APPENDIX A

Order DN 15 from the district court which dismissed Qiu's complaint

1:22-cv-00062 DN 15 Filed 03/02/23

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION

WEI QIU, Plaintiff,
V.
BOARD OF EDUCATION OF BOWLING GREEN INDEPENDENT SCHOOLS, KY, Defendant.

Civil Action No. 1:22-cv-62-DJH-CHL

MEMORANDUM AND ORDER

Plaintiff Wei Qiu sued Defendant Board of Education of Bowling Green Independent Schools, Kentucky (the Board), alleging violations of Title VII of the Civil Rights Act of 1964 and the Kentucky Civil Rights Act. (Docket No. 1) The Board moves for dismissal pursuant to Federal Rule of Civil Procedure Rule 12(b)(6). (D.N.5) Qiu responded in opposition (D.N. 6), and the Board replied. (D.N.7) Subsequently, Qiu filed a sur-reply and a "Request to Amend" her sur-reply. (D.N.8; D.N.9) The Board moves to strike both the sur-reply and the "Request to Amend" as improper. (D.N.10) Qiu then filed "Request to the Court to permit all her pleadings." (D.N.12; D.N.11) For the reasons set forth below, the "Request to the

Court to permit all her pleadings"will be denied; the motion to strike both the sur-reply and the "Request to Amend" the sur-reply will be denied as moot; and the motion to dismiss for failure to state a claim will be granted.

I.

The following facts are set forth in the complaint and accepted as true for purposes of the present motion. See *Siefert v. Hamilton Cnty.*, 951 F.3d 753, 757 (6th Cir. 2020). Plaintiff Wei Qiu is an American citizen of Chinese origin. (D.N. 1, PageID.5) She is a highly qualified and licensed chemistry and physics teacher. (*Id.*) In June 2021, Qiu applied for an open chemistry teacher position at Bowling Green High School by emailing "school leaders" her application materials. (*Id.*) She also applied for three other math and science positions around the same time. (*Id.*) Qiu had not heard back about the positions by July 2021, so she emailed the school "to ask about her application." (*Id.*) The school informed her that "the positions were filled." (*Id.*) Qiu alleges that her application was "completely ignored" and that she "did not even have an interview for the positions" despite her high qualifications. (*Id.*) Qiu filed this suit on May 27, 2022, alleging that the Board discriminated against her based on her race, color, and national origin in violation of Title VII of the Civil Rights Act and the Kentucky Civil Rights Act. (See D.N.1) The Board then moved to dismiss her

complaint for failure to state a claim (D.N.5), and the parties exchanged several filings in addition to the traditional response and reply briefs. (See D.N. 8; D.N. 9; D.N.10;D.N.11;D.N.12)

II.

As an initial matter, the Court must determine which of the parties' many filings are proper under federal and local rules. After the Board moved to dismiss (D.N. 5), Qiu responded (D.N.6), and the Board replied. (D.N.7) Qiu then filed a sur-reply (D.N. 8), as well as a later "Request to Amend" her sur-reply. (D.N.9) The Board moves to strike both documents as improper. (D.N.10) Qiu ultimately filed a "Request to the Court to permit all her pleadings" along with a memorandum in support of her request. (D.N. 12; D.N.11) Although they are not labeled as such, the Court will consider Qiu's "Request to Amend" and "Request to the Court to permit all her pleadings" as motions for leave to file additional sur-replies in order to evaluate whether they are permissible.

"Generally speaking,sur-replies are 'highly disfavored, as they are usually a strategic effort by the nonmoving party to have the last word on a matter.'" *Cousins Smokehouse, LLC v.Louisville Processing & Cold Storage, Inc.*, 588 F. Supp. 3d 753, 763 (W.D. Ky. 2022) (quoting *Disselkamp v. Norton Healthcare,*

Inc., No. 3:18-CV-00048-GNS, 2019 WL 3536038, at *14 (W.D. Ky. Aug. 2, 2019)). Although neither the Federal Rules of Civil Procedure nor the local rules of the Court expressly permit the filing of sur-replies, see Fed. R. Civ. P. 7; see L.R. 7.1(c), "such filings may be allowed in the appropriate circumstances, especially '[w]hen new submissions and/or arguments are included in a reply brief, and a nonmovant's ability to respond to the new evidence has been vitiated.'" *Key v. Shelby Cnty.*, 551 F. App'x 262, 265 (6th Cir.2014) (quoting *Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 481 (6th Cir. 2003)). When a reply "present[s] no new evidence or arguments," however, a motion for sur-reply should be denied. *Id.*; see also *Carter v. Paschall Truck Lines, Inc.*, 364 F. Supp. 3d 732, 748 (W.D. Ky. 2019) (denying leave to file a sur-reply when the defendant "did not make a new submission or argument in its Reply" and the information raised in the sur-reply "was already before the Court").

