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Robert D. Meyers
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February 8, 2019

The Governor's Council for Judicial Appointments
c/o Administrative Office of the Courts
ATTN: Ceesha Lofton
Suite 600, Nashville City Center
511 Union Street
Nashville, Tennessee 37219

Re: Application for Nomination to Judicial Office of Robert David Meyers

Dear Ms. Lofton:

Enclosed, please find my Application for Nomination to Judicial Office, along with the attachments.

If you have any questions, please do not hesitate to call.

Very truly yours,

GLANKLER BROWN, PLLC

A handwritten signature in blue ink that reads "Robert Meyers".

Robert D. Meyers

RDM/vkc
Enclosures
ND 4852-4738-0097, v. 1

The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Robert David Meyers

Office Address: 6000 Poplar Avenue, Suite 400, Memphis, Tennessee 38119
(including county)

Office Phone: 901-576-1715 Facsimile: 901-525-2389

Email Address:

Home Address: Memphis, Shelby County, Tennessee 38125
(including county)

Home Phone:

Cellular Phone:

INTRODUCTION

The State of Tennessee Executive Order No. 54 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am a partner in the law firm of Glankler Brown, PLLC.

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

I was licensed to practice law in Tennessee in 1986, Tennessee Bar No. 012187.

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Arkansas Bar No. 200500008. Admitted in February of 2005 – Active.
District of Columbia Bar No. 85420. Admitted February of 2009 – Active.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Glankler Brown, PLLC - June 2013 to present
Ford Harrison, LLP - January 2011 to June 2013
Kiesewetter Wise Kaplan Prather, PLC - January 1998 to January 2011
Spicer, Flynn & Rudstrom - May 1995 to January 1998
The Hardison Law Firm - October 1989 to May 1995
Glankler Brown - August 1986 to October 1989
Prior to attending law school I worked as a registered nurse. I initially went to work at Methodist Hospital – Central (Memphis) in its Neurotrauma Unit (6/81 to 8/82) and then worked at University of Tennessee Memorial Hospital – Knoxville in its Cardiovascular Unit (8/82 to

12/83).

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

My practice is primarily focused on employment law (75%) and also includes civil rights law (20%), workers' compensation law (1%), and health law (4%). I provide my clients with both advice (how to comply with the law) and advocacy (when they are accused of legal violations). I represent clients before administrative agencies, in court, and on appeal.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

During the first 10 years of my practice, I represented clients in court who were insured for claims of negligence, including professional negligence, products liability, contract disputes and workers' compensation. I also represented individuals who were suing other individuals or entities for negligence, including professional negligence.

Since 1998, however, I have focused my practice almost exclusively on representing employers in labor and employment matters. In my current practice, I counsel public and private employers regarding compliance with local, state, and federal employment laws; such as the Americans with Disabilities Act, the Family and Medical Leave Act, the Genetic Nondiscrimination Act, Title VII of the Civil Rights Act of 1964, as amended, Section 1981, the Tennessee Human Rights Act, and the Tennessee Governmental Tort Liability Act. I also serve as lead counsel on behalf of these employers before administrative agencies and in state and federal cases alleging violations of these or other statutes, including claims for wrongful termination, breach of

employment contract, violation of non-compete agreements, and similar causes of action. I have represented employers before state and/or federal courts in Tennessee, Mississippi, Arkansas, Alabama, Texas, Georgia, Louisiana, Indiana and California. Additionally, I have extensive experience representing public employers against claims brought under Title VII and for Constitutional violations brought under Section 1983. Finally, I have also represented employers and municipalities before appellate courts in Tennessee and before the Sixth Circuit Court of Appeals. I have defended claims brought by a single individual, multiple individuals, and class action claims.

In addition, I am certified as a Civil Trial Specialist by the National Board of Trial Advocacy.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

I represented the Tennessee Defense Lawyers Association (“TDLA”) in *Haynes v. Formac Stables, Inc.* 463 S.W.3d 34 (Tenn. 2015), where I co-authored the amicus brief and presented oral argument on behalf of the TDLA.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

As a mediator, I have mediated one case.

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

Not applicable.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

Based on what I have learned during my law practice, I developed the “control theory of litigation” which I teach to the young lawyers on my litigation team. Controlling litigation begins with an analysis of the law applicable to each legal claim, then focuses on the facts necessary to satisfy each element of a claim, examines the potential for filing a motion to dismiss, pushes the case through discovery specifically related to the claims made and potential damages available, reexamines the case to determine if filing a full or partial motion for summary judgment is

appropriate, and guides trial preparation. The goal at each stage of the litigation is to control the direction of the case, typically by eliminating claims, and anticipate the cases next phase. By working to continually eliminate claims and narrow issues you can help control the case's outcome, whether by motion, judgment or settlement. This theory is also prevalent in most of the seminar presentations I have made.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

In 2015 I applied for an open position on the Tennessee Supreme Court.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

University of Tennessee College of Law, Knoxville: Juris Doctorate – 1986 (President of the Law School Student Government Association; member of the University of Tennessee Law Review for one year)

University of Tennessee Health Sciences Center, Memphis: Bachelor of Science in Nursing – 1983 (President of the Student Government Executive Counsel)

University of Tennessee, Martin: Bachelor of Science – 1979 (Member of the men's basketball team for two years)

PERSONAL INFORMATION

15. State your age and date of birth.

I was born on [REDACTED] 1956. I am 62 years old.

16. How long have you lived continuously in the State of Tennessee?

I have lived in Tennessee continuously since 1970.

17. How long have you lived continuously in the county where you are now living?

I have lived in Shelby County continuously since 1986.

18. State the county in which you are registered to vote.

I am registered to vote in Shelby County, Tennessee.

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Not applicable.

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

None.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

More than twenty years ago, my wife and I sued a contractor in Shelby County General Sessions Court. The matter was settled and I do not have and cannot find the docket number for this case.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

Knights of Columbus
Knights of the Vine
Chaine des Rotisseurs

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.
- If so, list such organizations and describe the basis of the membership limitation.
 - If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

I have never belonged to such a group.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Defense Research Institute (“DRI”) Employment and Labor Law Committee, 1999 to present (current member of the steering committee member)

DRI Civil Rights and Government Tort Liability Committee, 2001 to present (Past Chair: 2009-2011)

Federation of Defense and Corporate Counsel, 2006 to present

National Workers Compensation Defense Network, 2002 to 2010

Memphis Bar Association, 1986 to present

Tennessee Bar Association, 1986 to present

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

- Since 2007 listed in Best Lawyers in America, Labor and Employment, Municipal Law
- Best Lawyers in America, Memphis Lawyer of the Year 2014 and 2018 - Municipal Law
- Since 2006 listed in Mid-South Super Lawyers and Super Lawyers Corporate Counsel Edition by Law & Politics magazine
- Top 50 Memphis Super Lawyers List 2018
- AV® Preeminent Peer Review Rated by Martindale Hubbell

30. List the citations of any legal articles or books you have published.

I co-authored the following articles:

“Must Websites be ADA Compliant?” In-house Defense Quarterly, DRI, Winter Issue 2017.

