CASE NO. 16-1340

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff/Appellant,

v.

COLLEGEAMERICA DENVER, INC., N/K/A CENTER FOR EXCELLENCE IN HIGHER EDUCATION, INC., D/B/A COLLEGEAMERICA,

Defendant/Appellee.

On Appeal from the United States District Court
For the District of Colorado
The Honorable Judge Lewis T. Babcock
No. 1:14-CV-01232-LTB-MJW

BRIEF OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Appellee CollegeAmerica Denver, Inc., n/k/a Center for Excellence in Higher Education, Inc., d/b/a CollegeAmerica, states that: (1) it is a nonprofit corporation that has no parent corporation; and (2) no publicly-held corporation owns ten percent or more of its stock.

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

STATEMENT OF THE ISSUES

1. The Equal Employment Opportunity Commission ("EEOC") alleged that an agreement, signed between Appellee CollegeAmerica Denver, Inc. ("College") and a former employee weeks after the employee voluntarily resigned, violated the section of the Older Workers Benefit Protection Act ("OWBPA") that pertains to the waiver of rights under the Age Discrimination in Employment Act ("ADEA"). However, the College has never asserted—and has affirmatively stated and sworn that it will never assert—that the former employee waived any claims or rights under the ADEA or OWBPA. Did the district court correctly dismiss the EEOC's claim as moot?

2. Alternatively, should this Court affirm the district court's dismissal of the EEOC's claim on other grounds supported by the record—namely, that it fails to state a claim because the validity of an OWBPA waiver is not at issue in this case, and Tenth Circuit authority forecloses an independent cause of action under the OWBPA for the affirmative relief sought by the EEOC?

STATEMENT OF THE CASE

The EEOC argued that a one-page agreement (the "Agreement") (Aplt. App. at 44), jointly negotiated between the College and its former employee, Debbi Potts—an agreement prepared without lawyers and that Potts initially drafted—

violated Potts' rights under the ADEA and OWBPA. Specifically, the EEOC contended that this agreement violated Potts' right to file charges of discrimination with the EEOC or to cooperate in EEOC investigations. Judge Babcock concluded that this claim was moot based on the College's repeated representations that it did not, and would not, assert that the Agreement precluded Potts from exercising such rights. Further, the Agreement, in practice, did not preclude Potts from exercising such rights since she filed three charges and cooperated with the EEOC's investigations. Judge Babcock correctly concluded that there was no justiciable issue for this claim and dismissed it for lack of jurisdiction.

The case proceeded to trial only on the EEOC's Third Claim for Relief. That claim asserted that the College improperly retaliated against Potts for her EEOC activity. The alleged retaliation was a lawsuit the College brought against Potts in Colorado county court for violating the Agreement by disparaging the College. The College sought return of the $7,000 consideration it paid to Potts as part of the Agreement. The EEOC's retaliation claim was tried to a jury on June 20-22, 2016. After approximately an hour of deliberations, the jury returned a verdict for the College, rejecting the EEOC's retaliation claim. The EEOC has not appealed any issue relating to that trial.

The College is an accredited nonprofit postsecondary college that offers degrees in business, information technology, and health care. (Aplt. App. at 52.)

Potts was the campus director for the College's Wyoming campus from January 9, 2009, until her voluntary resignation on July 16, 2012. (Aplee. Supp. App. at 83.) After Potts resigned in a letter that made no allegation of age discrimination, she filed a claim asserting that the College had failed to pay her a bonus in the amount of $7,000; the College disputed that Potts was owed the bonus. (*Id.* at 86, 91; Aplt. App. at 79.)

In August 2012, the College's CEO, Eric Juhlin, contacted Potts to see if he and Potts could voluntarily resolve the dispute. (Aplee. Supp. App. at 87-89.) Although the College's General Counsel prepared the first draft of an agreement between Potts and the College, Potts rejected that agreement completely, indicating that she was not interested in negotiating her dispute. (*Id.* at 90-94, 100.) However, the next day Potts reversed her position and sent the College a new draft agreement that she had prepared. (*Id.* at 94, 96-97, 101.) It was this agreement, the one prepared by Potts, that Potts and the College signed with only minor modifications.[1] (*Id.* at 102-103.) The Agreement was dated September 1, 2012. (Aplt. App. at 44.)

[1] Other than the General Counsel's involvement in preparing the draft of the agreement that Potts rejected, the actual agreement signed by the parties was drafted by Potts with minor revisions by Mr. Juhlin, and without any involvement of, or review by, lawyers. (Aplee. Supp. App. at 94-103.)

In the Agreement, the College agreed to pay Potts $7,000 and not to oppose her claim for unemployment benefits. In exchange, Potts agreed to (i) "refrain from personally (or through the use of any third party) contacting any governmental or regulatory agency with the purpose of filing any complaint or grievance that shall bring harm to CollegeAmerica, Denver Inc. and any of its related companies"; (ii) "direct any complaints or issues against CollegeAmerica Denver, Inc. or its related entities that may arise with disgruntled staff, students, or the public at large to CollegeAmerica's toll free complaint number"; and (iii) "not intentionally with malicious intent (publicly or privately) disparage the reputation of CollegeAmerica, Denver Inc. or any of it related entities." (Aplt. App. at 44.)