Qiu's sur-reply, "Request to Amend" her sur-reply, and "Request to the Court to permit all her pleadings" all raise the same argument. (See D.N. 8; D.N. 9; D.N. 12) Qiu maintains that because the Board did not expressly admit or deny the allegations in her complaint in its motion to dismiss, the Board has effectively admitted those allegations under Rule 8 of the Federal Rules of Civil Procedure. (See D.N. 8, PageID.45) It is true that a party generally must file

an answer to the complaint within twenty-one days, Fed. R. Civ. P. 12(a)(1)(A)(i), and in that answer must admit, deny, or state that it lacks knowledge of all factual allegations. Fed. R. Civ. P. 8(b). The time to file an answer is tolled, however, if the defendant files a motion to dismiss under Rule 12, as the Board did here. Fed.R. Civ. P. 12(a)(4). (See D.N. 5) Therefore, Qiu's sur-reply, "Request to Amend" her surreply, and"Request to the Court to permit all her pleadings," merely restate an incorrect interpretation of the Federal Rules of Civil Procedure. They do not respond to "new evidence or arguments" in the Board's reply, and Qiu's ability to respond to any new evidence has not "been vitiated." *Key,* 551 F. App'x at 265. Accordingly, the Court will deny both Qiu's "Request to Amend" her sur-reply (D.N. 9) and her "Request to the Court to permit all her pleadings." (D.N. 12) The Board's motion to strike both the sur-reply and the "Request to Amend"will therefore be denied as moot. (D.N. 10) In considering the Board's motion to dismiss, the Court will consider only the motion itself (D.N. 5), Qiu's response (D.N.7), and the Board's reply (D.N.9), consistent with both federal and local rules. See Fed. R. Civ. P. 12; L.R. 7.1(c).

III.

To avoid dismissal for failure to state a claim upon which relief can be granted, "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)).[11] A claim is plausible on its face" when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. If "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the plaintiff has not shown that she is entitled to relief. *Id.* at 679. For purposes of a motion to dismiss, "a district court must (1) view the complaint in the light most favorable to the plaintiff and (2) take all well-pleaded factual allegations as true." *Tackett v. M&G Polymers, USA, LLC*, 561 F.3d 478, 488 (6th Cir. 2009) (citing *Gunasekera v. Irwin*, 551 F.3d 461, 466 (6th Cir. 2009)). "But the district court need not accept a 'bare assertion of legal conclusions.'" *Id.* (quoting *Columbia Nat. Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995)). A complaint is not sufficient when it only "tenders naked assertions devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678 (internal

[11] The Board cites an out-of-date pleading standard in its motion to dismiss. (See D.N. 5-1, PageID.18- 19 (citing *Conley v. Gibson*, 335 U.S.41 (1957)) The Supreme Court retired Conley's "no set of facts" test in 2007. *Twombly*, 550 U.S. at 1959-60. As discussed above, the current pleading standard was set forth by the Supreme Court in Twombly and Iqbal. See Mediacom Se.LLC v. BellSouth Telecomms., Inc., 672 F.3d 396,399(6th Cir.2012).

quotations omitted) (citing *Twombly*, 550 U.S. at 557).

A. What Documents to Consider

To begin, the Court must determine what documents it may consider in reviewing the motion to dismiss. Qiu attached eleven pages of exhibits to her response, including an excerpt from the EEOC decision on her case and documentation regardng her qualifications for the teaching position. (See D.N. 6-2; D.N. 6-3; D.N. 6-4; D.N. 6-5) Generally, a court may not consider "documents attached in response to a motion to dismiss" as they are "merely' matters outside the pleadings.'" *Simon Prop. Grp., L.P. v. CASDNS, Inc.,* No. 3:14-CV-566-CRS, 2015 WL 3407316, at *3 (W.D. Ky. May 26, 2015) (collecting cases). A court may consider some extraneous documents, including exhibits attached to the complaint, "public records, items appearing in the record of the case[, or] exhibits attached to a defendant's motion to dismiss so long as they are referred to in the complaint." *Bassett v. Nat'l Collegiate Athletic Ass'n,* 528 F.3d 426,430 (6th Cir. 2008). Qiu's exhibits do not fall into any of these categories. (See D.N.6-2;D.N. 6-3; D.N. 6-4; D.N. 6-5) Although "a pro se complaint must be held to a less stringent standard than that prepared by an attorney," the Court may not "abrogate basic pleading essentials in pro se suits." *Leisure v. Hogan,* 21 F. App'x 277,278