“Defending Discrimination Claims after *Vawter v. DuPont*” TDLA Journal, Fall 2016 Issue I, at 14.

“Are Employee Drug Tests Going up in Smoke?” The Job Description, Vol. 26 No. 3 (10/16/2014).

“Opposing Post-Judgment Fee Petitions in Civil Rights and Discrimination Cases,” FDCC Quarterly, Fall 2010.

“When Does an Employee Return to work for the Pre-Injury Employer?” Tennessee Bar Journal, August 2010.

“TN Court Rules Companies Subcontracting Part of Principal Business Immune from Negligence Claims by Subcontractor Employees,” Workerscompensation.com, June 23, 2010.

“Tennessee Workers Compensation Law Outline,” National Workers’ Compensation Defense Network website, last updated June 2010.

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

“The ABC’s of Section 1983, An Analysis of Municipal Liability for Violations of Federal Law” Arkansas Bar Associations Annual Meeting, June 14, 2014.

“ADA/FMLA/WC How Has the Bermuda Triangle been effected by the ADAA and over 750 pages of Regulations” ABA Mid-Year Meeting Scottsdale, Arizona, March 2010.

“Substantive Due Process and How It Has Changed,” DRI’s Civil Rights and Governmental Tort Liability Seminar, New Orleans, Louisiana, January 28-30, 2009.

“How to Win: Strategically Using Motions and Other Tools in Defending Governmental Entities,” DRI’s Civil Rights and Governmental Tort Liability Seminar, Scottsdale, Arizona, January 24-25, 2008.

Program Chair for DRI’s Civil Rights and Governmental Tort Liability Seminar held in Orlando, Florida, February 1-2, 2007.

“Hiring the Competition’s Employees: What Are The Risks and How Can They Be Minimized?” DRI’s Employment Law Seminar, May 17-19, 2006 Fort Lauderdale, Florida.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

In April of 2008, the State Election Commission appointed me to the Shelby County Election Commission as a Commissioner. I was reappointed to a two year term in May of 2010. I was again reappointed for two year terms in April of 2013, 2015 and 2017. In 2011 I was elected Chairman of the Commission by my fellow Commissioners and again elected Chairman in April of 2015 and 2017.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

I have never registered as a lobbyist.

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

I am attaching "Motion for Partial Dismissal – To Dismiss Plaintiff's Appeal of the District Court's March 12, 2014 Order Dismissing the Plaintiff's Case in its Entirety," which was filed with the United States Court of Appeal for the Sixth Circuit and the "Defendant's Memorandum in Support of its Renewed Motion for Summary Judgment," which was filed in the United States District Court For the Western District of Tennessee, Western Division. Each of these pleadings represents approximately 80% of my work.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? *(150 words or less)*

Our law and our legal process set us apart from other societies. As a lawyer I believe in our laws and I want to see them upheld. As St. Thomas Moore said, "I would uphold the law if for no other reason than to protect myself." Ultimately, it is the public's faith in the law and in those who interpret the law that holds society together. I will work with the other Court of Appeals Judges to issue clear and legally consisted opinions, because I believe that is the best way to insure truly just results.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. *(150 words or less)*

I provide approximately 40 hours of pro bono service per year.

In addition, through my membership and activities with Defense Research Institute ("DRI"), I have been active in advocacy for the civil defense bar and education. By educating lawyers on substantive law and procedure I work to assure that our clients receive appropriate counseling and advocacy, thus, working towards equal justice. Both the DRI Employment and Labor Law and Civil Rights Committees hold a national annual substantive law seminar. I have participated on both Committees' annual seminar steering committees as a planner and speaker. I also served as chair of the annual seminar steering committee for the Civil Rights Committee. Each Annual Seminar is a two to three day seminar designed to be the leading seminar in its field.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. *(150 words or less)*

I am seeking the vacant seat on the West Tennessee Court of Appeals. I will bring a trial practitioner's perspective to the court. As a civil trial practitioner, I have extensive litigation experience both in Tennessee, and in state and federal courts in other jurisdictions, including Arkansas, Mississippi, Indiana, and Texas. My front line experience counseling clients and litigating cases will assist the Court in understanding of how its decisions impact not only the litigants before the court, but all of the citizens and businesses in our State. In addition, my extra territorial experience allows me to bring fresh ideas about how the Court can best meet the needs of those who appear before it and the subordinate courts of our State. Finally, I have significant appellate experience having appeared before the Tennessee Court of Appeals and Supreme Court, as well as the Sixth Circuit Court of Appeals.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? *(250 words or less)*

I participate in various activities of the Knights of Columbus, an organization dedicated to public service. Typically, my service involves attending events sponsored by the Knights. I will continue to serve the Knights if selected to fill the vacant seat on the Tennessee Supreme Court.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. *(250 words or less)*

I was born in France and lived in Europe for almost eight years during my childhood while my father served in the United States Army. This early life experience abroad gives me a world perspective.

In addition, I have a degree a Bachelor of Science in Nursing and worked as a registered nurse for nearly three years before beginning law school. As a nurse I worked in critical care units, and my experiences there have given me considerable empathy for my fellow human beings.

I was an athlete in High School and played basketball at a Division II college for two years.