A few months after the Agreement was executed, the College discovered that Potts had breached the Agreement by repeatedly disparaging the College. (Aplee. Supp. App. at 108-109.) The College has never obtained all of the information necessary to identify all of Ms. Potts's disparaging comments made in breach of the Agreement. (*Id.* at 115.) However, a former employee of the College forwarded to a College official a series of disturbing emails he received from Potts. (*Id.* at 110-112.) The former employee had no knowledge that Potts had contractually agreed not to disparage the College. He sent the emails to the College because he believed they were inappropriate. (*Id*.) In these emails, Potts categorized the College as being in "deep trouble," called its owner "crazy,"

labeled one of the College's directors as "weak and inept," and made other disparaging statements about the College. (Aplt. App. at 45-46.)

As a result of her breach, the College sent a letter to Potts on January 11, 2013, demanding that she return the $7,000. (*Id.* at 47.) The letter expressly stated that if Potts did not return the money, the College would file a lawsuit asserting she had breached the Agreement and seeking return of the $7,000 consideration. (*Id.*)

Instead of returning the money to the College, Potts responded by filing her first charge of discrimination against the College, alleging that the College: (i) discriminated against her based on her age by allegedly giving better severance packages to younger employees, (ii) retaliated against her for giving a sworn affidavit in response to a subpoena, and (iii) issued her "a severance/release" (i.e., the Agreement) that violated the OWBPA. (*Id.* at 48-49.) Remarkably, at trial, Potts admitted that these allegations of discrimination against the College, made under oath, were false and based entirely on Potts's conjecture. (*E.g.* Aplee. Supp. App. at 116-125.)

Potts further admitted that she filed the charge of discrimination in retaliation for the College's January 11, 2013, letter. (*Id.* at 126.)

The College received notice of Potts' charge of discrimination on February 1, 2013, and March 18, 2013. (*Id.* at 84-85.) Potts filed two additional charges of discrimination against the College on April 8, 2013, and December 18, 2013.

(Aplt. App. at 30.) The College never interfered with Potts' ability to file any of the charges of discrimination nor asserted that she had waived her rights under the ADEA in response to the charges. (*Id.* at 52-61, 78-81, 86 at ¶ 11.)

On March 25, 2013, the College filed its lawsuit against Potts in Larimer County, Colorado. It asserted Potts had breached the non-disparagement provision of the Agreement through her emails to the former employee and sought return of the $7,000. (*Id.* at 50-51.) The county court complaint expressly states that the College's claim stemmed from Potts' agreement not to disparage its reputation and her subsequent violation of that provision in the Agreement. (*Id.* at 50.) The county court complaint contained no allegations that Potts had violated the Agreement by filing a charge of discrimination, by participating in an EEOC's investigation, or by talking to the EEOC. (*See generally id.* at 50-51.)

On December 20, 2013, the EEOC issued a letter of determination to the College, finding that it had violated the ADEA by filing the county court lawsuit against Potts in retaliation for her charge of discrimination. The EEOC also asserted that the College was using the Agreement (which the EEOC erroneously thought was a standard severance agreement) to interfere with Potts' right to file a charge or participate in an investigation or proceeding conducted by the EEOC. (*Id.* at 75-77.)

After the EEOC letter of determination, and before the EEOC filed this lawsuit, the College clarified on three separate occasions that the Agreement was not intended to waive any of Potts' claims or rights under the ADEA or OWBPA:

- On January 7, 2014, the College sent a letter to Potts stating that it "has never asserted and will not assert at any time in the future that the Agreement constitutes a waiver of age discrimination claims under the [OWBPA]" as well as that it "does not assert and will not assert at any time in the future that [Potts] violated the Agreement by filing a charge with the EEOC . . . ." (*Id.* at 78);
- On January 10, 2014, the College sent a letter to the EEOC stating that it "has never asserted that the [Agreement] constitutes a waiver of any rights under the OWBPA or the ADEA," that it "fully acknowledges that the Agreement does not contain a release under the OWBPA/ADEA, nor was the Agreement ever intended to waive such a claim," and that it "does not currently allege and will not allege at any time in the future that Ms. Potts is liable for breaching the contract based on the filing of her charges with the Commission . . . ." (*Id.* at 79-81); and
- On February 4, 2014, the College filed an Amended Complaint in the state court case against Potts, expressly stating that it "does not assert

> that the parties' agreement constitutes a waiver of discrimination claims, nor that Ms. Potts violated the contract by filing EEOC charges." (*Id.* at 82-83.)

In spite of these unequivocal statements, the EEOC filed its lawsuit against the College on April 30, 2014, alleging that (i) the Agreement violated the OWBPA by limiting, interfering, chilling, and deterring "Potts' protected right to file charges of discrimination or participate in investigations or proceedings conducted by the Commission or state [Fair Employment Practice Agencies ("FEPAs")]"; (ii) the College's "Separation and Release Agreements" (which Potts did not receive) were unlawful; and (iii) the College had retaliated against Potts in violation of the ADEA by filing the county court lawsuit. (*Id.* at 22-24.)

For the First Claim, the EEOC sought an injunction to stop the College from:

> engaging in resistance to Potts' right to file charges of discrimination and participate and cooperate in investigations by the EEOC and the state FEPAs, including but not limited to (a) the entry of a declaratory judgment that the [Agreement] was and is void *ab initio* as against public policy and was and is therefore unlawful, invalid, and unenforceable in its entirety, or alternatively, the entry of a declaratory judgment that the offending provisions of the [Agreement] were and are void *ab initio* as against public policy and are therefore unlawful, invalid, and unenforceable; and (b) enjoining the Defendant Employers from using the [Agreement] (or any substantially equivalent agreement) or from prohibiting Potts from filing charges with or cooperating with the EEOC or state FEPAs[.]

(*Id.* at 25.)

