

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

AMY PICKETT,
Plaintiff,

v.

TEXAS TECH UNIVERSITY HEALTH
SCIENCES CENTER; BARBARA CHERRY,
individually and in her official capacity as
Department Chair of Leadership Studies; and
MICHAEL EVANS, individually and in his
official capacity as Dean of School of Nursing,
Defendant.

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Civil Action No. 5:20-CV-00232-H-BQ

**DEFENDANTS' RESPONSE BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION
FOR LEAVE TO FILE AMENDED COMPLAINT OUT OF TIME**

TO THE HONORABLE JUDGE JAMES WESLEY HENDRIX:

Defendants Texas Tech University Health Sciences Center, Barbara Cherry, and Michael Evans respectfully request the Court deny Plaintiff Amy Pickett's Motion for Leave to File an Amended Complaint (the Motion) out of time for three reasons. First, the amendment is not timely under the Findings, Conclusions, and Recommendation of the United States Magistrate Judge (FCR). Dkt. 28. Second, the amendment does not comply with the FCR's limitation on amending only as to the Rehabilitation Act (RA) and Americans with Disabilities Act (ADA) claim based on the October 2, 2018, exam start time. *Id.* at pp. 42–43. Third, Pickett has not demonstrated good cause for allowing the amendment because to do so would be futile.

ARGUMENT

I. The proposed amended complaint is untimely under the Court's Recommendation.

In the FCR, Pickett was instructed that, if she elected to amend her complaint as to her ADA or RA failure-to-accommodate claims based on the October 2, 2018 exam, she “**do so within the**

fourteen days allotted for objections to [the] recommendation.” Dkt. 28 at p. 43. The FCR was filed on July 30, 2021, making Plaintiff’s amended pleading due on August 13, 2021. And although Defendants agreed with Pickett on August 18, 2021, that she could delay filing an amended complaint if she did so by August 25, 2021, and so long as the amendment complied with the FCR’s limitation on scope, Dkt. 33 at p. 7, Pickett still filed untimely on August 27, 2021—two weeks later than the original deadline. The Court should deny the Motion because it is untimely under the FCR.

II. Pickett has not complied with the recommendation to limit the scope of the amendment.

The FCR instructed Pickett would be allowed to amend “*only as to the . . . failure-to-accommodate allegations*” premised on denial of accommodations in connection with course 5440 and the October 2, 2018, exam start time. Dkt. 28 at pp. 42–43. Pickett’s Proposed Amended Complaint, however, adds several factual allegations beyond the scope specified in the FCR. Dkt. 32.1 ¶¶ 29, 58–61, 82–84. For instance, Pickett appears to be adding new factual allegations regarding her reasonable accommodation claim premised on the alleged denial of deadline extensions from her advisor. *Id.* ¶ 29. Further, Pickett adds irrelevant material concerning her employment-related issues that is not related to her ADA and RA claims—it is unclear for what purpose this material is offered, but it nevertheless fails to comport with the FCR. *Id.* ¶¶ 58–61. Under the Cause of Action heading for Pickett’s ADA and RA claims, she includes new allegations of breach of contract, retaliation, and that she was denied a due process appeal, which would be causes of action separate and apart from her claims for disability discrimination and failure to accommodate. *See id.* ¶¶ 82–84. The Court should deny Pickett leave to file these amendments because they exceed the scope of the instructions included in the FCR.

III. Permitting the amendment would be futile.

Should the Court consider the Motion despite the foregoing, the Motion should still be denied

because it does not meet Rule 15(a)(2)'s requirement to show good cause for the amendment. *See* Fed. R. Civ. P. 15(a)(2) (“[A] party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.”). But, “[o]f course, the grant or denial of an opportunity to amend is within the sound discretion of the District Court,” provided there is a reason for denial. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Such reasons include undue delay, bad faith or dilatory motive, previous opportunities to amend, undue prejudice to the opposing party by virtue of the amendment, or futility of the amendment. *Id.* Forcing the parties to go through another round of filing motions to dismiss would be futile in resolving the dispute because it would not serve judicial economy. If nothing important changes from one iteration of the complaint to the next, the Court should not accept the new complaint and address the motions pending in the case meant to move things forward, not those that cause an unjustified delay. *See Travis v. City of Grand Prairie*, No. 3:14-cv-3650-P, 2015 WL 13002069, at **6–7 (N.D. Tex. Aug. 6, 2015) (holding that attempts to “artfully draft around Defendants’ motion to dismiss” were improper and warrant denial of motion for leave to amend). And that is exactly what happened here. Nothing important changed.

Pickett’s proposed amendments are futile because they do not alter the nature of her claims, which Defendants assert remain subject to dismissal under Rules 12(b)(1) and 12(b)(6) for the reasons stated in their Motion to Dismiss, Objections to the FCR, and Response in Opposition to Plaintiff’s Objections. *See* Dkts. 11, 12, 29, 31. The Proposed Amended Complaint alleges that Pickett was told in a voicemail that she could not have any further changes to her exam schedule, which had already been postponed once before. Dkt. 32.1 ¶¶ 50–51. But this information was already before the Court in Plaintiff’s Original Complaint, where she mentions the voicemail and states she was not allowed further postponement past 10:30AM. Dkt. 1 ¶ 48–50. Similarly, the addition of material concerning her appeal of her academic dismissal was also already before the Court. *Compare* Dkt. 1 ¶ 87 *with* Dkt. 32.1 ¶ 84. Thus, Pickett’s revisions in the amended complaint add nothing new to the issues before

the Court, further delay for the purposes of reasserting the same claims would be futile, and the Court should find there is no good cause to permit the amendment. *See Travis*, 2015 WL 13002069, at **6–7.

CONCLUSION

Defendants respectfully pray the Court deny Pickett's Motion for Leave to File an Amended Complaint out of time and otherwise find that the Motion does not support a finding of good cause necessary to permit the filing of the Proposed Amended Complaint.

Dated: September 17, 2021

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2021, a true and correct copy of the foregoing document was served via Certified Mail, Return Receipt Requested and email as follows:

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