These unique experiences, together with my experiences as a lawyer and recently as an Election Commissioner have shaped who I am and what I believe. It is because of my life experiences that I believe in treating all people with dignity and respect. Moreover, I am team oriented. I know how to work on a team made up of diverse people to reach a common goal.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. *(250 words or less)*

Yes, without reservation. I have in the past presented trial courts with binding legal precedent that they ultimately did not follow. Aside from those instances when the court determined the

precedent was not fully applicable, I have had two courts say that they thought the precedent was wrong and they were not going to follow it. As a practitioner, it is difficult to advise your clients on how to abide by the law when a court may disregard the rule of law on a whim. As a Judge on the Court of Appeals, I would uphold the rule of law even if I personally disagreed with its substance because that is what my oath would require.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. John L. Ryder - Harris Shelton Hanover Walsh, PLLC One Commerce Square, 40 Main Street, Suite 2700 Memphis, Tennessee 38103-2555. P: [REDACTED]

B. Louis P. Britt - Ford & Harrison, LLP 1715 Aaron Brenner Drive, Suite 200 Memphis, Tennessee 38120. P: [REDACTED]

C. Mark White, Representative District 83, 425 5th Avenue North, Suite 624 Cordell Hull Bldg., Nashville, Tennessee 37243. P: [REDACTED]

D. Steve Stamson - Retired Shelby County Juvenile Court Clerk, currently serving as a Shelby County Election Commissioner, 8520 Fox Heather Cove, Cordova, Tennessee 38018.

P: [REDACTED]

E. Brian Kelsey, Senator, Tennessee Senate District 31, 425 5th Avenue North, Suite 742 Cordell Hull Bldg., Nashville, Tennessee 37243. P: [REDACTED]

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the West Tennessee Court of Appeals of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: 2/8, 2019.


Signature

When completed, return this application to Ceesha Lofton, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.



**THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS**

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

**TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS**

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

Robert David Meyers
Type or Print Name

Robert Meyers
Signature

2/8/19
Date

12187
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

Arkansas Bar No. 200500008. Admitted in February of 2005 - Active.

District of Columbia Bar No. 85420. Admitted February of 2009 - Active.

4826-7564-9158, v. 1

4826-7564-9158, v. 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

JON MISEWICZ, et al.,

Plaintiffs,

vs.

No. 2:10-cv-02593-STA-cgc

CITY OF MEMPHIS, TENNESSEE,

Defendant.

**DEFENDANT’S MEMORANDUM IN SUPPORT OF ITS RENEWED MOTION FOR
SUMMARY JUDGMENT**

Pursuant to Local Rules 7.2 and 56.1 of the United States District Court for the Western District of Tennessee, the Defendant, City of Memphis (the “City”) for its Memorandum in Support of its Renewed Motion for Summary Judgment states as follows:

INTRODUCTION

The Plaintiffs filed their Complaint on August 10, 2010 seeking declaratory judgment, injunctive relief, monetary damages, attorneys’ fees and costs. Plaintiffs allege that the City violated the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, *et seq.*, by failing to compensate Plaintiffs for overtime incurred while they participated in mandatory training. On August 12, 2011, both parties filed Motions for Summary Judgment, which this Court denied in its Order dated March 26, 2012. In its Order, the Court found that fact issues remained as to whether Memphis Fire Department (“MFD”) policy required paramedic training for fire recruits hired after October 29, 2007. Furthermore, the Court held that “both [29 C.F.R. § 553.226 and

29 C.F.R. § 785.27] are relevant to the issue of whether [the City] must compensate the Plaintiffs for their time spent in paramedic training though [the City] **need not establish that both exceptions apply...[I]f the undisputed evidence establishes any of the exceptions to compensability, then the exception will shield [the City] from any liability** to Plaintiffs for their time spent in the paramedic training.” See March 26, 2012 Order pp. 13-14 (emphasis added). Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the City now renews its Motion for Summary Judgment against the Plaintiffs because there is no genuine dispute as to any material fact and the City is entitled to judgment as a matter of law. Here, the undisputed facts show that the City meets all the requirements for the exception to compensability found at 29 C.F.R. § 553.226(b)(1); thus, the City should be shielded from any liability to the Plaintiffs for their time spent in paramedic training.

UNDISPUTED FACTS

All citations herein will be to the Defendant’s Statement of Undisputed Facts (DSMF ¶). In October 2007 the City began requiring all MFD firefighters hired on or after a date certain in October 2007 to obtain EMT-P certification within three (3) years as a condition of employment. DSMF ¶1. Later, the City extended this requirement by six (6) months, which now gives fire recruits three and a half years (3 1/2) to achieve the EMT-P certification. DSMF ¶2. Fire recruits hired on or after the date certain in October 2007 were required to sign an “Emergency Medical Technician-Paramedic Certification and Recertification Agreement Between City of Memphis Fire Services Division and Fire Recruit” (the “Paramedic Agreement”) acknowledging, *inter alia*, that they: (1) must become licensed by the State of Tennessee as paramedics within the allotted period of time or risk immediate termination; (2) must perform as paramedics, regardless of rank, as a condition of continued employment; and (3) must maintain paramedic

certification at their expense. DSMF ¶3. As early as December 2006, it was readily apparent from City job descriptions and job postings for Fire Recruits that MFD firefighters were required to attain paramedic licensure. DSMF ¶5. Additionally, the Plaintiffs were further reminded of the paramedic certification requirement even before the City promulgated it in the Paramedic Agreement because one hundred and eleven (111) of them signed an “Availability of Applicant” form in January or February 2007, whereby they acknowledged that they were required to obtain paramedic certification as a condition of continued employment. DSMF ¶4.

To satisfy the paramedic certification requirement MFD fire recruits may take the City’s free EMT-P certification training or opt to obtain the training at a community college with a comparable program. DSMF ¶7. Regardless of where the fire recruits obtain the EMT-P training, the City does not compensate them for it. DSMF ¶8. Additionally, requirements for obtaining the EMT-P certification are set by the State of Tennessee, and the City cannot change them. DSMF ¶6.

MFD firefighters must, *inter alia*, “administer[] first responder treatment **in response to patient condition** as an ‘Essential Job Function’” DSMF ¶9 (emphasis added). This job function includes paramedic-level care, which MFD firefighters are obligated to perform as required, regardless of rank. DSMF ¶10. As part of their paramedic duties, MFD firefighters are, from time-to-time, required to perform the following emergency medical services (“EMS”) among others: electrocardiographic monitoring; recognizing and treating cardiac dysrhythmias; gastric, esophageal or tracheal intubation and suction; administering intravenous solutions or blood products by peripheral venipuncture of the scalp, extremities and external jugular veins; intraosseous infusions; administering oral, parenteral, endotracheal or other means antiarrhythmic agents, chronotropic agents, vagolytic agents, alkalizing agents, vasopressor

agents, and anticonvulsive agents. DSMF ¶15. MFD firefighters, including the Plaintiffs, typically spend twelve (12) hours on an ambulance and twelve (12) hours on a firefighter apparatus—which becomes an advanced life support vehicle (“ALS”) when a licensed paramedic is on board—in a twenty-four (24) hour shift as they are cross-trained to provide both EMS and fire suppression services. DSMF ¶12 and 14. They have a duty to perform paramedic-level functions whether they are on an ambulance or a firefighter apparatus. DSMF ¶13. Between October 2007 and June 1, 2013, MFD firefighters responded to substantially more EMS incidents than fires. DSMF ¶11. In fact, over that time period, they responded to 563,273 EMS incidents compared to only 131,113 fire incidents. DSMF ¶11. These EMS calls required them to consistently administer emergency medical treatment, which includes advanced emergency medical treatment requiring paramedic certification. DSMF ¶13.