(6th Cir. 2001) (citations omitted). The Sixth Circuit does not allow a plaintiff to "amend [her] complaint in an opposition brief or ask the court to consider new allegations (or evidence) not contained in the complaint." *Bates v. Green Farms Condo. Ass'n*, 958 F.3d 470, 483 (6th Cir. 2020) (collecting cases). Thus, the Court will not consider the attached documents when evaluating the motion to dismiss. *See Simon Prop.Grp., L.P.*, 2015 WL 3407316, at *3.

B. Failure to State a Claim

Qiu alleges that the Board discriminated against her based on her race, color, and national origin in violation of both Title VII of the Civil Rights Act and the Kentucky Civil Rights Act (KCRA). (D.N.1, PageID.3-4) Under Title VII, it is unlawful for an employer to "fail or refuse to hire...or otherwise to discriminate against an individual with respect to h[er] compensation, terms, conditions, or privileges of employment, because of such individual's race, color,...or national origin." 42 U.S.C. § 2000e-2(a)(1). The KCRA contains a similar prohibition, and the Kentucky Supreme Court "interpret[s] the civil rights provisions of KRS Chapter 344 consistent with the applicable federal antidiscrimination laws." *Williams v. Wal-Mart Stores, Inc.*, 184 S.W. 3d 492, 495 (Ky. 2005) (citing *Brooks v. Lexington-Fayette Urban Cnty. Hous. Auth.*, 132 S.W. 3d 790, 802 (Ky. 2004)). Because the KCRA largely mirrors Title VII,

discrimination claims under the two statutes are analyzed using the same standard. See *Roof v. Bel Brands USA, Inc.*,641 F. App'x 492, 496 (6th Cir. 2016) (citing *Hamilton v. Gen. Elec. Co.*, 556 F.3d 428, 435 (6th Cir.2009)). The Court will therefore evaluate Qiu's federal and state claims together.

To survive a motion to dismiss, a plaintiff alleging employment discrimination must "allege sufficient 'factual content' from which a court, informed by its 'judicial experience and common sense,' could 'draw the reasonable inference,'" *Keys v. Humana, Inc.*, 684 F.3d 605, 610 (6th Cir. 2012) (quoting *Iqbal*, 556 U.S. at 678-79), that the defendant "discriminate[d] against [the plaintiff] with respect to [her] compensation, terms, conditions, or privileges of employment, because of [her] race, color, religion, sex, or national origin." *Id.* (quoting 42 U.S.C. § 2000e-2(a)(1) (emphasis added)). The Board argues that Qiu's complaint fails to meet this standard because, "she has alleged no facts connecting her race, color, or national origin to her allegation of employment discrimination." (D.N.5-1, PageID.20)

The Board is correct that the complaint contains few factual allegations. (See D.N.1) Qiu alleges that she is an American citizen of Chinese origin. (*Id.*, PageID.5) She further alleges that she is a "highly qualified" chemistry teacher who applied for a job at

Bowling Green High School in June 2021. (*Id.*) In July 2021, the school informed her that the position had been filled. (*Id.*) Qiu alleges that the Board "completely ignored" her application despite her high qualifications because of her Chinese origin. (*Id.*)

Even construed in the light most favorable to Qiu, the complaint "is devoid of any facts which could produce an inference that Defendant unlawfully considered Plaintiff's national origin, "color, or race when deciding not to hire her. *Masaebi v. Arby's Corp.,* 852 F. App'x 903, 906 (6th Cir.2021) (affirming dismissal for failure to state a claim). The complaint does not allege that the Board or its employees "made any statements concerning h[er] race," or that they"engaged in any conduct whatsoever that could reasonably be interpreted as racially motivated." *Veasy v.Teach for Am., Inc.,* 868 F. Supp. 2d 688, 696 (M.D. Tenn. 2012). Qiu does not allege any facts to suggest the Board even knew her race or national origin. (See D.N.1) Without some indication that race factored into the Board's decision, Qiu is left with only the bare legal conclusion that she was discriminated against. See *Tackett*, 561 F.3d at 488.