The College moved to dismiss the EEOC's Complaint, arguing, as relevant here, that the district court lacked jurisdiction over the First Claim because it was moot and, alternatively, that the First Claim failed to state a claim upon which relief could be granted. (*See* Aplee. Supp. App. at 15-57.) Specifically, the College argued that there was no justiciable controversy regarding the First Claim because the College had never asserted that Potts had waived any of her ADEA or OWBPA claims or rights in the Agreement, and even if there had been a controversy regarding the First Claim at some point, it had become moot. (*Id.* at 23-25, 37-41.) In support of this argument, the College attached two additional declarations from its general counsel (the "Declarations"), signed under penalty of perjury, which unequivocally stated:

> It is not [the College's] position that the Agreement constitutes a waiver of Ms. Potts' rights under the Age Discrimination in Employment Act. In responding to Ms. Potts' charges filed with the EEOC, [the College] never asserted that she had waived her right to bring the charges. (Aplt. App. at 86, ¶ 11)
>
> The College does not and will never assert that the Agreement constitutes a waiver of Ms. Potts' ADEA claims or waives her otherwise unfettered rights to file charges of discrimination and cooperate in any proceeding conducted by the EEOC or FEPAs, whether that proceeding is based on a charge filed by Potts or anyone else. (*Id.* at 89-90, ¶ 4.)

Finally, the College argued that the First Claim should be dismissed because, as Tenth Circuit precedent holds, there is no independent cause of action for an OWBPA violation. (Aplee. Supp. App. at 25-26, 42-45.)

In a written order dated December 2, 2014 (the "Order"), the district court granted the College's motion as to the First Claim. (Aplt. App. at 33-36.) It found that, based on the record, the College had:

> met its burden of demonstrating that there is no reasonable expectation that it will use the Agreement to interfere with the ADEA rights of Potts or the EEOC. To the extent that CollegeAmerica previously used the Agreement in this manner, any resulting effects have been eradicated by CollegeAmerica's recent representations and assurances. The EEOC's First Claim for Relief based on the Agreement is therefore moot and must be dismissed for lack of jurisdiction.

(*Id.* at 36.)

Because the district court concluded that it lacked jurisdiction over the First Claim, it declined to address the College's alternative argument regarding the EEOC's failure to state a claim. (*Id.*)[2]

The district court denied the motion as to the EEOC's retaliation claim, and the case proceeded to trial on that claim. Finding no retaliation, the jury entered its verdict for the College, and the district court entered judgment accordingly. (Aplee. Supp. App. at 127-131.)

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[2] The district court also dismissed the EEOC's Second Claim for Relief, a decision that the EEOC has not appealed. In the Second Claim, the EEOC challenged the College's standard severance agreements, agreements that had not been used in Potts' case because she resigned and was not terminated. (Aplt. App. 36-41.) The College had provided these agreements to the EEOC as evidence that Potts' Agreement was not the College's standard severance agreement. The EEOC made no effort to conciliate this second claim before filing suit, and the claim was dismissed on that ground. (*Id.*)

SUMMARY OF ARGUMENT

The district court correctly concluded that the First Claim is moot. Through repeated statements and actions disclaiming any release of OWBPA/ADEA rights, the College has met its burden of showing that there is no reasonable expectation the alleged violation will recur and any effects of the alleged violation have been completely and irrevocably eradicated. The College's assurances encompassed the entire First Claim, not only part of it, as the EEOC mistakenly contends. The College did not take its position simply to evade judicial review or avoid judgment. The College has not since "reversed course" on its representations, some of which were made under penalty of perjury. Not only has the College not asserted that Potts has waived any rights, but Potts has clearly not been deterred or chilled from exercising her rights—she filed three (baseless) claims with the EEOC and actively cooperated with the EEOC through trial, sitting at counsel table with the EEOC's attorneys throughout the entire trial. As Judge Babcock concluded, the First Claim does not present a justiciable controversy. Mootness deprives the Court of jurisdiction, and the Court should therefore affirm the Order.

Even if the claim was not moot, the Court should affirm dismissal on the alternative ground that the claim fails as a matter of law. There is no independent cause of action for an alleged violation of the waiver section of the OWBPA. *Whitehead v. Okla. Gas & Elec. Co.*, 187 F.3d 1184, 1191 (10th Cir. 1999). There

is no need to determine whether an alleged release of an ADEA claim is valid because there is no assertion here that Potts released any ADEA claim. The EEOC's claim and prayer for relief lack statutory authority.[3]

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED THE FIRST CLAIM AS MOOT

This Court reviews the jurisdictional issue of mootness de novo. *WildEarth Guardians v. Pub. Serv. Co. of Colo.*, 690 F.3d 1174, 1181 (10th Cir. 2012). Applying this standard, the Court should affirm the dismissal because there is no live controversy.

"Mootness is a threshold issue because the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction." *McClendon v. City of Albuquerque*, 100 F.3d 863, 867 (10th Cir. 1996). The mootness doctrine provides that even if there is "an actual and justiciable controversy at the time the litigation is commenced, once that controversy ceases to exist, the federal court must dismiss the action for want of jurisdiction." *Jordan v. Sosa*, 654 F.3d 1012, 1023 (10th Cir. 2011) (internal quotation marks and citation omitted). The doctrine "focuses upon whether a definite controversy exists

[3] In Section B of its brief, the EEOC argues that it had standing to bring the First Claim, anticipating that the College might challenge this. The College is not challenging on appeal the EEOC's standing and will not address that part of the EEOC's brief.

throughout the litigation and whether conclusive relief may still be conferred by the court despite the lapse of time and any change of circumstances that may have occurred since the commencement of the action." *Id.* at 1024 (internal quotation marks and citation omitted).