STANDARD OF REVIEW

Rule 56 states, in relevant part, that “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “To survive summary judgment, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial.” *Pucci v. Nineteenth Dist. Court*, 628 F. 3d 752, 759-60 (6th Cir. 2010). The non-moving party “must provide the court with more than ‘some metaphysical doubt as to the material facts’” *Matsushita Elec. Indus., Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The nonmovant “may not oppose a summary judgment motion by sole reliance on the pleadings, but must provide ‘concrete evidence supporting [his] claims.’” *Cloverdale Equip. Co. v. Simon Aerials, Inc.*, 869 F.2d 934, 937 (6th Cir. 1989).

ARGUMENT

This Court previously held that “both [29 C.F.R. § 553.226 and 29 C.F.R. § 785.27] are relevant to the issue of whether [the City] must compensate the Plaintiffs for their time spent in paramedic training though [the City] need not establish that both exceptions apply...[I]f the undisputed evidence establishes any of the exceptions to compensability, then the exception will shield [the City] from any liability to Plaintiffs for their time spent in the paramedic training.” See March 26, 2012 Order pp. 13-14. As explained below, the City meets the requirements set forth in 29 C.F.R. § 553.226(b)(1), which shields it from liability to the Plaintiffs for time spent in paramedic training.

The exception to compensability found at 29 C.F.R. § 553.226(b)(1), states, in relevant part, as follows:

(b) While time spent in attending training required by an employer is normally considered compensable hours of work, following are situations where time spent by employees of State and local governments in required training is considered to be noncompensable:

(1) Attendance outside of regular working hours¹ at specialized or follow-up training, which is required by law for certification of public and private sector employees within a particular governmental jurisdiction (e.g., certification of public and private emergency rescue workers), does not constitute compensable hours of work for public employees within that jurisdiction and subordinate jurisdictions.

The Court held that “[i]n order to determine whether the exception in paragraph (b)(1) applies, [the City] must prove that each Plaintiff was hired to perform duties as a paramedic and therefore that each Plaintiff’s paramedic training was ‘required by law for certification of public and private sector employees within’ the state of Tennessee.” See March 26, 2012 Order pp. 22-23. More specifically, “[a]t issue are the actual duties Plaintiffs were hired to perform as MFD fire fighters.” See March 26, 2012 Order p. 23. “If [the City] actually hired Plaintiffs to provide

¹ Plaintiffs do not dispute that the mandatory training at issue here took place outside Plaintiffs’ regular shift schedule. See Plaintiffs’ Complaint ¶6.

emergency medical services only a certified paramedic could provide, then the paramedic training is arguably required under state law.” See *id.*

PLAINTIFFS WERE AWARE THAT MFD REQUIRED FIRE RECRUITS TO OBTAIN EMT-P CERTIFICATION BECAUSE THE REQUIREMENT IS DISPLAYED PROMINENTLY ON JOB POSTINGS AND THEY SIGNED THE CITY’S “AVAILABILITY OF APPLICANT” FORM

It is beyond dispute that the City considers “administer[ing] first responder treatment in response to patient condition”, among other things, to be an “Essential Job Function” of its fire recruits. DSMF ¶9. The City lists said function prominently on its Notices of Job Openings and has done so since as early as December 2006. DSMF ¶5. A reasonable reading of the job function implies that the level of first responder treatment administered by fire fighters depends upon the patient’s condition. Additionally, although the Paramedic Agreements by which the City promulgated its official policy with regard to EMT-P certification were not used until October 2007, at least one hundred and eleven (111) of the Plaintiffs signed “Availability of Applicant” forms further evidencing that they were aware that MFD required paramedic certification as a condition of permanent employment. DSMF ¶4. In essence, the Availability of Applicant forms coupled with the Notices of Job Postings for Fire Recruits, which pre-dated the use of the forms, sufficiently apprised Plaintiffs that they were, in fact, applying to be fire fighters/ paramedics. The Paramedic Agreement only reinforced the paramedic certification requirement of which Plaintiffs were already made aware in the above-mentioned sources.

PLAINTIFFS, IN FACT, PERFORM PARAMEDIC-LEVEL EMERGENCY MEDICAL SERVICES

Furthermore, once the Plaintiffs obtained their EMT-P certifications as required by state law, they were expected to and did perform paramedic-level emergency medical services. Again, a reasonable reading of the fire recruit’s Essential Job Function as it relates to EMS

implies that fire fighters administer such first responder treatment as the patient's condition requires. Undoubtedly, some first responder treatment requires advanced EMS for which the state mandates that the first responder possess EMT-P certification. DSMF ¶11. That MFD fire fighters perform such advanced EMS in response to patient condition is underscored by the sheer number of EMS incidents to which they respond as compared to fire suppression incidents. Between October 2007 and June 1, 2013, MFD firefighters responded to 563,273 Emergency Medical Services ("EMS") incidents compared to only 131,113 fire incidents. DSMF ¶11.

MFD firefighters, including the Plaintiffs, have a duty to perform as paramedics, as required, regardless of rank. DSMF ¶10. Even officers—such as Battalion Chiefs and Lieutenants—must perform as paramedics where necessary and maintain their paramedic licenses. DSMF ¶10. All fire fighters are cross-trained to provide both EMS and fire suppression services, and all non-officer fire fighters rotate between ambulances and fire fighting vehicles in any given twenty-four (24) hour shift. DSMF ¶12. Whether on an ambulance or some fire-fighting apparatus (or advanced life support vehicle as they are referred when licensed paramedics are on board), MFD fire fighters must and do perform paramedic-level functions within the scope of their paramedic licensure. DSMF ¶13 and 14.