Furthermore, nothing in the complaint gives rise to a reasonable inference that Qiu was treated differently than anyone outside of her protected class. *See*, e.g. *Smith v. Bd. of Trustees Lakeland Cmty.*

Coll.,746 F.Supp. 2d 877, 895 (N.D. Ohio 2010) (granting dismissal when the complaint did "not identif[y] asimilarly situated member of an unprotected class who was treated differently"); cf. *Parker v. Strawser Constr., Inc.,* 307 F. Supp. 3d 744 (S.D. Ohio 2018) (denying dismissal when the complaint alleged that the plaintiff was a member of a protected class and was treated differently than employees outside of her class). Qiu does not state whether any other applicants applied for the position, and if they did, whether they were of a different race, color, or national origin. (See D.N. 1) The complaint likewise does not allege whether the individual who eventually filled the role was of a different race, color, or national origin than Qiu. (See *id.*) The Sixth Circuit has made clear that "broad and conclusory allegations of discrimination cannot be the basis of a complaint and a plaintiff must state allegations that plausibly give rise to the inference that a defendant acted as the plaintiff claims." *HDC, LLC v. City of Ann Arbor,* 675 F.3d 608, 614 (6th Cir.2012). Thus, Qiu's "allegations of racial discrimination, which are entirely subjective as alleged, do not give rise to a fair inference" that racial discrimination actually took place. *Veasy,* 868 F. Supp. 2d at 696. "Although dismissal on the pleadings is often inappropriate in employment discrimination cases where evidence of motive and discriminatory intent is frequently exclusively in the hands of defendants, this constitutes the rare case in

which the allegations regarding discrimination [a]re so conclusory that no plausible claim could be inferred." *Masaebi* 852 F. App'x at 909. The Court therefore finds that Qiu has failed to state a claim for discrimination and will grant the motion to dismiss. See *Keys*, 684 F.3d at 610.

IV.

For the reasons set forth above, and the Court being otherwise sufficiently advised, it is hereby

ORDERED as follows:

(1) Plaintiff Wei Qiu's "Request to the Court to permit all her pleadings" (D.N. 12)is DENIED.

(2) Qiu's "Request to Amend" her sur-reply (D.N. 9) is DENIED.

(3) The defendant's motion to strike both the sur-reply and the "Request to Amend"the surreply (D.N. 10) is DENIED as moot.

(4) The defendant's motion to dismiss (D.N. 5) is GRANTED. This matter is DISMISSED and STRICKEN from the Court's active docket.

March 2, 2023

David J. Hale s/
David J. Hale
Judge United States District Court

APPENDIX B

Order DN 22 from the district court which denied Qiu's 59(e) motion

1:22-cv-00062 Document 22 Filed 03/20/24

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWING GREEN DIVISION

WEI QIU, Plaintiff,
V.
BOARD OF EDUCATION OF BOWLING GREEN INDEPENDENT SCHOOLS, KY, Defendant.

Civil Action No. 1:22-cv-62-DJH-CHL

MEMORANDUM AND ORDER

Plaintiff Wei Qiu, proceeding pro se, sued Defendant Board of Education of Bowling Green Independent Schools, Kentucky ("the Board"), alleging violations of Title VII of the Civil Rights Act of 1964 and the Kentucky Civil Rights Act. (Docket No. 1) The Court entered a Memorandum and Order granting the Board's motion to dismiss pursuant to Fed. R. Civ.P.12(b)(6). (D.N.15) Qiu filed a motion to alter or amend judgment under Fed. R. Civ. P. 59(e)(D.N.16); the Board filed a response to the motion (D.N. 17); and Qiu filed a reply. (D.N.18) For the reasons stated herein, the Court will deny the Rule 59(e) motion. Qiu also filed a motion for sanctions under Rule 11 against the Board's counsel (D.N. 19),

which has also been fully briefed (D.N.20; D.N.21). The Court will also deny the motion for sanctions herein.

I.

