

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

SHANNON CORBETT,

Plaintiff,

v.

TEXAS TECH UNIVERSITY HEALTH
SCIENCES CENTER,

Defendant.

No. 5:21-CV-281-H

ORDER

Before the Court is defendant Texas Tech University Health Sciences Center's (TTUHSC) opposed motion for leave to file an amended answer. Dkt. No. 55. Plaintiff Dr. Shannon Corbett has responded. Dkt. No. 57. Because persuasive caselaw supports granting the amendment and TTUHSC has met the good cause standard, the Court grants TTUHSC's motion.

1. Background

In November 2021, Dr. Shannon Corbett sued TTUHSC, bringing claims of sex discrimination, retaliation, and hostile work environment under both Title VII and the TCHRA. Dkt. No. 1-6. TTUHSC timely filed its answer, asserting various affirmative defenses, including a "failure to mitigate" affirmative defense. Dkt. No. 1-16 at 2. TTUHSC then removed the case to this Court. Dkt. No. 1.

TTUHSC moved for summary judgment as to all claims (Dkt. No. 17), which the Court granted in part (Dkt. No. 37 at 1–2). Summary judgment was granted in favor of TTUHSC as to the sex discrimination and retaliation claims but denied as to Dr. Corbett's hostile-work-environment claim. *Id.*

Pursuant to the Court's scheduling order and in anticipation of trial, TTUHSC and Dr. Corbett were drafting the joint jury charge when TTUHSC became aware of Dr. Corbett's belief that TTUHSC had waived the *Ellerth-Faragher* affirmative defense to Dr. Corbett's hostile work environment claim. Dkt. No. 55 at 2–3. The proposed jury charge was filed on July 3, 2023. Dkt. No. 53.

TTUHSC promptly filed its emergency motion for leave to file an amended answer on July 5, 2023. Dkt. No. 55. TTUHSC argues that the motion should be granted because caselaw supports an amendment when a general “failure to mitigate” defense has been raised and because the good-cause factors weigh in its favor. *Id.* at 2–3. Dr. Corbett responded, claiming that the motion should be dismissed because the affirmative defense would be surprising, prejudicing her, and two of the remaining good-cause factors allegedly weigh in her favor. Dkt. No. 57 at 2–5.

2. Analysis

As caselaw from other courts explain, the *Ellerth-Faragher* affirmative defense is not waived when the employer alleged a general failure to mitigate damages defense. In *Howard v. City of Robertsdale*, for example, the plaintiff argued that the defendant waived the *Ellerth-Faragher* affirmative defense by not specifically including it in the answer. No. 03-0770-BH-C, 2004 WL 5551812, at *7 n.4 (S.D. Al. Dec. 9, 2004). The defendant had not named the defense nor spelled out its elements but had included under the “Affirmative Defenses” section of its answer that “some or all of the claims asserted by the Plaintiff's complaint are barred by the Plaintiff's failure to mitigate damages, as alleged, if any.” *Id.* The Court noted that the *Ellerth-Faragher* affirmative defense “essentially deals with mitigation of

damages” and, as such, the defense fell under the description of “failure to mitigate damages.” *Id.* Therefore, the defendant’s pleading was sufficient to assert the defense. *Id.*

The Eleventh Circuit agreed with the district court’s conclusion. *Howard v. City of Robertsdale*, 168 F. App’x 883, 886 n.3 (11th Cir. 2006). The Court pointed to *Pennsylvania State Police v. Suders*, where the Supreme Court held that “[f]ollowing *Ellerth* and *Faragher*, the plaintiff who alleges no tangible employment action has the duty to mitigate harm, but the defendant bears the burden to allege and prove that the plaintiff failed in that regard.” *Id.* (quoting *Penn. St. Police v. Suders*, 542 U.S. 129, 1522 (2004)). The Eleventh Circuit explained that “the *Ellerth-Faragher* defense is clearly a mitigation defense,” so the plaintiff had therefore received “notice of the affirmative defense and a chance to rebut it.” *Id.*; see also *Adams v. Austal, U.S.A., L.L.C.*, 754 F.3d 1240, 1258–59 (11th Cir. 2014).

Here, TTUHSC similarly included a general failure to mitigate damages defense in its answer, listing it under the Affirmative Defenses section. Dkt. No. 1-16 at 2. The Court agrees with the Eleventh Circuit’s conclusion that although TTUHSC did not refer to the defense by its name, the general “failure to mitigate damages” provided Dr. Corbett with sufficient notice and a chance to rebut it as required by Federal Rule of Civil Procedure 8(c). See *Howard*, 168 F. App’x at 886 n.3. Therefore, TTUHSC did not waive the *Ellerth-Faragher* defense.

In addition, TTUHSC has shown good cause for leave to amend its answer. In determining good cause, the Court considers four factors: “(1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice.” *Sw. Bell. Tel. Co. v. City of El Paso*, 346 F.3d 541, 546 (5th Cir. 2003).

Here, the factors weigh in favor of TTUHSC. First, as to its explanation, TTUHSC states that it “intends, as it always has,” to assert the *Ellerth-Faragher* defense and “argu[e] that [Dr. Corbett] failed to take advantage of the process and procedures” that TTUHSC had in place “for preventing and handling harassment complaints, thereby failing to mitigate her harm.” Dkt. No. 55 at 2–3. TTUHSC was not aware that Dr. Corbett believed that the defense had been waived until the parties were discussing and drafting the joint jury charge, which was filed only two days prior to TTUHSC’s motion. *Id.* at 2–3. Second, the *Ellerth-Faragher* defense is significant because it “allow[s] an employer to avoid vicarious liability in supervisor hostile environment sexual harassment cases, as alleged in this case.” *Perales v. Yes! Cmty., Inc.*, No. SA-12-CA-450-PM, 2013 WL 3245357, at *7 (W.D. Tex. June 26, 2013). Third, Dr. Corbett argues that she will be surprised and therefore seriously prejudiced because she believed that TTUHSC had waived the defense. Dkt. No. 57 at 4. But as TTUHSC points out, Dr. Corbett requested “all materials that contain or refer to [TTUHSC’s] employment sexual harassment policies and procedures” during discovery, which provides some indication that Dr. Corbett was aware that TTUHSC would be asserting the *Ellerth-Faragher* defense. Dkt. No. 55 at 3. Finally, and in any event, the Court grants a continuance, which would cure any alleged prejudice. Rather than setting the trial date for July 17, 2023, the Court sets trial for July 24, 2023.

3. Conclusion

Because caselaw from other courts counsel that the *Ellerth-Faragher* affirmative defense has not been waived where the employer has alleged a failure to mitigate damages defense and because TTUHSC has shown good cause, the Court grants the motion.

TTUHSC may file an amended answer clarifying its assertion of the *Ellerth-Faragher* affirmative defense by July 11, 2023.

So ordered on July 7, 2023.



JAMES WESLEY HENDRIX
UNITED STATES DISTRICT JUDGE