This Court has set out the crux of the mootness inquiry:

> In deciding whether a case is moot, the crucial question is whether granting a present determination of the issues offered will have some effect in the real world. When it becomes impossible for a court to grant effective relief, a live controversy ceases to exist, and the case becomes moot." Put another way, a case becomes moot "when a plaintiff no longer suffers actual injury that can be redressed by a favorable judicial decision.

Ind v. Colo. Dep't of Corrs., 801 F.3d 1209, 1213 (10th Cir. 2015) (quoting *Rhodes v. Judiscak*, 676 F.3d 931, 933 (10th Cir. 2012)); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1311 (10th Cir. 2010).

Voluntary cessation of a complained-of practice may moot litigation if two conditions, which are present in this case, are satisfied: "'(1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *Ind*, 801 F.3d at 1214 (quoting *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1115 (10th Cir. 2010)); *see also E.E.O.C. v. United Parcel Serv.*, 860 F.2d 372, 377 (10th Cir. 1988).

The defendant bears a heavy—but not insurmountable—burden of showing that the challenged conduct cannot reasonably be expected to start up again. *Ind*, 801 F.3d at 1214; *see also Brown v. Buhman*, 822 F.3d 1151, 1167 (10th Cir. 2016). "Moreover, '[v]oluntary cessation of offensive conduct will only moot litigation if it is clear that the defendant has not changed course simply to deprive the court of jurisdiction.'" *Ind*, 801 F.3d at 1214 (quoting *Rio Grande*, 601 F.3d at 1115).

A. There is No Reasonable Expectation That the Alleged Violation Will Recur

The College has stated repeatedly that the Agreement was not intended to be a waiver of any rights under the OWBPA or ADEA and that the College would not assert that it was a waiver. Statements to this effect were made before litigation started, including in its letters to Potts and the EEOC in January 2014. Those pre-litigation letters stated that the College did not, and never would, assert that the Agreement constituted a waiver of any rights under the OWBPA or ADEA. The EEOC's argument that the waiver issue is still a live controversy is without merit.

The EEOC first argues that the College's statements did not address the entirety of the First Claim—that is, "[t]hey addressed only whether Potts violated the 2012 agreement by filing charges with the EEOC" and "said nothing about the Commission's concern that the agreement interfered with Potts' right to participate in protected activity in other ways besides filing charges[.]" (EEOC Br. at 15-16.)

This is incorrect. To begin with, the College's letters and amended county court complaint were broader than the EEOC contends. In addition to stating its unequivocal position that Potts did not violate the Agreement by filing a charge with the EEOC, the letters and Amended Complaint stated that the College: "has never asserted and will not assert at any time in the future that the Agreement constitutes a waiver of age discrimination claims under the [OWBPA]"; "has never asserted that the [Agreement] constitutes a waiver of any rights under the OWBPA or the ADEA"; "fully acknowledges that the Agreement does not contain a release under the OWBPA/ADEA, nor was the Agreement ever intended to waive such a claim"; and "does not assert that the parties' agreement constitutes a waiver of discrimination claims . . . ." (Aplt. App. at 78, 80, 82 (emphasis added).) There is no ambiguity or narrowness in the statements.

The EEOC's argument is based on a faulty premise that the College's assurances did not encompass the "breadth" of the First Claim because they did not use certain language—that the College would not interfere with Potts' right to participate in protected activity under the ADEA and OWBPA. (EEOC Br. at 16.) This argument is wrong for several reasons. First, the Agreement contains no language that could be construed as interfering with Potts' participation rights. The Agreement says nothing about Potts' right to participate in protected activity beyond filing a claim. Additionally, the College has never interfered with those

rights. Third, the College made clear that it had never asserted and would not assert that the Agreement is a waiver or release of any claims or rights under the ADEA or OWBPA, which plainly embraces the EEOC's concern. (*See* Aplt. App. at 78, 80.) According to the EEOC itself, the ADEA prohibits employers from "using waiver agreements to interfere with the protected right of an employee to file charges and participate in EEOC proceedings." (EEOC Br. at 2 (emphasis added).) Disclaiming release of any "claims or rights" obviously covers these. Stated differently, Potts' ADEA right to participate in EEOC investigations and proceedings is one of the rights that the College assured her and the EEOC had not been waived in the Agreement.[4]

The full ambit of the First Claim was also addressed in both Declarations. The first Declaration, which the EEOC failed to address, stated that "It is not our position that the Agreement constitutes a waiver of Ms. Potts' rights under the [ADEA]." (Aplt. App. 86, ¶ 11 (emphasis added).) The second Declaration stated that the College

> does not and will never assert that the Agreement constitutes a waiver of Ms. Potts' ADEA claims or waives her otherwise unfettered rights to file charges of discrimination and cooperate in any proceeding

[4] Contrary to the EEOC's assertion, the College did not misunderstand the First Claim in moving to dismiss it. (*See* Aplee. Supp. App. at 23 (arguing that there is "no justiciable controversy regarding the First Claim because the College does not contend that the Agreement contains such a waiver, much less that Ms. Potts waived her ADEA rights." (emphasis added)).)

> conducted by the EEOC or FEPAs, whether that proceeding is based on a charge filed by Potts or anyone else.

(*Id.* at 89-90, ¶ 4.) The EEOC's attempt to frame the issue for this Court as whether the second Declaration alone supports the Order is in conflict with the record.

