

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

AMY PICKETT,
Plaintiff,

v.

**TEXAS TECH UNIVERSITY HEALTH
SCIENCES CENTER, *et al.*,**
Defendants.

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Civil Action No. 5:20-CV-00232

**DEFENDANTS' RESPONSE TO PLAINTIFF'S RESPONSE TO FINDINGS,
CONCLUSIONS, AND RECOMMENDATION OF THE
UNITED STATES MAGISTRATE JUDGE**

TO THE HONORABLE JAMES WESLEY HENDRIX:

Defendants Texas Tech University Health Sciences Center ("TTUHSC"), Barbara Cherry ("Dr. Cherry"), individually and in her official capacity as Department Chair of Leadership Studies, and Michael Evans ("Dr. Evans), individually and in his official capacity as Dean of School of Nursing (collectively, "Defendants"), file Defendants' Response to Plaintiff's Response to Findings, Conclusions, and Recommendations of the United States Magistrate Judge (Dkt. 92).¹ This Court should adopt the magistrate's FCR (Dkt. 89), grant Defendants' Motion for Summary Judgment (Dkt. 82), and dismiss all of Plaintiff's ("Plaintiff" or "Pickett") claims against Defendants with prejudice.

¹ Defendants did not file objections to the magistrate's Findings, Conclusions, and Recommendation ("FCR"). Thus, Plaintiff incorrectly states that her filing (Dkt. 92) is a "Response" rather than Plaintiff's objections to the FCR.

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INTRODUCTION

This Court should adopt the magistrate judge’s FCR recommending the granting of Defendants’ Motion for Summary Judgment and dismissal of all Plaintiff’s claims with prejudice. Dkt. 89. Plaintiff’s Response fails to include any specific written objections to the FCR as required by Federal Rule of Civil Procedure 72(b), the Fifth Circuit, and the magistrate judge. *See Douglass v. United Servs. Auto. Ass’n*, 79 F.3d 1415, 1417 (5th Cir. 1996); Dkt. 89. Due to Plaintiff’s failure to provide this Court with any proper objections, Defendants request that this Court fully adopt the magistrate judge’s FCR and dismiss all of Plaintiff’s remaining claims.

In response to the FCR, Pickett filed the same “Response” to the FCR (hereinafter “Plaintiff’s Response”) five times. (Dkt. 92–96).² Pickett also filed approximately 46 documents (“Plaintiff’s Filed Documents”) and attached them haphazardly to Plaintiff’s five Responses.³ Despite the clearly-defined rules for making specific objections, Pickett made zero objections to the magistrate judge’s FCR in Plaintiff’s Response. Nowhere does she identify a specific finding, conclusion, or recommendation, state an objection, and specify where the disputed determination

² Defendants file this Response to Docket Entry 92. Given that Docket Entries 92 through 96 are the exact same 21-page document entitled “Plaintiff’s Response to Findings, Conclusions, and Recommendations of the United States Magistrate Judge,” Defendants request that the Court only consider Docket Entry 92. If the Court considers Docket Entries 93-96, Defendants request that this Response be considered as responsive to each of Plaintiff’s filings.

³ Plaintiff attaches a Table of Contents to Plaintiff’s Response and labels it “Plaintiff’s Response to Summary Judgment Appendix.” Dkt. 92 at 22–23. Plaintiff’s Response is a response to the magistrate’s FCR (Dkt. 89), not a response to Defendants’ Motion for Summary Judgment (Dkt. 82). Defendants emphasize that Plaintiff attached these 46 documents to five different lead documents. Defendants object to Plaintiff’s Table of Contents, each of Plaintiff’s Filed Documents, the title of her Table of Contents, and the characterization that she assigns to each of Plaintiff’s Filed Documents. Defendants also note that various filed documents are irrelevant as they pertain to Plaintiff’s prior employment with TTUHSC, including a confidential employment settlement agreement. (Dkt. 92.2, 92.3, 92.6, 93.11, 95.3, 95.5, 95.9, 95.14).

is located in the FCR. *See* Dkt. 92. For this reason alone, this Court should disregard Plaintiff's Response and adopt the magistrate judge's FCR.