In its Memorandum and Order granting the Board's motion to dismiss, the Court accepted the facts set forth in the complaint as true. (D.N.15, PageID.58) Qiu alleged in the complaint that she was an American citizen of Chinese origin and that she was a highly qualified and licensed chemistry and physics teacher. (D.N. 1, PageID.5) In June 2021, she applied for an open chemistry teacher position at Bowling Green High School by emailing "school leaders" her application materials.(*Id.*) She also applied for three other math and science positions around the same time. (*Id.*) Qiu alleged that she had not heard back about the positions by July 2021, so she emailed the school "to ask about her application." (*Id.*) The school informed her that "the positions were filled." (*Id.*) Qiu alleged that her application was "completely ignored" and that she "did not even have an interview for the positions" despite her high qualifications. (*Id.*) Qiu filed this suit on May 27, 2022, alleging that the Board discriminated against her based on her race, color, and national origin in violation of Title VII of the Civil Rights Act and the Kentucky Civil Rights Act. (See D.N.1)

In granting the Board's motion, the Court found that, even construed in the light most favorable to

Qiu, the complaint was "devoid of any facts which could produce an inference that Defendant unlawfully considered Plaintiff's national origin," color, or race when deciding not to hire her. (D.N.15, PageID.64) (citing *Masaebi v. Arby's Corp.*, 852 F. App'x 903, 906 (6th Cir.2021) (affirming dismissal for failure to state a claim)) The Court found that the complaint did not allege that the Board or its employees "made any statements concerning h[er] race" or that they "engaged in any conduct whatsoever that could reasonably be interpreted as racially motivated."(*Id.*) (citing *Veasy v. Teach for Am., Inc.*, 868 F. Supp. 2d 688, 696 (M.D. Tenn. 2012)) The Court observed that Qiu did not allege any facts to suggest that the Board even knew her race or national origin. (*Id.*) The Court found, "Without some indication that race factored into the Board's decision, Qiu is left with only the bare legal conclusion that she was discriminated against." (*Id.*) (citing *Tackett v. M&G Polymers, USA, LLC,* 561 F.3d 478, 488 (6th Cir.2009))

Further, the Court held that nothing in the complaint gave rise to a reasonable inference that Qiu was treated differently than anyone outside of her protected class. (*Id.*) (citing, inter alia, *Smith v. Bd. of Trustees Lakeland Cmty. Coll.*, 746 F. Supp. 2d 877, 895 (N.D. Ohio 2010)) The Court found that Qiu did not state whether any other applicants applied for the position, and if they did, whether they were of a

different race, color, or national origin or whether the individual who eventually filled the role was of a different race, color, or national origin than Qiu. (*Id.*, PageID.64-65) The Court observed that the Sixth Circuit has made clear that "broad and conclusory allegations of discrimination cannot be the basis of a complaint and a plaintiff must state allegations that plausibly give rise to the inference that a defendant acted as the plaintiff 3 claims."(*Id.*) (citing *HDC, LLC v. City of Ann Arbor,* 675 F.3d 608, 614 (6th Cir.2012)) Thus, the Court found, "Qiu's' allegations of racial discrimination, which are entirely subjective as alleged, do not give rise to a fair inference' that racial discrimination actually took place." (*Id.*) (quoting *Veasy*,868 F. Supp. 2d at 696)) The Court stated,"'Although dismissal on the pleadings is often inappropriate in employment discrimination cases where evidence of motive and discriminatory intent is frequently exclusively in the hands of defendants, this constitutes the rare case in which the allegations regarding discrimination [a]re so conclusory that no plausible claim could be inferred.'" (*Id.*) (quoting Masaebi, 852 F. App'x at 909)

II.

"'A district court may alter or amend its judgment based on '(1) a clear error of law;(2) newly discovered evidence; (3) an intervening change in the controlling law; or (4) a need to prevent manifest injustice.'"

Brumley v. United Parcel Serv., Inc., 909 F.3d 834, 841 (6th Cir. 2018) (quoting *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615 (6th Cir. 2010))."The Sixth Circuit has consistently held that a Rule 59 motion should not be used either to reargue a case on the merits or to reargue issues already presented[.]" *Durbin v.Marquette Transp. Co., LLC,* No. 5:18-cv-00055-TBR, 2021 U.S. Dist. LEXIS 213508, at *3 (W.D. Ky. Nov. 3, 2021) (citing *Whitehead v. Bowen*, 301 F. App'x 484, 489 (6th Cir. 2008)). Nor may a party use a Rule 59 motion to "'merely restyle or rehash the initial issues.'" *Id.* (quoting *White v. Hitachi, Ltd.*, No. 3:04-CV-20, 2008 U.S. Dist. LEXIS 25240, at *3 (E.D. Tenn. Mar. 20, 2008)). "Amending or altering a final judgment is an 'extraordinary' measure, and motions requesting such amendment are 'sparingly granted.'" *New London Tobacco Mkt., Inc. v. Kentucky Fuel Corp.*, No. CV 12-91-GFVT, 2016 U.S. Dist. LEXIS 190855, at *4 (E.D. Ky. Feb. 9, 2016) (quoting *Marshall v. Johnson,* No. 3:07-CV-171-H, 2007 U.S. Dist. LEXIS 29881, at *4 (W.D. Ky. Apr. 19, 2007)).