Moreover, even if the second Declaration was the College's only assurance that covered the scope of the First Claim (and it is not), this Court should still affirm the Order. In *Brown*, the plaintiffs claimed that a state criminal statute violated their constitutional rights. 822 F.3d at 1156-57. As relevant here, the county attorney moved to dismiss the case as moot based on a policy, adopted after the lawsuit was filed, not to prosecute under the statute unless certain circumstances, not applicable to the plaintiffs, were present. *Id.* at 1155, 1159. Similar to this case, the county attorney attached a declaration to the motion that contained the content of the policy and a statement that, absent new evidence, the plaintiffs would not be prosecuted. *Id.* at 1159. The district court denied the motion, but a panel of this Court reversed on mootness grounds, holding that the district court lost jurisdiction when the county attorney submitted the declaration announcing the new policy, which made it clear that prosecution of the plaintiffs "could not reasonably be expected to recur." *Id.* at 1168 (internal quotation marks and citation omitted).

This case bears strong similarities with *Brown*. There, the county attorney's voluntary cessation mooted the case because, among other reasons, there was no

basis to conclude that he "had engaged in deliberate misrepresentation to the court"; the risk that he would revoke or ignore the policy after attesting to it under penalty of perjury was "minimal at best, and certainly not enough to sustain a live case or controversy"; the policy and the decision not to prosecute was "contained in a declaration that was signed under penalty of perjury and submitted to the federal district court"; and "violation of the declaration would expose [the county attorney] to prosecution for perjury or contempt." *Id.* at 1170-71.

Accordingly, the court held:

> Nothing in the record suggests [the county attorney] has attempted to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior. . . . Any prospective relief the district court might have awarded in the face of [his] commitment would therefore have virtually no effect in the real world. [The] declaration deprived the parties of a concrete interest, even a small one, in the outcome of this litigation.

Id. at 1171 (internal quotation marks and citation omitted). The College's actions and statements here are very similar: there is no suggestion of misrepresentation; there is little risk of a change in the representations or position; the statements were made under penalty of perjury; and there is no likelihood that the College's behavior was only temporarily changed to evade judicial review.

Other cases are also on point in finding that sworn statements are more than adequate to render a claim moot. For example, in *Winsness v. Yocom*, 433 F.3d 727, 736-37 (10th Cir. 2006), affidavits attached to a motion to dismiss rendered

one of the plaintiff's claims moot because they made it "absolutely clear" that the defendants had no intention of enforcing a statute against him. That is, again, similar to what occurred here. *See also Haywood v. U.S.*, 642 F. Supp. 188, 190 (D. Kan. 1986) (granting a motion to dismiss a claim as moot because the IRS attested to corrective changes that it had taken, thereby showing that there was no reasonable expectation of future wrongful conduct against the plaintiff).

In this case, the College has gone even farther than in the cases above. It made its position absolutely clear through its letters, the amended county court complaint, and the Declarations. In addition, the College repeatedly stated in its Motion to Dismiss briefing that it does not contend that Potts waived her ADEA or OWBPA rights. (*See* Aplee. Supp. App. at 23-25, 37-41.) These judicial admissions in the College's pleadings are also binding upon it. *Grynberg v. Bar S Servs., Inc.*, 527 F. App'x 736, 739 (unpublished) (10th Cir. 2013). The College has, as the district court found, satisfied its burden to show that there is no reasonable expectation that the alleged violation of Potts' ADEA or OWBPA rights will ever occur or recur. *See Ind*, 801 F.3d at 1214.

The EEOC cites to the decision of the D.C. Circuit in *Kifafi v. Hilton Hotels Ret. Plan*, 701 F.3d 718 (D.C. Cir. 2012), but that case is not binding on this Court, and it is also readily distinguishable. In *Kifafi*, the plaintiff alleged that the defendant had violated an ERISA provision that prohibits "backloading," but the

defendant argued that the claim was moot because "it would be 'illogical,' 'irrational,' and 'absurd'" to continue to violate the provision and subject itself to further litigation and tax consequences. *Id.* at 725. The court rejected the defendant's mootness argument as insufficient because its assertion that the backloading would not recur "boil[ed] down" to a mere promise not to violate ERISA in the future. *Id.* The court was also unconvinced that the violation could not reasonably be expected to recur because, after amending the retirement plan to supposedly eradicate the effect of the backloading, the defendant had erroneously stated that its original plan did not violate ERISA. *Id. Kifafi* is therefore far different from the facts here. In addition, there is no chance that the College could assert that the Agreement waived Potts' ADEA rights because her 300-day period to file additional charges following mutual execution of the Agreement has long since passed, and there are no EEOC investigations dating back to her employment with the College over four years ago.

B. Interim Relief or Events Have Completely and Irrevocably Eradicated the Effects of the Alleged Violation

There is no evidence that Potts has been adversely affected by the alleged violations. From the time that she learned that the College would pursue her violation of the non-disparagement provision of the Agreement, Potts has contended that the Agreement contains an improper waiver of her ADEA rights. But she aggressively pursued those rights, even to the extent of filing spurious

claims of discrimination in an effort to get the College to drop its breach of contract claim.