Plaintiff is attempting to use this opportunity at the objections stage as a second bite at the apple to file a Response to Defendants' Motion for Summary Judgment (which Defendants filed on August 2, 2023). *See* Dkt. 82.⁴ However, this Court should not consider Plaintiff's Response as a response to Defendants' Motion for Summary Judgment because her response is untimely, and it would cause undue prejudice to Defendants. Nor should this Court consider any of Plaintiff's Filed Documents as newly proffered evidence because all four factors established by the Fifth Circuit for the introduction of new evidence weigh against their consideration. However, even should this Court consider Plaintiff's Response as a response to Defendants' Motion for Summary Judgment, she fails to meet her evidentiary burden on all claims as previously noted in the FCR.

This Court should adopt the magistrate judge's FCR because: (1) Pickett has failed to raise specific objections to the FCR; and (2) Plaintiff's Filed Documents are not new evidence and should not be considered by this Court. Pickett's Response should not be construed as Plaintiff's Response to Defendant's Motion for Summary Judgment, but even were the Court to do so, Pickett has failed to meet her evidentiary burden, which also supports this Court granting Defendants' Motion for Summary Judgment.

This Court should therefore adopt the FCR, finding that Pickett has not met her evidentiary burden for her ADA, Rehabilitation Act, and substantive due process claims and dismiss all claims against Defendants with prejudice.

⁴ The magistrate judge notes that "Pickett did not file a response to Defendants' Motion for Summary Judgment, and the time to do so has passed." Dkt. 89 at 9. The magistrate also notes that " . . . Pickett's failure to respond to Defendants' summary judgment motion renders their legitimate, nondiscriminatory reasons un rebutted." *Id.* at 26.

STANDARD OF REVIEW

The Court shall grant summary judgment when the depositions, documents, interrogatory answers, declarations, or other materials show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) and (c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–323 (1986); *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports her claim. *Ragas*, 136 F.3d at 458. If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *Celotex Corp.*, 477 U.S. at 322–323.

If a party timely objects to a Magistrate Judge’s recommendations or findings, the Court must determine *de novo* any part of the objectionable portions of the recommendations or findings. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). The Court may then accept, reject, or modify the recommendations or findings, in whole or in part. *Id.* The Court may also return the matter to the Magistrate Judge with instructions. *Id.* “Any party who objects to any part of these findings, conclusions, and recommendation must file specific written objections within fourteen days after being served a copy.” Dkt. 89; *see also* Fed. R. Civ. P. 72(b)(2).

“To be specific, an objection must identify the specific finding, conclusion, or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge’s Findings, Conclusions, and Recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge

that are accepted or adopted by the district court, except upon grounds of plain error.” Dkt. 89; *see Douglass v. United Servs. Auto. Ass’n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

ARGUMENTS & AUTHORITIES

I. Pickett failed to state any specific objections in her Response to the FCR.

Despite clear instructions by the FCR of her right to object, including specifically informing Plaintiff of the requirement to “file specific written objections” that “identify the specific finding, conclusion, or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge’s Findings, Conclusions, and Recommendations where the disputed determination is found,” Pickett failed to state *any* objections of any kind whatsoever to the FCR in Plaintiff’s Response. Dkt. 92; *see* Dkt. 89 at 36.

Federal Rule of Civil Procedure 72(b) states that “[w]ithin 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations.” *See also Douglass*, 79 F.3d at 1417.

Here, in Pickett’s “objections,” she failed to state even one general objection. Dkt. 92. She never objected to the FCR issued by the magistrate judge. *Id.* She instead simply stated, “[u]pon further review of the Defendants misrepresentation of facts outlined in the Defendants Summary Judgement (sic), and after considering the Findings, Conclusions, and Recommendations of the United States Magistrate Judge, Plaintiff, Amy Pickett, Pro Se objectively opposes the Defendants (sic) unlawful position, and respectfully request The Honorable United States Magistrate Judge D. Gordan Bryant. Jr. to review and consider the Plaintiff’s compelling evidence provided in response and outlined in the attached Appendix, and re-evaluate previous Findings, Conclusions, and Recommendations, and propel Plaintiff’s claims, and unjust matter forward initiating and setting a trail (sic) scheduling order, granting Plaintiff rights to a fair jury trial.” *Id.* at 1.