The advanced medical services that only a state-certified paramedic may perform "include the procedures and treatments defined under the Tennessee EMS regulations." See March 26, 2012 Order p. 22. The Court so construed the relevant Tennessee EMS regulations as to authorize licensed paramedics (or students during training in accredited programs) to utilize the following procedures under medical control:

- (1) perform electrocardiographic monitoring, recognize and treat cardiac dysrhythmias;
- (2) perform gastric, esophageal, or tracheal intubation and suction;

(3) administer intravenous solutions or blood products by peripheral venipuncture of scalp, extremities and external jugular veins or intraosseous infusions, or by pre-established indwelling lines;

(4) administer by oral, parenteral, endotracheal, or other indicated means, medications of any of the following classes of drugs: antiarrhythmic agents, chronotropic agents, vagolytic agents, analgesic agents, alkalinizing agents, vasopressor agents, anticonvulsive agents; and other drugs which may be deemed necessary by the ordering physician;

(5) perform chest decompression; and

(6) perform cricothyrotomy.

See March 26, 2012 Order p. 21 (citing TENN. COMP. R. & REGS. 1200-12-01-.04(3)).

Additionally, the Court concluded that when construed with the Tennessee Emergency Medical Services Act found at TENN. CODE ANN. § 68-140-301 *et seq.*, the applicable Tennessee EMS regulations make “it...clear that any person providing these types of medical procedures and treatments must possess state-approved training and certification as a paramedic.” See March 26, 2012 Order p. 22. Plaintiffs, from time-to-time, are required to perform the very medical services and procedures contemplated under Tennessee EMS regulations and the Emergency Medical Services Act as part of their paramedic duties. DSMF ¶15. Accordingly, the undisputed material facts establish that the requirements of the exception to compensability set forth in 29 C.F.R. § 553.226(b)(1) have been met, and the City is not liable to the Plaintiffs for the time they spent in paramedic training.

CONCLUSION

Based on the reasons stated herein, summary judgment is appropriate in this case and should be granted.

Respectfully submitted,

GLANKLER BROWN, PLLC

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Attorney for the City of Memphis

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has been served electronically on Plaintiffs' counsel, Thomas A. Woodley, Sara L. Faulman, William B. Ryan, and John F. Canale, III, via the Court's ECF system this the 6th day of August, 2013.

/s/ Robert D. Meyers

Robert D. Meyers

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

CLAUDETTE H. DANDRIDGE,

Plaintiff - Appellant,

vs.

No. 14-6078

**TURNER HOLDINGS, LLC
d/b/a TURNER DAIRY FOODS,**

Defendant - Appellee.

**MOTION FOR PARTIAL DISMISSAL - TO DISMISS PLAINTIFF'S APPEAL
OF THE DISTRICT COURT'S MARCH 12, 2014 ORDER
DISMISSING THE PLAINTIFF'S CASE IN ITS ENTIRETY**

Defendant Turner Holdings, LLC hereby files its Motion for Partial Dismissal of Plaintiff's appeal pursuant to Rules 3(c) and 4(a) of the Federal Rules of Appellate Procedure. Plaintiff's notice of appeal did not designate the district court's March 12, 2014, order dismissing her case in its entirety as an order being appealed in Plaintiff's notice of appeal, as required by Rule 3(c). In addition, with respect to the March 12, 2014 order, Plaintiff's notice of appeal was not timely filed in accordance with Rule 4. For these reasons, this Court lacks jurisdiction to hear an appeal of the order dismissing Plaintiff's case in its entirety.

Plaintiff's notice of appeal, filed on August 27, 2014, requests an appeal of "the Order of the district court denying her motion to set aside order of dismissal entered in this action on June 28, 2014."¹ The notice of appeal does not mention the March 12, 2014 order dismissing

¹ Defendant assumes that this date represents a typographical error, as the order denying plaintiff's motion to set aside judgment was entered on July 28, 2014. A review of the district court's docket sheet shows that no orders were entered on June 28, 2014. Otherwise, her notice of appeal filed on August 27, 2014 would be untimely as to both orders she is now seeking to appeal.

Plaintiff's case. In her Civil Appeal Statement of Parties and Issues, however, Plaintiff states that "Plaintiff purposes to appeal the [d]istrict [c]ourt's dismissal of her case in its entirety . . . and the denial of her motion to set aside the dismissal...." Rule 3(c)(1)(b) specifies that a notice of appeal "must . . . designate the judgment, order, or part thereof being appealed." Since Plaintiff failed to include the March 12, 2014 order in the notice of appeal, she has failed to perfect her appeal. This Court should therefore dismiss this appeal to the extent that it seeks review of the March 12, 2014 order.

Furthermore, Plaintiff's attempt to appeal the order of dismissal is untimely. The district court entered this order (attached as Exhibit A) on March 12, 2014 after Plaintiff failed to respond to two separate show cause orders. Rule 4(a)(1)(A) states that the notice of appeal "must be filed with the district court clerk within 30 days after the entry of the judgment or order appealed from." Plaintiff did not perfect her appeal within thirty (30) days from the entry of the judgment on March 12, 2014. Consequently, this Court does not have jurisdiction to hear an appeal of this order.

Instead of filing a timely notice of her intent to appeal the March 12, 2014 order, Plaintiff filed her "First Motion to Set Aside Judgment" on June 6, 2014. The court entered an order denying Plaintiff's motion to set aside judgment on July 28, 2014 (attached as Exhibit B). Plaintiff filed her notice of appeal from this order on August 27, 2014.

Plaintiff is seemingly attempting to rely on an exception to Rule 4 to pursue an appeal of the March 13, 2014, order; however, none of the exceptions related to filing motions under Rule 4 is applicable. Specifically, Plaintiff relied on Rule 60 to support her motion to set aside judgment. For the exception to apply under Rule 4(a)(4)(vi), a plaintiff's Rule 60 motion must be filed "no later than 28 days after the judgment is entered." Plaintiff did not file her motion to

set aside judgment until 87 days after the order granting defendant's motion to dismiss was entered by the district court. Accordingly, her appeal as to the district court's March 12, 2014 order dismissing her case is untimely and this court is without jurisdiction to hear the same.

WHEREFORE, for the foregoing reasons, Defendant respectfully requests that this Court grant its Motion and dismiss Plaintiff's appeal of the district court's March 12, 2014 order dismissing the Plaintiff's case in its entirety as both improper and untimely.

Respectfully submitted,

GLANKLER BROWN, PLLC

/s/ Robert D. Meyers

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Phone: 901-525-1322

Fax: 901-525-2389

Attorney for Defendant - Appellee

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served electronically on Plaintiff's counsel, Venita Marie Martin-Andrews, 13 North Third Street, Memphis, Tennessee 38103 via the Court's ECF system, this the 25th day of September, 2014.