However, even assuming that the very existence of the language in the Agreement somehow adversely impacted Potts, the Declarations and other representations have completely and irrevocably eradicated any possible effect of the alleged violations. *See Ind*, 801 F.3d at 1214. As this Court has noted, there must be a live controversy and some real world effect on the case. *See, e.g.*, *Brown*, 822 F.3d at 1171; *Ind*, 801 F.3d at 1213. Neither exists here. The College's assurances and statements that it does not and will not assert that the Agreement waives Potts' ADEA claims or rights have eliminated any controversy that ever existed with respect to the Agreement and, with it, any possibility that effective relief could be granted to the EEOC.[5] With no likelihood that Potts will be

[5] Granting the EEOC the relief it requested on the First Claim would also be ineffective because (i) the EEOC requested injunctive relief to prohibit the College from "engaging in resistance" to Potts' rights to file charges and cooperate with the EEOC, but the College has engaged in no such resistance and declared that it would not interfere with her ADEA rights (and, at this point, it is too late for her to file charges under the Agreement anyway); (ii) the EEOC also requested a declaration that the Agreement is void, but has not suggested that Potts is willing to return the $7,000 that she received as consideration under the Agreement; (iii) in the alternative, the EEOC requested a declaration that the "offending provisions" of the Agreement are void, but again, the College has declared that the Agreement, as a whole, was not a waiver of Potts' ADEA rights; and (iv) there is no possibility that the College will use the Agreement in the future with respect to any other employee or former employee because it is undisputed that the Agreement was created solely for the purpose of resolving the specific disputes that had arisen between Potts and the College following her resignation. (Aplt. App. at 25, 89-90.)

prevented from freely exercising her ADEA rights, a judicial determination regarding the First Claim would have no real world effect, rendering the First Claim moot. *See Newman v. D.C. Courts*, 125 F. Supp. 3d 95, 107 (D.D.C. 2015) (dismissing for lack of jurisdiction a claim that a waiver and release of ADEA rights violated the OWBPA where, among other things, the defendants did not rely on them as a defense to the plaintiff's ADEA claims or seek to enforce them).

C. The College Did Not Take Actions to Evade Judicial Review

Contrary to the EEOC's arguments, nothing in the record indicates that the College took its position with respect to the Agreement to evade judicial review or avoid judgment. First, the timing of the College's assurances are not suspicious—the College has never asserted that Potts waived her ADEA or OWBPA rights, and it began stating this months before this lawsuit was filed. (Aplt. App. at 78-83.)

Second, after the College filed the county court lawsuit, it learned that Potts had continued to disparage the College in violation of the Agreement by calling its Chief Operating Officer an "old hag." (Aplee. Supp. App. at 114.) The College served discovery in the county court case aimed at compiling a complete list of all of the disparaging comments that Potts had made about the College after signing the Agreement. This information would be highly relevant at the trial of the non-disparagement breach of contract case, a fact that Potts conceded at trial here. (*Id.* at 115.) Thus, the EEOC's argument that the College deliberately interfered with

Potts' right to participate in protected activity by serving those discovery requests ignores their legitimate strategic purpose, which had nothing to do with Potts' ADEA rights. And even if the requests somehow affected her rights (and they did not), any alleged effect was eradicated by the College's subsequent letters, Amended Complaint, and Declarations.

Third, the EEOC asserts that a factor in the voluntary cessation analysis is whether a defendant has admitted to wrongdoing. This factor does not appear to have been applied by the Tenth Circuit, and even in the Eleventh Circuit case cited by the EEOC, it was just one of several factors to be taken into consideration. *See Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1184 (11th Cir. 2007) (listing three factors that were important to determining mootness when a defendant had voluntarily ceased the conduct at issue). Because it is clear that the College has not changed course simply as a ploy to deprive the court of jurisdiction, the voluntary cessation exception does not rescue the EEOC's claim from mootness. *See Ind*, 801 F.3d at 1214.

Finally, the EEOC's argument that the College "reversed course" in the pretrial order in this case is incomplete and incorrect. (EEOC Br. at 19.) The pretrial order clearly states the position, which the College has always maintained, that "Potts had every right to file her charge of discrimination with the EEOC." (Aplt. App. at 91.) Further, the pretrial order was submitted in preparation for trial

on Potts' claim that the College's breach of contract case against her was retaliation for her charge of discrimination and for participating in the EEOC's investigation. (Aplee. Supp. App. at 66.) The College successfully defended against that claim by arguing that the county court lawsuit was not retaliatory; rather, it sued Potts because she repeatedly breached the Agreement by disparaging the College's reputation and by failing to notify the College of her complaints via its toll free complaint number. (*Id.* at 8-13, 104-107; Aplt. App. at 44.) The point the College was making was that Potts' filing of complaints without first notifying the College was a violation of the notice provision in the Agreement. It did not inhibit her from making the complaints at all. The College did not "reverse course" and claim that Potts had waived her ADEA rights. The record is devoid of evidence that the College has reneged on its multiple assurances and sworn statements that it "does not and will ***never*** assert that the Agreement constitutes a waiver of Ms. Potts' ADEA claims or waives her otherwise unfettered right to file charges of discrimination and cooperate in any proceeding conducted by the EEOC or FEPAs, whether that proceeding is based on a charge filed by Potts or anyone else." (Aplt. App. at 89-90, ¶ 4.)

For all of these reasons, the district court properly dismissed the First Claim as moot. The Court should affirm the Order. *See Clark v. State Farm Mut. Auto.*

Ins. Co., 590 F.3d 1134, 1141 (10th Cir. 2009) (affirming district court's dismissal of case on mootness grounds).

II. IF THE CLAIM IS NOT MOOT, THE COURT SHOULD AFFIRM DISMISSAL BECAUSE THE CLAIM FAILS AS A MATTER OF LAW

Because mootness is a jurisdictional issue, the district court did not reach the College's alternative argument that the claim failed as a matter of law. However, this Court may affirm the Order on any grounds supported by the record, even if it requires ruling on arguments not reached by the district court. *A.M. v. Holmes*, 830 F.3d 1123, 1146 n.11 (10th Cir. 2016).