Nor did Pickett state specific objections. Not once in her lengthy response did Pickett actually use the language “Plaintiff objects to . . .” any of the findings, conclusions, or recommendation made by the magistrate judge nor did she refer to any specific place in the magistrate’s FCR that she is disputing. *See generally, id.* Pickett simply opposes the Defendants’ “unlawful position” and requests that the magistrate consider her “evidence” and “re-evaluate” his previous FCR. *Id.* This is improper and insufficient per Federal Rule of Civil Procedure 72(b).

Plaintiff’s Response does not raise any legal arguments that the magistrate judge considered in issuing his FCR either.

Due to the failure to identify even one specific objection to the magistrate judge’s FCR, this Court should not consider Plaintiff’s Response because Pickett fails to abide by Federal Rule of Civil Procedure 72(b), the Fifth Circuit standard for specific objections, and this Court’s instructions. *See Douglass*, 79 F.3d at 1417; *see also* Dkt. 89 at 36. This Court should adopt the FCR.

II. This Court should not consider Plaintiff’s newly-proffered evidence.

This Court should not consider Pickett’s newly-proffered evidence at this late stage.⁵ While district courts have “wide discretion to consider evidence offered for the first time in an objection to the magistrate judge’s findings and recommendation . . . [I]tigators, however, ‘may not . . . use the magistrate judge as a mere sounding-board for the sufficiency of the evidence.’” *Watkins v. Gateway First Bank*, No. 3:20-CV-2136-L-BH, 2021 WL 1720255, at *1 (N.D. Tex. Apr. 30, 2021) (quoting *Freeman v. County of Bexar*, 142 F.3d 848, 852 (5th Cir. 1998)). Whether a district court considers new evidence depends on the following four factors:

⁵ Defendants assert that Plaintiff’s Filed Documents are not new evidence at all because she never filed any evidence in response to Defendant’s Motion for Summary Judgment. Further, as will be explained, many of the documents were attached to Defendants’ Motion for Summary Judgment.

(1) the moving party's reasons for not originally submitting the evidence; (2) the importance of the omitted evidence to the moving party's case; (3) whether the evidence was previously available to the non-moving party when it responded to the summary judgment motion; and (4) the likelihood of unfair prejudice to the non-moving party if the evidence is accepted.

Id. (quoting *Performance Autoplex II Ltd. v. Mid-Continent Cas. Co.*, 322 F.3d 847, 862 (5th Cir. 2003)) (citing *Freeman*, 142 F.3d at 852).

A. The four new evidence factors support this Court's not considering Plaintiff's newly-proffered evidence.

First, Pickett never requested additional time to file a response to Defendants' Motion for Summary Judgment. Nor did she articulate in Plaintiff's Response to the FCR why she waited until January 23, 2024, five months after her response deadline to Defendants' Motion for Summary Judgment, to now file these documents. Thus, Pickett has demonstrated no reason to have missed her deadline by five months. The first element weighs in Defendants' favor.

Second, many of the documents that Pickett filed as exhibits to Plaintiff's Response were used as evidence in Defendants' Motion for Summary Judgment. *See* Dkt. 82.3, 82.4. Furthermore, several documents only relate to her prior employment as a nursing instructor with TTUHSC and are irrelevant to Pickett's case as a former student at TTUHSC.⁶ Therefore, these documents do not support Pickett's ADA, Rehabilitation Act, and substantive due process claims at all.

None of the other exhibits assist the Court. Regarding Pickett's disability discrimination claims, none of Plaintiff's Filed Documents establishes that Pickett was excluded from the combined program because of a disability, the third element of an ADA and Rehabilitation Act

⁶ *See* Dkt. 92.2, 92.3, 92.6, 93.11, 95.3, 95.5, 95.9, 95.14.

disability discrimination claim. *See Maples v. Univ. of Tex. Med. Branch at Galveston*, 901 F.Supp.2d 874 (S.D.Tex. 2012), *aff'd* 524 Fed. Appx. 93 (5th Cir. 2013).