/s/ Robert D. Meyers
Robert D. Meyers (TN# 12187)

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

CLAUDETTE H. DANDRIDGE,)	
)	
Plaintiff,)	
)	
v.)	Case No. 2:13-cv-02736-JTF-dkv
)	
TURNER HOLDINGS, LLC)	
d/b/a TURNER DAIRY FOODS,)	
)	
Defendant.)	

**ORDER GRANTING DEFENDANT’S MOTION TO DISMISS
AND
ORDER OF DISMISSAL**

On September 23, 2013, Plaintiff Claudette H. Dandridge filed a Complaint for Sex and Race Discrimination, Retaliation, and Injunctive Relief against Defendant Turner Holdings, LLC. (D.E. #1). On November 22, 2013, Defendant Turner Holdings, LLC filed a Motion to Dismiss Plaintiff’s Claims, pursuant to Title VII, claims related to Sex Discrimination under § 1981, and Tennessee Human Right Acts and State law claims based on conduct that occurred more than one year prior to filing of Plaintiff’s Complaint. (D.E. #5). Pursuant to L.R. 12.1(b), “[a] party opposing a motion to dismiss must file a response within 28 days after the motion is served.” Plaintiff failed to respond to Defendant’s Motion to Dismiss.

On January 14, 2014, this Court entered a Show Cause Order, directing Plaintiff to file her response to Defendant’s Motion to Dismiss by January 28, 2014. (D.E. #7). The Order stated that “[f]ailure to respond . . . will result in the granting of Defendant’s Motion, pursuant to Fed. R. Civ. P. 41(b).” Plaintiff submitted her Response to the Show Cause Order, via facsimile,

to the Clerk's Office. On January 31, 2014, the Clerk's Office returned Plaintiff's documents to her and directed Plaintiff to properly submit her documents via the ECF Filing System. Plaintiff did not properly file her Response to Defendant's Motion to Dismiss or respond to this Court's first Show Cause Order.

On March 7, 2014, due to the possible confusion of the Clerk's Office returning Plaintiff's documents to her, this Court entered a Second Show Cause Order, directing Plaintiff to file her Response to Defendant's Motion to Dismiss and the Court's second Order of Show Cause by close of business March 11, 2014. The Order notified the Plaintiff that "[o]nce more, the Court emphasizes that failure to respond to the Show Cause Order or to show good cause . . . will result in the granting of Defendant's Motion, pursuant to Fed. R. Civ. P. 41(b)." Plaintiff has failed to respond to the second Show Cause by the date specified by this Court.

Under Fed. R. Civ. P. 41(b), a defendant may move to dismiss a case or certain claims against it, "[i]f the plaintiff fails to prosecute or to comply with [the Federal Rules of Civil Procedure] or a court order." A dismissal under Fed. R. Civ. P. 41(b) serves as an adjudication on the merits.

The Sixth Circuit evaluates the aptness of a Rule 41(b) dismissal through four factors: "1) whether the party's failure is due to willfulness, bad faith, or fault; 2) whether the adversary was prejudiced by the dismissed party's conduct; 3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and 4) whether less drastic sanctions were imposed or considered before dismissal was ordered." *Richter v. Am. Aggregates Corp.*, 552 Fed.App'x. 253, 259 (6th Cir. 2013)(quoting *Knoll v. Am. Tel. & Tel. Co.*, 176 F.3d 359, 363 (6th Cir. 1999)). Although district courts are given considerable discretion "in managing its dockets and determining whether a delay results in unnecessary burdens on the court and on opposing

parties,” Rule 41(b) dismissals are not to be taken lightly. *Id.* Rule 41(b) dismissals are “harsh sanction[s] which the court should order only in extreme situations showing a clear record of contumacious conduct by the plaintiff.” *Id.* (quoting *Wu v. T.W. Wang, Inc.*, 420 F.3d 641, 643 (6th Cir. 2005)).

Here, the Court finds that all four factors of the *Ritcher* test apply. First, Plaintiff’s failure to respond to Defendant’s Motion to Dismiss is due to her own fault. On January 31, 2014, Plaintiff was informed by the Clerk’s Office that her response to this Court’s Show Cause Order and Defendant’s Motion to Dismiss was improper. She was directed to properly file her response through the ECF Filing System. Additionally, Plaintiff was given another opportunity to file her Response by close of business on March 11, 2014, which was over a month after she was originally directed to properly file her Response. However, Plaintiff did not file her response.

Second, Defendant has been prejudiced by Plaintiff’s failure to timely and properly respond. Defendant filed its Motion to Dismiss on November 22, 2013. Plaintiff’s response was due December 22, 2013. It is now March 12, 2014. This delay in properly briefing this case has prejudiced Defendant’s time and the interests of justice in proceeding with this case. Third, this Court entered two Show Cause Orders that warned Plaintiff that failure to respond would lead to the granting of Defendant’s Motion to Dismiss and the dismissal of her case. Therefore, Plaintiff was on notice that her failure to cooperate would lead to dismissal. Last, less drastic measures were imposed through the Court’s two Show Cause Orders. This Court gave Plaintiff a second opportunity to properly and timely file her response, but Plaintiff failed to do so. This Court has given Plaintiff ample opportunity to respond to Defendant’s Motion to Dismiss and to show good cause why Defendant’s Motion should not be granted.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss is hereby GRANTED. It is further ORDERED that this case is DISMISSED with prejudice, pursuant to Fed. R. Civ. P. 41(b).

IT IS SO ORDERED this 12th day of March, 2014.

BY THIS COURT:

s/John T. Fowlkes, Jr.
JOHN T. FOWLKES, JR.
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

CLAUDETTE H. DANDRIDGE,)

Plaintiff,)

v.)

Case No. 2:13-cv-02736-JTF-dkv

TURNER HOLDINGS, LLC)
d/b/a TURNER DAIRY FOODS,)

Defendant.)

ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT OR ORDER

Before the Court comes Plaintiff Claudette H. Dandridge’s Motion for Relief from Judgment or Order, filed on June 6, 2014. (Pl.’s Mot. Relief, ECF No. 12). On June 10, 2014, Defendant Turner Holdings, LLC filed its Response in Opposition to Plaintiff’s Motion. (Def.’s Resp. Pl.’s Mot. Relief, ECF No. 13). After reviewing the Motion, Response, and the entire record, this Court finds that Plaintiff’s Motion should be denied.