Congress amended the ADEA in 1990 by passing the OWBPA. *Whitehead*, 187 F.3d at 1191; *see also* Pub. L. No. 101-433, 104 Stat. 978 (1990). The OWBPA is dual-purposed—first, "to make clear that discrimination on the basis of age in virtually all forms of employee benefits is unlawful," and second, "to ensure that older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA." *Palmer v. Salazar*, 324 F. App'x 729, 733 (10th Cir. 2009) (unpublished) (internal quotation marks and citation omitted). Accordingly, an employee may not waive an ADEA claim unless the waiver or release satisfies the requirements of the OWBPA. *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 426-27 (1998).

The First Claim alleges that the College violated the OWBPA—specifically, 29 U.S.C. § 626(f)(4). (Aplt. App. at 22-23.) Section 626(f) is titled "Waiver," and it sets forth the minimum requirements for a "knowing and voluntary" waiver of any right or claim under the ADEA as well as the burden of proof to establish the validity of a waiver. *See* 29 U.S.C. § 626(f)(1)-(3). The last provision of the "Waiver" section states:

> No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

29 U.S.C. § 626(f)(4).

The OWBPA determines whether an employee has, as a matter of law, waived the right to bring a separate and distinct ADEA claim, but it does not, by itself, determine whether age discrimination has occurred. *Whitehead*, 187 F.3d at 1192. Furthermore, the waiver provisions of the OWBPA are not "swords that provide plaintiffs with an independent cause of action for affirmative relief," other than declaratory relief to negate a waiver asserted in an ADEA claim. *Whitehead*, 187 F.3d at 1191.[6] There is no ADEA claim in this case, much less an asserted

[6] Many other courts have held similarly. *See, e.g., Powers v. AT&T*, No. 15-CV-01024-JSC, 2015 WL 5188714, at *7 (N.D. Cal. Sept. 4, 2015) (unpublished); *Cummings-Harris v. Kaiser Found. Health Plan of Ga., Inc.*, No. 1:12-CV-0984-JEC, 2013 WL 5350937, at *4-5 (N.D. Ga. Sept. 23, 2013) (unpublished); *Baker v. Washington Grp. Int'l, Inc.*, No. CIV.A. 1:06-CV-1874, 2008 WL 351396, at *2-3

waiver. Instead, the EEOC asserts an independent cause of action for affirmative relief, in direct conflict with *Whitehead.*

Under *Whitehead* and other cases applying it, the "Waiver" section of the OWBPA is not applicable when there is no need to determine whether a release of an ADEA claim is valid. *Id.* at 1191; *Gray v. Oracle Corp.*, No. 2:05-CV-534 TS, 2006 WL 2987936, at *1 (D. Utah Oct. 17, 2006) (unpublished). In other words, where there is "no attempt to enforce a waiver of the right to sue under the ADEA by an employer, nor an attempt to avoid the effect of such a waiver by a former employee, § 626(f)'s provisions are not applicable." *Gray*, 2006 WL 2987936, at *1.

This is precisely the case here. The College has never attempted to enforce the Agreement as a waiver of Potts' ADEA rights and, in fact, has stated and declared that Potts has never waived any claims or rights under the ADEA or OWBPA. (Aplt. App. at 78, 80, 86 at ¶ 11, 89-90 at ¶ 4) Similarly, neither Potts nor the EEOC has sought to negate the validity of a waiver for a particular claim

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(M.D. Pa. Feb. 7, 2008) (unpublished); *Syverson v. Int'l Bus. Machs. Corp.*, No. C-03-04529-RMW, 2007 WL 2904252, at *2-5 (N.D. Cal. Oct. 3, 2007) (unpublished); *Graves v. Horry-Georgetown Tech. Coll.*, 512 F. Supp. 2d 413, 415-16 (D. S.C. 2007); *Halstead v. Am. Int'l Grp. Inc.*, No. CIV-04-815-SLR, 2005 WL 885200, at *2 n.5 (D. Del. Mar. 11, 2005) (unpublished); *EEOC v. UBS Brinson, Inc.*, No. 02-CIV-3748-RMBTK, 2003 WL 133235, at *3-5 (S.D.N.Y. Jan. 15, 2003) (unpublished); *EEOC v. Sears, Roebuck and Co.*, 883 F. Supp. 211, 215 (N.D. Ill. 1995); *EEOC v. Sara Lee Corp.*, 923 F. Supp. 994, 999 (W.D. Mich. 1995).

under the ADEA.[7] Thus, this case requires the same result as *Burden v. Isonics Corp.*, No. CIV.A 09-CV-01028-CMA-MJW, 2009 WL 3367071 (D. Colo. Oct. 15, 2009) (unpublished), where the court applied *Whitehead* to dismiss the plaintiff's OWBPA claim because the defendant did not allege that the plaintiff had waived his ADEA claim and therefore, "whether plaintiff knowingly and voluntarily waived a right or claim under the ADEA is simply not at issue in this case." *Id.* at *3, 7-8; *see also Piascik-Lambeth v. Textron Auto. Co.*, No. CIV. 00-258-JD, 2000 WL 1875873, at *5 (D.N.H. Dec. 22, 2000) (unpublished) (dismissing a separate cause of action for violation of the OWBPA because, among other reasons, the parties agreed that a release signed by the plaintiff did not bar her ADEA claim). Because whether Potts waived any right or claim under the ADEA was never at issue in this case, there was no cause of action available to the EEOC under the OWBPA and the First Claim therefore fails to state a claim for relief.[8]

[7] This is because they have never needed to. In this case, the Agreement did not prevent or dissuade Potts from filing charges with the EEOC—she filed three separate charges against the College. (Aplt. App. at 30.) It also bears noting that Potts testified at trial that she "now know[s]" that the OWBPA does not apply to the Agreement. (Aplee. Supp. App. at 124.)