III.

In her motion to alter or amend judgment, Qiu argues that the Court committed an error of law when it did not consider the attachments to her response to the motion. (D.N. 16, PageID.67) She maintains that the instructions in the Complaint for Employment

Discrimination form did not instruct her to attach evidence to the form. (*Id.*, PageID.68) She argues, "So, when Defendant dismisses the complaint, Plaintiff has the only opportunity to attach evidence to refute the dismiss in her reply. Plaintiff's reply to the dismiss is all about the complaint, and it does not add any other stuff to the complaint."(*Id.*)[1] [1] Qiu also asserts that the Court's dismissal violated Fed. R. Civ. P. 11(b)(3) and (4), which she states," require the basis to alter or amend a judgment entered by the Court.

Qiu next argues that the Court's decision was in error because "it devoids the evidence of Plaintiff's qualification for the job which Defendant absolutely and completely ignored Plaintiff's application and contact." (D.N. 16, PageID.69) She reiterates her qualifications for the position which she has stated in her previous filings and maintains that she was highly qualified for the position. (*Id.*) She argues, "The principals of the high school in the city of Bowling Green knew Wei Qiu is Chinese by a glance at her name Wei Qiu." (*Id.*) She maintains that the principals also received her resume and teaching certificate which showed her education was in China. (*Id.*, PageID.69-70) She also asserts that when the case was being investigated by the Equal Employment Opportunity Commission, "it was found out only Qiu the Chinese was not interviewed for the chemistry position, and all the other applicants were interviewed."(*Id.*, PageID.70) She also alleges that a

White/Caucasian applicant was interviewed who did not score as highly as she did in a professional assessment exam. (*Id.*) She states, "Defendant absolutely and unconditionally did not hire Chinese. It is about discrimination, not qualification." (*Id.*) Qiu reiterates her allegations in the complaint about her qualifications and argues that discovery is needed "to determine if an applicant from an unprotected class was treated more favorably in the court." (*Id.*, PageID.71) She states, "The order dismisses the case in the Memorandum and Order (DN 15) is an error of law, and it is against Title VII and justice."(*Id.*) She further states, "More, this case meets all the requirements of the case laws in Page 4 and Page 6 in the Memorandum and Order (DN 15). The order dismisses the case is a manifest error of both fact and law." (*Id.*) (emphasis omitted)

Qiu additionally argues that the following statements by the Court in the Memorandum and Order were erroneous: "The Board argues that Qiu's complaint fails to meet this standard because, 'she has alleged' no facts connecting her race, color, or national origin to her allegation of employment discrimination.'"; and "The Board is correct that the complaint contains few factual allegations." (*Id.*, PageID.72) She states, "The Memorandum and Order (DN 15) is an error for it agrees with the error Defendant purposely produced." (*Id.*) She argues,

"Defendant made the erroneous statement purposely to stretch the case taking advantage of the rules of the Federal Rules of Civil Procedure." (*Id.*) She states, "The Memorandum and Order (DN 15) does not know what a fact is." (*Id.*) Qiu also argues that the Court's conclusions were "crooked and messed up" and that her motion to reply (DN 6) "EXISTS." (*Id.*, PagelD.73)

IV.

