Katie Wood *et al.*,

Plaintiffs,

v. No. 4:23-cv-00526-MW-MAF

Florida Department of Education *et al.*,

Defendants.
_____/

The logic of Mx. Schwandes's Title IX claim tracks that of their Title VII claim, which FLVS does not challenge but which Mx. Schwandes has addressed at more length in their response to State Defendants' motion to dismiss. Doc. 67 at 4–21. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Courts "must accord it a sweep as broad as its language." *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 521 (1982) (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

Title IX claims are analyzed under the framework for Title VII claims. *See, e.g.*, *Kocsis v. Fla. State Univ. Bd. of Trs.*, 788 F. App'x 680, 686 (11th Cir. 2019); *Bowers v. Bd. of Regents of Univ. Sys. of Ga.*, 509 F. App'x 906, 911 n.7 (11th Cir. 2013). Subsection 3 discriminates against Mx. Schwandes because it is based on impermissible sex stereotypes and treats them differently on the basis of sex. "Title VII bar[s] not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender." *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (discussing agreement of six Justices in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). "All persons,

whether transgender or not, are protected from discrimination on the basis of gender stereotype." *Id.* at 1318; *see also id.* at 1318 nn.6–7 (citing Title VII cases as examples); *Chavez v. Credit Nation Auto Sales, LLC*, 641 F. App'x 883, 884 (11th Cir. 2016) (citing *Glenn* in a Title VII case). Subsection 3's prohibition on Mx. Schwandes's use of Mx. rests entirely on such stereotypes about individuals assigned female at birth. It is a sex stereotype to assume that someone like Mx. Schwandes would use titles like Ms. and pronouns like she and her merely because they are deemed to have biological characteristics of the female sex.

Mx. Schwandes also states a Title IX claim because subsection 3 discriminates on the basis of sex by prohibiting them from using non-gendered titles and pronouns while allowing other employees to use those pronouns. If Mx. Schwandes had one of the intersex conditions listed in Fla. Stat. §1000.071(1), they would be exempt from the entire Section and hence free to use the title Mx. and they/them pronouns (as some, but not all, intersex people do). But because under the law FLVS deems their sex to be female and because Mx. Schwandes does not have the sex characteristics of intersex people,[1] they cannot. This is discrimination on the basis of sex. *See EEOC v. R.G. &. G.R. Harris Funeral Homes*, 884 F.3d 560, 575 n.4

[1] The fact that Florida's law discriminates between intersex people and others like Mx. Schwandes on the basis of sex is confirmed by the statute itself, which defines an employee's "sex" as determined by their "sex chromosomes, naturally occurring sex hormones, and internal and external genitalia present at birth," and similarly identifies intersex people by reference to genetic, biochemical, chromosomal, and genital characteristics. Fla. Stat. §§1000.21(9), 1000.071(1).

(6th Cir. 2018) ("[D]iscrimination because of a person's … intersex, or sexually indeterminate status is no less actionable than discrimination because of a person's identification with two religions, an unorthodox religion, or no religion at all.").

response to State Defendants' motion to dismiss. Doc. 67 at 49–50.

Pursuant to their Title VII and IX claims, Mx. Schwandes seeks compensatory damages, back pay, front pay, and nominal damages. Doc. 56 at 61–62. FLVS argues that Mx. Schwandes is precluded from recovering monetary damages resulting from its compliance with Florida law. Doc. 64 at 13–14. FLVS's argument is not appropriate at the pleadings stage. "[O]nly claims for relief are subject to dismissal, not the relief itself." *Fla. Action Comm., Inc. v. Seminole Cnty.*, 212 F. Supp. 3d 1213, 1229 (M.D. Fla. 2016) (citing *Bontkowski v. Smith*, 305 F.3d 757, 762 (7th Cir. 2002)); *see also Pucci v. Carnival Corp.*, 146 F. Supp. 3d 1281, 1293 (S.D. Fla. 2015) ("[A] motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) applies to 'claims,' not to requests for a certain type of damages that are 'merely the relief demanded as part of a claim.'" (citation omitted)). Nor is it appropriate to strike Mx. Schwandes's prayer for relief. f. Fly5 (x)3.4 (.)]T (to)nSchyaiPrhdur FL-4.3 (C0 1 Tf 24.069

As to the merits, this argument misstates both the law and Plaintiffs' allegations. First, FLVS went beyond the requirements of subsection 3. Mx. Schwandes agrees that FLVS was required by state law to report them to the Florida Department of Education or relay others' complaints if they violated subsection 3. Doc. 56 ¶¶ 40, 48–51, 68. But FLVS did far more, barring them from using the title Professor, though that had been permitted previously and was not barred by subsection 3, requiring them to use the title Ms., and first suspending then firing them when they did not comply. *Id.* ¶¶ 106–09.

FLVS's legal argument that compliance with state law immunizes it from damages claims under Title VII and Title IX relies on *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 254 (5th Cir. 1974). Doc. 64 at 14. *Pettway* was a race discrimination case and

1979) (holding that "compliance with state statute, alone, will not bar an award of back pay").

Within a year, though, the Supreme Court rejected the "special circumstances" approach,[2] finding that where a court finds unlawful discrimination, "back-pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975); *see also Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1377 (5th Cir. 1974) ("In sum, we feel that an employer's alleged reliance on the unsettled character of employment discrimination law as a defense to back pay is unpersuasive."). Post-*Albemarle*, the Eleventh Circuit has not applied the "special circumstances" to Title VII back pay considerations.[3] And to the extent the pre-*Albemarle*

with a recently-adopted Title VII. The same cannot be said about subsection 3, enacted long after Title VII, which facially discriminates against Plaintiffs on the basis of sex in violation of Title VII without any protective justification for the employee. Deterring enforcement of such a law

2020). Here, it should be clear that Mx. Schwandes is not seeking injunctive relief against FLVS because it is no longer their employer and they have not sought reinstatement.

Plaintiff AV Schwandes respectfully requests that the Court deny Defendant Florida Virtual School Board of Trustees's motion to dismiss.

Respectfully submitted.

March 4, 2024

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The Undersigned certifies that this Response, inclusive of footnotes, contains 2,295 words according to the word-processing system used to prepare the memorandum.

March 4, 2024

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