Nor do any exhibits establish that any of Defendants' actions were pretextual. *See Rodriguez v. Eli Lilly & Co.*, 820 F.3d 759, 765 (5th Cir. 2016) (quoting *E.E.O.C. v. LHC Grp. Inc.*, 773 F.3d 688, 702 (5th Cir. 2014) (alteration in original) (quoting *Laxton v. Gap Inc.*, 333 F.3d 572, 578 (5th Cir. 2003) (finding that "[a]t summary judgment, '[e]vidence demonstrating that the employer's explanation is false or unworthy of credence, taken together with the plaintiff's prima facie case, is likely to support an inference of discrimination even without further evidence of defendant's true motive.'"); *Kitchen v. BASF*, 343 F. Supp. 3d 681, 688 (S.D. Tex. 2018), *report and recommendation adopted*, No. 3:17-CV-00040, 2018 WL 5723147 (S.D. Tex. Nov. 1, 2018), *aff'd*, 952 F.3d 247 (5th Cir. 2020) (quoting *Price v. Fed. Exp. Corp.*, 283 F.3d 715, 720 (5th Cir. 2002) (Showing pretext "[a]t the summary judgment stage, [] means 'the plaintiff must substantiate his claim of pretext through evidence demonstrating that discrimination lay at the heart of the employer's decision.'"); *Roberson-King v. State of La. Workforce Comm'n*, 904 F.3d 377, 381 (5th Cir. 2018) (quoting *LeMaire v. La. Dep't. of Transp. & Dev.*, 480 F.3d 383, 391 (5th Cir. 2007) ("In conducting a pretext analysis, the court does not 'engage in second-guessing of an employer's business decisions.'"); *E.E.O.C. v. Louisiana Off. of Cmty. Servs.*, 47 F.3d 1438, 1448 (5th Cir. 1995) (affirming that the Fifth Circuit has "consistently held that an employee's subjective belief of discrimination, however genuine, cannot be the basis of judicial relief.")). None of the exhibits show that Defendants' explanation of why Pickett was dismissed from the combined program was false or unworthy of credence. *Rodriguez*, 820 F.3d at 765. Rather, to the extent that any documents show anything related to pretext, they only support Pickett's subjective belief that she was

discriminated against. *Louisiana Off. of Cmty. Servs.*, 47 F.3d at 1448.⁷ A subjective belief, however, does not meet the heightened burden of showing pretext.

Similarly, for Pickett's failure-to-accommodate claims under the ADA and Rehabilitation Act, no exhibits could establish that receiving the PowerPoint presentations as pdf documents was an unreasonable accommodation as "reasonableness" is a legal determination. *See E.E.O.C. v. Agro Distribution, LLC*, 555 F.3d 462, 471 (5th Cir. 2009) ("The ADA provides a right to reasonable accommodation, not to the employee's preferred accommodation."). The ADA regulations Appendix provides:

The accommodation, however, does not have to be the "best" accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated . . . [T]he employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.

Id. (quoting 29 C.F.R. pt. 1630, App., § 1630.9). Given that Pickett admitted to having received the PowerPoints on the three occasions in dispute, her failure-to-accommodate claims are meritless. Dkt. 82.4 at 127, 131–133.⁸

Nor do any of Plaintiff's Filed Documents establish that Pickett has a constitutionally protected property or liberty interest in continuing in a graduate program and/or in her school loans. (*Plummer v. Univ. of Hous.*, 860 F.3d 767, 773 n.6 (5th Cir. 2017) (citing *Univ. of Tex. Med. Sch. At Hous. v. Than*, 901 S.W.2d 926, 930 n2. (Tex. 1995)); *see also Perez v. Tex. A&M Univ.*

⁷ The magistrate noted that "[t]his 'subjectiveness' according to Pickett, stemmed from 'disability discrimination' but Pickett points to no specific evidence in support." Dkt. 89 at 22.

⁸ The magistrate judge states that the Rehabilitation Act failure-to-accommodate claim regarding the deadline extension for pre-submission feedback and professors failing to provide notes is live. Dkt. 89 at 4. However, the Fifth Circuit dismissed this failure-to-accommodate claim, "[s]o Pickett failed to state a claim for failure to accommodate her by refusing to move back the deadlines" without limiting its decision to the ADA and excluding the Rehabilitation Act claim. Dkt. 46 at 26.

at Corpus Christi, 589 F. App'x 244, 248 (5th Cir. 2014) (per curiam). As the magistrate found, Plaintiff's substantive due process claim fails as a matter of law without a contractual right. Dkt. 89 at 31, 33.