Qiu is essentially rearguing or rehashing the issues she already presented, which is not permitted under Rule 59(e). See *Durbin,* 2021 U.S. Dist. LEXIS 213508, at *3. She maintains that the Court erred when it did not consider the attachments to her response to the motion to dismiss. As the Court stated in its Memorandum and Order, a court generally may not consider "documents attached in response to a motion to dismiss" as they are "merely 'matters outside the pleadings.'" *Simon Prop. Grp., L.P. v. CASDNS, Inc.,* No.3:14-CV-566-CRS, 2015 U.S. Dist.LEXIS 67492, at*6 (W.D. Ky. May 26, 2015) (collecting cases). The Sixth Circuit does not allow a plaintiff to "amend [her] complaint in an opposition brief or ask the court to consider new allegations (or evidence) not contained in the complaint." *Bates v. Green Farms Condo. Ass'n,* 958 F.3d 470, 483 (6th Cir. 2020) (collecting cases). While Qiu argues that the complaint form she completed did not indicate in the instructions that she should attach documents to

the complaint, nothing in the form's instructions prevented her from alleging facts in the complaint to meet the pleading standard. For these reasons, the Court was not in error in not considering Qiu's attachments to her response to the motion to dismiss.2 2 As precedent for her argument that the Court should have considered the attachments to her response to the motion No. 5:21-CV-197-GFVT. (D.N. 16,PageID.68) She states that in that case "Defendant intended to dismiss the case with lies in its DN 8, and Qiu replied to the dismiss with DN 9 in which she cracked the lies with attached evidence."failure to name the correct defendant and based on the insufficiency of the summons and service (No.5:21-CV-197-dismiss for failure to state a claim.

Qiu also argues that the Board was aware of her Chinese national origin based on "a glance at her name" and based on receiving her resume and teaching certificate which showed that she received her education in China. However, even if the Board or its employees were aware that Qiu was of Chinese national origin, the complaint was still lacking in any facts to allege that the Board did not interview Qiu because of her Chinese national origin and not for any number of other reasons.

The remaining arguments in Qiu's motion amount to relitigating the arguments the Court has already rejected in granting the motion to dismiss. Qiu has shown no clear error of law, newly discovered evidence, intervening change in the law, or manifest

injustice to warrant altering or amending the judgment under Rule 59(e).

Accordingly, it is hereby

ORDERED that Qiu's motion to alter or amend judgment (D.N. 16) is DENIED.

This matter remains CLOSED.

Qiu also moved for sanctions against the Board's counsel under Fed. R. Civ. P. 11 based on arguments made in the motion to dismiss (D.N. 19). The Court granted the Board's motion to dismiss and has denied Qiu's motion to alter or amend judgment herein. The Court, therefore, finds that sanctions are not warranted against the Board's counsel. Accordingly, it is hereby

ORDERED that Qiu's motion for sanctions (D.N.19) is DENIED.

Date: March 19, 2024

David J.Hale s/
David J.Hale, Judge
United States District Court

cc: Plaintiff Qiu, pro se
Counsel of record
4415.010

APPENDIX C

Order D 13 from the 6th Circuit Court which affirmed the dismissal of Qiu's complaint

NOT RECOMMENDED FOR PUBLICATION
No. 24-5368
FILED on Dec 23, 2024, KELLY L. STEPHENS, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WEI QIU, Plaintiff-Appellant
v.
BOARD OF EDUCATION OF BOWLING GREEN INDEPENDENT SCHOOLS, KY
Defendant-Appellee.

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

ORDER

Before: BATCHELDER, COLE, and BUSH, Circuit Judges.

Wei Qiu, proceeding pro se, appeals the district court's judgment in favor of the Bowling Green, Kentucky Board of Education(the Board) on her employment-discrimination claims. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument

is not needed. See Fed. R. App. P. 34(a). For the following reasons, we affirm.

In June 2021, Qiu, a Chinese woman, applied for a chemistry teacher position at Bowling Green High School by emailing "school leaders" her application. She also applied for three other math and science positions around that time. The school did not contact Qiu about her application, and in July 2021 she emailed the school asking for an update. The school replied, telling Qiu that it had filled the positions. Qiu alleged that the school "completely ignored"her and did not offer her an interview.

Qiu filed an initial charge of discrimination with the Equal Employment Opportunity Commission, which granted her a right to sue in May 2022. Qiu then sued the Board for violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000 to 2000e-17, and the Kentucky Civil Rights Act (KCRA), alleging that the Board discriminated against her based on her race, color, and national origin. The Board moved to dismiss the complaint, and Qiu responded in opposition and filed a sur-reply. She then sought leave to file additional sur-replies. The district court denied Qiu leave to file additional sur-replies and granted the Board's motion to dismiss, reasoning that Qiu's complaint failed to allege any facts supporting her discrimination claims. The court then denied

Qiu's motion to alter the judgment and for sanctions. On appeal, Qiu argues that the district court erred in not considering evidence that she attached to her response to the Board's motion to dismiss and that her complaint stated enough facts to survive a motion to dismiss.