[8] To the extent that the EEOC has argued the Agreement's non-disparagement provision violates the OWBPA because it precludes or inhibits Potts from participating fully in an EEOC investigation, its argument similarly fails. Section 626(f)(4) prohibits a "waiver" from being used to interfere with an employee's right to file a charge or participate in an EEOC investigation or

Second, even if the First Claim was tied to any assertion that an ADEA claim had been validly or invalidly waived (and it is not), it also fails to state a cognizable claim because the EEOC sought overly-broad, unauthorized injunctive and declaratory relief. Specifically, the EEOC prayed for a permanent injunction enjoining the College from:

> engaging in resistance to Potts' right to file charges of discrimination and participate and cooperate in investigations by the EEOC and the state FEPAs, including but not limited to (a) the entry of a declaratory judgment that the [Agreement] was and is void *ab initio* as against public policy and was and is therefore unlawful, invalid, and unenforceable in its entirety, or alternatively, the entry of a declaratory judgment that the offending provisions of the [Agreement] were and are void *ab initio* as against public policy and are therefore unlawful, invalid, and unenforceable; and (b) enjoining the Defendant Employers from using the [Agreement] (or any substantially

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proceeding, and as discussed, there is no waiver at issue in this case. Further, even if the Agreement contained a waiver (and it does not), the non-disparagement clause does not interfere with Potts' participation rights because it is limited to prohibiting Potts from disparaging the College's reputation "intentionally with malicious intent" (Aplt. App. at 44), and because the College has never contested Potts' ability to communicate and participate with the EEOC. *See Thiessen v. Gen. Elec. Capital Corp.*, 232 F. Supp. 2d 1230, 1242-43 (D. Kan. 2002) (refusing to invalidate a waiver of ADEA claims that contained a non-disparagement clause "simply because the language of the waiver could be interpreted to interfere with the employee's right to communicate with the EEOC," where the defendants were not contesting the filing of an EEOC charge or any communication with the EEOC). Additionally, there are several cases in which agreements that waived ADEA claims have been held to be valid under the OWBPA despite containing non-disparagement clauses. *See, e.g.*, *Powell v. Omnicom*, 497 F.3d 124, 127, 132 (2d Cir. 2007); *Galanis v. Harmonie Club of City of N.Y.*, No. 1:13-CV-4344-GHW, 2014 WL 4928962, at *1, 12-13 (S.D.N.Y. Oct. 2, 2014) (unpublished); *Bachiller v. Turn On Prods., Inc.*, No. 00 CIV. 8701 (JSM), 2003 WL 1878416, at *1-2, 5 (S.D.N.Y. Apr. 14, 2003), *aff'd*, 86 F. App'x 465 (2d Cir. 2004) (unpublished).

> equivalent agreement) or from prohibiting Potts from filing charges with or cooperating with the EEOC or state FEPAs[.]

(Aplt. App. at 25.)

Significantly, in its Complaint, the EEOC did not request that a waiver of Potts' ADEA rights be negated (likely, because waiver has never been at issue in this lawsuit). The word "waiver" does not appear anywhere in the First Claim or the Prayer for Relief. (*Id.* at 22-23, 25-26.) Instead, the EEOC asked the district court to declare that the Agreement and its "offending provisions" were against public policy and thus, unlawful, as well as to enjoin the College from using the Agreement or prohibiting Potts from filing charges or cooperating with the EEOC. (*Id.* at 25.) This is not the narrow relief, tied to an asserted waiver, recognized by *Whitehead*. *See* 187 F.3d at 1191-92. This Court therefore has alternate grounds supported by the record to affirm the Order because the First Claim sought unallowable affirmative relief above and beyond rescission of a (non-existent) waiver of ADEA rights.[9]

[9] Although one of the extra-jurisdictional cases on which the EEOC relied in the district court denied a motion to dismiss a claim for violation of 29 U.S.C. § 626(f)(4), that case is not binding on this Court, does not provide any meaningful analysis, and is an outlier case decided before *Whitehead*. *See Commonwealth of Mass. v. Bull HN Info. Sys., Inc.*, 16 F. Supp. 2d 90, 107-08 (D. Mass. 1998). The other extra-jurisdictional case on which the EEOC relied involved an affirmative claim under the OWBPA that, unlike the EEOC's claim here, was tied to the invalidation of a waiver of ADEA rights. *See Krane v. Capital One Servs., Inc.*, 314 F. Supp. 2d 589, 603-10 & n.11 (E.D. Va. 2004) (denying motion to dismiss OWBPA claims that sought determination that ADEA claim waivers were invalid).

CONCLUSION

The district court correctly determined that the First Claim for relief was moot and thus properly dismissed that claim. Alternatively, this Court should affirm the Order because the EEOC's First Claim fails as a matter of law. The College respectfully requests that the Court affirm the Order dismissing the EEOC's First Claim.

Dated: December 22, 2016

Respectfully submitted,

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I hereby certify that with respect to the foregoing:

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I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was served on those listed below via the Tenth Circuit Court of Appeals' electronic email system this 22nd day of December 2016 to the following:

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