I. BACKGROUND

For the purposes of this Motion, the Court will briefly address the procedural history of this case. On September 23, 2013, Plaintiff Claudette H. Dandridge filed a Complaint for Sex and Race Discrimination, Retaliation, and Injunctive Relief against Defendant Turner Holdings, LLC. (Compl., ECF No. 1). On November 22, 2013, Defendant filed a Motion to Dismiss Plaintiff’s Claims, pursuant to Title VII, claims related to Sex Discrimination under § 1981, and Tennessee Human Right Acts and State law claims based on conduct that occurred more than one year prior to filing of Plaintiff’s Complaint. (Def.’s Mot. Dismiss, ECF No. 5). Plaintiff

failed to respond to Defendant's Motion to Dismiss. On January 14, 2014, this Court entered a Show Cause Order, directing Plaintiff to file her response to Defendant's Motion to Dismiss by January 28, 2014. (First Order to Show Cause, ECF No. 7). The Order stated that "[f]ailure to respond . . . will result in the granting of Defendant's Motion, pursuant to Fed. R. Civ. P. 41(b)." (*Id.* at 1). Plaintiff submitted her Response to the Show Cause Order, via facsimile, to the Clerk's Office. On January 31, 2014, the Clerk's Office returned Plaintiff's documents to her and directed Plaintiff to properly submit her documents via the ECF Filing System. (Clerk's Office Memo. to Pl., ECF No. 8).¹ Plaintiff did not properly file her Response to Defendant's Motion to Dismiss or respond to this Court's first Show Cause Order.

On March 7, 2014, due to the possible confusion of the Clerk's Office returning Plaintiff's documents to her, this Court entered a second Show Cause Order, directing Plaintiff to file her Response to Defendant's Motion to Dismiss and the Court's second Order to Show Cause by close of business March 11, 2014. (Second Order to Show Cause, ECF No. 9). The Order notified the Plaintiff that "[o]nce more, the Court emphasizes that failure to respond to the Show Cause Order or to show good cause . . . will result in the granting of Defendant's Motion, pursuant to Fed. R. Civ. P. 41(b)." (*Id.* at 2). Plaintiff failed to respond to the second Show Cause Order by the date specified by this Court. On March 12, 2014, the Court entered an Order Granting Defendant's Motion to Dismiss and dismissed the case with prejudice, pursuant to Fed. R. Civ. P. 41(b). (Order of Dismissal, ECF No. 10). The Court also entered a Judgment, and the case was closed on March 12, 2014. (J., ECF No. 11).

On June 6, 2014, Plaintiff filed a Motion for Relief from Judgment or Order, pursuant to Fed. R. Civ. P. 60. (Pl.'s Mot. Relief, ECF No. 12). Specifically, Plaintiff requests the Court to

¹ The Court notes that the Clerk's Office Response to Plaintiff's improperly filed document is sealed as a "Court Only" document.

set aside its Order Granting Defendant's Motion to Dismiss and Order of Dismissal and its Judgment of Dismissal, based on an argument of excusable neglect. Plaintiff explains that,

[She] attempted to file a response to the order to show cause on January 28, 2014; however, there was a problem with the ECF System. . . . As instructed in the CM/ECF Manual Plaintiff's counsel thereafter faxed the response to the Clerk's Office . . . In addition to filing a response to the Court's show cause order, the undersigned filed a motion seeking leave to file a response to Defendant's motion. Plaintiff's counsel consulted with Defendant's counsel on January 28, 2014, regarding the motion and Defendant's counsel had no objection to the motion . . . This motion, too, was faxed to the Clerk's office for filing. The undersigned received no further instruction and believed that the filing was timely. The undersigned's office was closed from March 7, 2014 until March 17, 2014, as the undersigned had previously scheduled trips to Florida and Alabama for a conference. While the undersigned was out of town, the Court dismissed Plaintiff's case with prejudice in the entirety.

(Pl.'s Mot. Relief, 2, ECF No. 12). Plaintiff avers that, because Defendant only sought to dismiss Plaintiff's claims that occurred more than a year prior to filing of her lawsuit, this Court erred in dismissing Plaintiff's case in its entirety. See *Id.* at 3.

On June 10, 2014, Defendant filed his Response in Opposition to Plaintiff's Motion, arguing that Plaintiff "clearly failed to prosecute, comply with the Federal Rules of Civil Procedure, the Local Rules and the Court's express Orders" by failing to timely respond to this Court's various Show Cause Orders. (Def.'s Resp. Pl.'s Mot. Relief, 3, ECF No. 13). Second, Defendant argues that Plaintiff's continued delay in the litigation of this case proves to be entirely within her control. See *id.* at 6 ("Despite [the Court granting her numerous opportunities to respond] and knowing that court dismissed her case in its entirety, Plaintiff waited three more months to seek relief from the Order of Dismissal. Plaintiff's actions in continuing to delay are within her own control"). Last, Defendant contends that, if the Order of Dismissal were set aside, Defendant would be highly prejudiced by Plaintiff's continued dilatory tactics. (*Id.* at 6).

II. ANALYSIS

Fed. R. Civ. P. 60(b)(1) allows a party to file a motion for relief from a final judgment or order if there is evidence of “mistake, inadvertence, surprise, or excusable neglect.” Although the Rules allow for such a relief, the Sixth Circuit has opined that “relief under Rule 60(b) is ‘circumscribed by public policy favoring finality of judgments and termination of litigation.’” *Blue Diamond Coal Co. v. Trs. of UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001) (internal citation omitted). The party seeking relief from the order or judgment “bears the burden of establishing that its prerequisites are satisfied.” *McCurry ex rel. Turner v. Adventist Health Sys./Sunbelt, Inc.*, 298 F.3d 586, 592 (6th Cir. 2002). To determine whether relief from a judgment or order is appropriate under Rule 60(b), the court must look to: “(1) whether the party seeking relief is culpable; (2) whether the party opposing relief will be prejudiced; and (3) whether the party seeking relief has a meritorious claim.” *United States v. Real Prop. at 2621 Bradford Drive, Middletown, Butler Cnty., Ohio*, 369 F. App’x, 663, 667 (6th Cir. 2010). The court must first determine whether the party seeking relief is culpable before turning to the other two factors.