We review de novo a district court's dismissal of a complaint for failure to state a claim under Rule 12(b)(6). *Jama v. Dep't of Homeland Sec.*, 760 F.3d 490, 494 (6th Cir. 2014). 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 on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* (citing *Twombly*, 550 U.S. at 556).

Review of a Rule 12(b)(6) motion "must ordinarily be undertaken without resort to matters outside the pleadings." *Gavitt v. Born*, 835 F.3d 623, 640 (6th Cir. 2016). A court may, however, "consider exhibits attached to the complaint, public records, items appearing in the record of the case, and exhibits attached to defendant's motion to dismiss, so long as

they are referred to in the complaint and are central to the claims contained therein." *Id.* Evidence outside these circumstances is considered "matters outside the pleadings." *Id.* If the court considers such matters, it must convert the Rule 12(b)(6) motion to a summary judgment motion. Fed. R. Civ.P.12(d).

First, the district court did not need to consider the exhibits attached to Qiu's response to the Board's motion to dismiss. The exhibits were "matters outside the pleadings," *id.*, because they were not "exhibits attached to the complaint, public records, items appearing in the record of the case, [or] exhibits attached to defendant's motion to dismiss," Gavitt, 835 F.3d at 640. Thus, the district court did not abuse its discretion in ruling on the motion to dismiss without considering the evidence. *See* Fed. R. Civ. P. 12(d); see, e.g., *Caraway v. CoreCivic of Tenn., LLC*, 98 F.4th 679, 688 (6th Cir.2024) (determining that the district court did not abuse its discretion in declining to convert a Rule 12(b)(6) motion).

Second, even applying the liberal pleading standard, we agree with the district court that Qiu failed to allege facts to support a plausible inference that the Board discriminated against her based on her race, color, or national origin. *See White v. Coventry Health & Life Ins.*, 680 F.App'x 410, 415-16

(6th Cir. 2017) (finding "naked assertions" to be "wholly conclusory" and insufficient to state a claim). Title VII prohibits an employer from "discriminat[ing] against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." § 2000e-2(a)(1); *see Queen v. City of Bowling Green,* 956 F.3d 893, 902 (6th Cir. 2020) ("[B]ecause '[t]he language of the KCRA generally tracks the language of Title VII[,]' the KCRA 'should be interpreted consonant with federal interpretation.'"(quoting *Morris v. Oldham Cnty. Fiscal Ct.*, 201 F.3d 784, 793 (6th Cir.2000))).

Qiu alleged-in conclusory fashion-that the Board discriminated against her because it "ignored" her application. But she alleges no facts supporting this conclusory allegation, such as who the Board ultimately hired for the position or any details about the application process. Her "broad and conclusory allegations of discrimination cannot be the basis of a complaint," and she failed to "state allegations that plausibly give rise to the inference that " the Board discrimninated against her. *HDC, LLC v. City of Ann Arbor,* 675 F.3d 608, 614 (6th Cir. 2012); *see, e.g., El-Hallani v. Huntington Nat'l Bank,* 623 F. App'x 730, 735 (6th Cir. 2015) ("[F]actual allegations about discriminatory conduct that are based on nothing

more than a plaintiff's belief are 'naked assertions devoid of further factual enhancement' that are insufficient to state a claim." (quoting *Iqbal*, 556 U.S. at 678)). Because Qiu did not allege sufficient facts to support an inference that she was treated differently based on her membership in a protected class, the district court properly dismissed her complaint for failure to state a claim.

For these reasons, we AFFIRM the district court's judgment.

ENTERED BY ORDER OF THE COURT
Kelly L. Stephens s/
Kelly L. Stephens, Clerk

APPENDIX D

Order D 17 from the 6th Circuit Court which denied Qiu's petition to rehear to the en banc

No. 24-5368
FILED on Jan 30, 2025, KELLY L. STEPHENS, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WEI QIU, Plaintiff-Appellant
v.
BOARD OF EDUCATION OF BOWLING GREEN INDEPENDENT SCHOOLS, KY
Defendant-Appellee.

ORDER

BEFORE: BATCHELDER, COLE, and BUSH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT
Kelly L. Stephens s/
Kelly L. Stephens, Clerk