As to the third factor, all of Plaintiff's Filed Documents have been available to Plaintiff since well before January 2024, as all of the documents relate to dates between 2013 and 2019. Thus, no documents have been newly identified by either party.

Regarding the fourth factor, should the Court consider Pickett's exhibits as new evidence, it would cause unfair prejudice to Defendants because Defendants' Reply deadline passed in September 2023. And since Pickett did not authenticate any of her exhibits pursuant to Federal Rule of Evidence 901, Defendants would need to analyze each document to ensure that it is the exact same document that Defendants possess.

Because the four factors weigh against this Court considering Pickett's newly-proffered evidence, this Court should not consider Plaintiff's Filed Documents as evidence.

III. This Court should not construe Plaintiff's Response as a response to Defendants' Motion for Summary Judgment, but even if the Court does, Pickett has failed to meet her evidentiary burden on all claims.

Pickett failed to file a response to Defendants' Motion for Summary Judgment in August 2023, and her response to the FCR should not be construed as such now.

A. ADA and Rehabilitation Act claims for disability discrimination

The magistrate judge correctly found that Defendants are entitled to summary judgment on Plaintiff's ADA and Rehabilitation Act claims and that the record was devoid of "any indication that these individuals acted by reason of Pickett's disability" in dismissing Plaintiff from the DNP combined program. Dkt. 89 at 23. The magistrate thus properly concluded that Plaintiff did not "ma[ke] out a prima facie case as to her ADA and [Rehabilitation Act] disability discrimination

claims. *Id.* at 25. The magistrate further found that even had Pickett “established a prima facie case, Defendants have submitted legitimate, nondiscriminatory reasons for their actions,” and that shifting the burden back to Plaintiff to demonstrate that these reasons were pretextual, “Pickett has not met her burden.” *Id.* at 26. The court therefore concluded that “[b]ecause Pickett has not met her burden of demonstrating that Defendants’ actions were pretextual and that discrimination was the real reason for their actions, Defendants are entitled to summary judgment.” *Id.* at 27–28.

As previously stated, Pickett has not identified or provided any evidence in Plaintiff’s Response or in Plaintiff’s Filed Documents to support Defendants having taken actions because of Pickett’s disability. Nor has she established any evidence showing pretext by Defendants. Accordingly, this Court should adopt the FCR as to Pickett’s ADA and Rehabilitation Act disability discrimination claims.

B. ADA and Rehabilitation Act failure-to-accommodate claims

The same is true for her failure-to-accommodate claims. The magistrate properly found that the record is “devoid of evidence showing that Defendants failed to accommodate Pickett” and concluded that Pickett “received ‘note-taking assistance’” as required by her letter of accommodation. *Id.* at 29–30. The magistrate therefore recommended dismissal of Plaintiff’s failure-to-accommodate claims under the ADA and Rehabilitation Act. *Id.* at 30.

For Pickett’s failure to produce any evidence showing that receiving the PowerPoint presentations as pdf documents was not a reasonable accommodation, this Court should adopt the FCR as to Pickett’s ADA and Rehabilitation Act failure-to-accommodate claims.

C. Substantive Due Process claim

Lastly, the magistrate correctly found that Pickett does not possess a protected property interest in her post-graduate education, “particularly true where Pickett does not contend she was

wholly denied access to public higher education but was instead, not able to continue in her chosen field at TTUHSC.” *Id.* at 34–35. The court therefore concluded that Pickett “cannot establish a § 1983 substantive due process claim” and recommended dismissal of Plaintiff’s substantive due process claim. *Id.* at 35.

Pickett has not provided any legal authority to show that she has a protected property or liberty interest in continued graduate studies or in her student loans; her claim fails as a matter of law. Therefore, this Court should adopt the FCR as to Pickett’s substantive due process claim.

CONCLUSION

For the foregoing reasons, Defendants, Texas Tech University Health Sciences Center, Barbara Cherry, individually and in her official capacity, and Michael Evans, individually and in his official capacity, respectfully request that this Court deny Plaintiff’s “objections” and adopt the Magistrate Judge’s Findings, Conclusions, and Recommendation, dismiss all claims against Defendants with prejudice, and grant Defendant any further relief deemed just and proper.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2024, the foregoing *Defendants' Response to Plaintiff's Response to Findings, Conclusions, and Recommendations of the United States Magistrate Judge* was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to the following counsel of record:

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