In this case, Plaintiff asserts this Court’s Order of Dismissal should be set aside because of her excusable neglect. Therefore, this Court must first look to the factors necessary to determine Plaintiff’s culpability, or lack thereof, under an excusable neglect theory before turning to the other two factors. *See United States v. Reyes*, 307 F.3d 451, 456 (6th Cir. 2002) (“[U]nder Rule 60(b)(1), a party must first demonstrate excusable neglect before other factors such as whether [a party] has a meritorious defense [or claim] and prejudice to the [the opposing party] will be considered”).

Because “clients are held accountable for their attorneys’ acts and omissions . . . ‘the proper focus [for a claim of excusable neglect] is upon whether the neglect of [the parties] and *their counsel* was excusable.” *Yeschick v. Mineta*, 675 F.3d 622, 629 (6th Cir, 2012) (original emphasis) (quoting *McCurry ex rel. v. Adventist Health Sys./Sunbelt, Inc.*, 298 F.3d 586, 594-595 (6th Cir. 2002)); *see also* *McCurry*, 298 F.3d at 595 (“[H]aving chosen a particular attorney to represent him in a proceeding, [a client] cannot ‘avoid the consequences of the acts or omissions of this freely selected agent...’”) (internal citation omitted). The Supreme Court has set forth the following five factors for the courts to determine whether excusable neglect is an appropriate remedy for relief under Rule 60(b)(1):

[T]he danger of prejudice to the [nonmovant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Pioneer Inv. Services Co. v. Brunswick Assocs. Ltd. P’ship, 507 U.S. 380, 395 (1993) (internal citation omitted). Although each of these factors are to be weighed equitably, courts within the Sixth Circuit have “place[d] greater weight to whether the moving party reasonably controlled the circumstances causing the delay.” *Moncier v. Jones*, 939 F.Supp.2d 854, 860-861 (M.D. Tenn. 2013). Furthermore, the courts have found these five factors particularly appropriate when determining factors when “procedural default has prevented the court from considering the true merits of a party’s claim.” *Jinks v. AlliedSignal, Inc.*, 250 F.3d 381, 386 (6th Cir. 2001).

Plaintiff alleges that she: (1) followed proper protocol by faxing her Response to this Court’s Show Cause Order when the CM/ECF System was malfunctioning; (2) received no information that her Response was untimely and/or not properly docketed; and (3) was out of town on business when the Court entered its second Show Cause Order. Because of these three factors, Plaintiff asserts that she has sufficiently met the factors for excusable neglect. Namely,

Plaintiff contends that: (1) Defendant is in no danger of being prejudiced by the reopening of the case, since it originally consented to Plaintiff's motion seeking leave to file a response to Defendant's Motion to Dismiss; (2) Plaintiff's federal claims would be impacted if the case is not reopened; (3) Plaintiff's reason for delay is outside of her control because the CM/ECF System was malfunctioning; (4) Plaintiff's counsel was out of the office when the Court issued its Second Show Cause Order; and (5) Plaintiff acted in good faith in attempting to timely respond to Defendant's Motion to Dismiss and the Court's First Show Cause Order.

Defendants argue to the contrary, stating that "the relevant facts dictate that this Court should not disturb its prior Order of Dismissal." (Def.'s Resp. Pl's Mot. Relief, 4, ECF No. 13). Specifically, Defendant argues that this Court gave Plaintiff ample opportunities to respond to the Court's Show Cause Orders. Defendant contends that Plaintiff's continued delay in resolving this case proves that the reopening of this case would highly prejudice Defendants. This Court finds Defendant's arguments persuasive.

There are insufficient facts to support Plaintiff's assertion that she is entitled to relief from this Court's Order of Dismissal and Judgment, based upon an excusable neglect theory. Courts within this Circuit have stated time and again that "parties have an affirmative duty to monitor the dockets to keep apprised of the entry of orders." *Moncier*, 939 F.Supp.2d at 861; *accord Yeschick*, 675 F.3d at 629. The courts have further stated that "failure to monitor the docket furnishes evidence of a lack of diligence rather than excusable neglect. . ." *Id.* at 862. Plaintiff's failure to respond to Defendant's Motion to Dismiss and this Court's two Show Cause Orders was completely within her control. As the *McCandless v. Countrywide Home Loans, Inc.* Court stated, "a court would abuse its discretion if it were to reopen a case under Rule 60(b)(1) when the reason asserted as justifying relief is one attributable solely to counsel's carelessness or

misapprehension of the law or the applicable rules of the court.” No. 08-14195, 2009 WL 2447656, at *3 (quoting *FHC Equities v. MBL Life Assurance Corp.*, 188 F.3d 678, 685 (6th Cir. 1999)).

As this Court stated in its Order of Dismissal, Plaintiff was given numerous opportunities to remedy her delay in litigating this case. However, it was not until three months after this Court had dismissed the matter that Plaintiff filed her Motion for Relief. Thus, this Court has difficulty assessing how Plaintiff has acted in “good faith” in this matter.

Additionally, if this Court were to reopen this case, Defendant would most undoubtedly be prejudiced by the reopening and relitigating of this matter. As Defendant appropriately noted, “[i]f Turner was prejudiced by Plaintiff’s inexcusable delays in March 2014, it would be prejudiced all the more by having the Order of Dismissal set aside now.” (Def.’s Resp. Pl.’s Mot. Relief, 6, ECF No. 13). Last, although she explains the negative impact this Court’s Order of Dismissal could have on her claims, Plaintiff asserts that “even if the Court were to dismiss Plaintiff’s federal claims, Plaintiff would have the right to proceed with her state claims in state court.” (Pl.’s Mot. Relief, 4, ECF No. 12). Therefore, the “potential impact” of upholding this Court’s Order of Dismissal is not so detrimental that Plaintiff would have no other judicial avenue to bring her claims.

Because Plaintiff cannot prove her lack of culpability through excusable neglect, this Court need not look to the other two remaining factors to determine whether relief under Rule 60(b)(1) is appropriate. Therefore, based upon the lack of evidence to support Plaintiff’s Motion, relevant case law, and public policy, this Court finds that its Order of Dismissal should remain undisturbed.

III. CONCLUSION

For the foregoing reasons, this Court hereby DENIES Plaintiff's Motion for Relief from this Court's Order of Dismissal and Judgment.

IT IS THEREFORE ORDERED that this Court's March 12, 2014 Order of Dismissal remains in place, and Plaintiff's Complaint is summarily DISMISSED.

IT IS SO ORDERED this 28th day of January, 2014.

BY THIS COURT:

s/John T. Fowlkes, Jr.
JOHN T. FOWLKES, JR.
United States District Judge