

Motion at pgs. 25-31. TTU also argued that the Fifth Circuit does not recognize a claim under Title VI for teacher-on-student harassment.

B. Plaintiff finally clarifies why he is suing the individual defendants in their “official capacities”

Plaintiff’s First Amended Complaint failed to make clear the reason why he is suing the individual defendants in their “official capacities.” He now claims it is for purposes of injunctive relief. Nevertheless, for the reasons set forth in Defendant’s Amended Motion and herein, he is not entitled to such relief.

C. Plaintiff’s Constitutional claims fail as a matter of law

1. Due process

Plaintiff’s argument that he has overcome the individual Defendants’ entitlement to qualified immunity should be flatly rejected. Despite his improper attempt to do so, Plaintiff cannot “escape” his own factual allegations. In this regard, Plaintiff essentially alleges that Dr. Simon (white female) required him to make corrections to his dissertation due to discriminatory animus. This contention fails and does not meet the plausibility standard for this reason: it makes absolutely no sense that initially, and without any discriminatory animus, Dr. Simon would “approve” his dissertation as “final” absent any discriminatory animus (which clearly advanced Plaintiff’s efforts towards graduation), but then virtually overnight decide she all of a sudden has something against Plaintiff’s “international status” as a Hispanic from Colombia, and (to use his language) create “procedural anomalies as a mechanism for obstruction.”

Moreover, Plaintiff’s suggestion that Dr. Simon would simply “pass” Asian Ph.D. students without scrutiny or without exercising any academic judgment whatsoever is so absurd as to render his “theory” utterly inconceivable, particularly when coupled with the additional suggestion that Dr. Simon went through the trouble of changing employers and moving to North Carolina – all

because she had something against Hispanics from Colombia and wanted to delay his graduation as long as possible. These allegations are so non-sensical as to render them implausible.

Plaintiff also attempts to “downplay” controlling Fifth Circuit precedent that a university’s departure from or violation of its own rules is not a due process violation every time that occurs. *Levitt v. University of Texas*, 759 F.2d 1224, 1230 (5th Cir.), cert. denied, 474 U.S. 1034 (1985). While he insists the alleged violation had something to do with his race and national origin, he continues to “second guess” Dr. Simon’s professional academic judgment as a reason for dissertation changes. U.S. Supreme Court precedent requires courts to “show great respect for faculty’s professional judgement” and significantly limit any review of academic decisions. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985). Plaintiff failed to address this argument and controlling precedent, which clearly weighs heavily in favor of “great respect” for Dr. Simon’s professional academic judgment.

Furthermore, even if *Plummer* recognized a liberty interest in higher education, that case is easily distinguishable and does not apply here. *Plummer* involved two students who were expelled for violating a state university’s sexual misconduct policy. *Plummer v. Univ. of Hous.*, 860 F.3d 767, 773 (5th Cir. 2017). Here, this case has nothing to do with such a policy and Plaintiff does not complain in this action about being suspended or expelled from TTU. To the contrary, he was, in fact, a full-time enrolled student at TTU and that status was never changed or altered. Thus, *Plummer* was not analyzed within the context of purported discriminatory actions involving a mere *seven-month delay in graduation*, as Plaintiff does in this case.

The *Thomas* case that Plaintiff relies upon is also easily distinguishable for the same reason – it involved the *dismissal* of a student at a state university’s medical school. *Thomas v. Gee*, 850 F. Supp. 665 (S.D. Ohio 1994). Once again, Plaintiff is improperly comparing academic dismissal

cases to his case involving, at best, a mere seventh-month delay in graduation.

Plaintiff fails to cite to one case holding for the proposition that alleged discriminatory actions resulting in a seven-month delay in graduation constitute the deprivation of either a liberty or property interest to warrant procedural protections of the Fourteenth Amendment. Because no such legal authority exists, qualified immunity shields all individual Defendants from civil damages because there was no clearly established statutory or constitutional right at the time of the challenged conduct.

Plaintiff's due process claim is implausible on its face since his allegations do not permit the court to infer more than the mere possibility of misconduct. Accordingly, Plaintiff's due process claim fails as a matter of law and all individual Defendants are entitled to qualified immunity.

2. *Equal protection*

The section in Plaintiff's Response addressing his equal protection claim only contains "argument" and *fails to cite to any legal authority in support*. See Response at pgs. 15-17. This is because Plaintiff has no legal authority that a seven-month delay in graduating constitutes a deprivation of a right was "clearly established" law, whether in the context of either a due process or equal protection analysis.

In this regard, while Plaintiff continues to emphasize that Dr. Simon was motivated by discriminatory motives and that other Defendants "endorsed and facilitated her actions," no legal authority exists that the alleged "material harm" or "injury" - a seven-month delay in graduating based on his own subjective "opinion" when he should have graduated - constitutes a deprivation of a right that was "clearly established" at the time of the challenged conduct. This is particularly true in light of the undisputable fact that Plaintiff was never disciplined, suspended or expelled

from the university. Simply stated, a seven-month delay in graduating allegedly caused by disparate treatment is not a “deprivation” of a right secured by the U.S. Constitution or federal law. Plaintiff does nothing more than cite to *student suspension or expulsion cases*, which clearly do not apply here. Plaintiff intentionally ignores this argument by Defendants. He has nothing to show that such material actions were taken against him. To the contrary, Plaintiff successfully graduated and was awarded a Ph.D.

There is no authority that it is unconstitutional (1) to ask a Ph.D. student to make dissertation corrections, even if the student believes that corrections are unnecessary or allegedly due to discriminatory animus or (2) to impose a “two-publication” requirement on one student but not on others due to discriminatory animus, particularly since this very requirement was admittedly “waived” for him. Thus, the specific conduct alleged by Plaintiff does not give rise to an equal protection violation because there is no clearly established law in support of these “detailed factual allegations.”

Plaintiff also ignored and failed to respond to Defendants’ argument that the exercise of Dr. Simon’s professional academic judgment is a rational basis for the alleged difference in treatment. See e.g., *Levi v. University of Texas at San Antonio*, 840 F.2d 277, 280 (5th Cir.1988). The fact Plaintiff refuses to accept this controlling law does not overcome Defendants’ motion.

D. Plaintiff’s Section 1981 claim fails as a matter of law

Plaintiff’s Response does nothing but mischaracterize Defendants’ arguments, claiming that Defendants argued that “factual issues exist” as to whether the purported “contractual materials” can be interpreted as binding. See Response at p. 18.

Plaintiff also intentionally mischaracterizes another argument made by Defendants. Defendants did not argue that he did not allege a source of the contractual relationship, but rather

that the sources cited by Plaintiff are vague, conclusory allegations and improper legal conclusions.

Plaintiff's allegation in support of his Section 1981 claim is as follows:

"The Department's handbook and other written policies of Texas Tech and its agencies created a contractual relationship between Texas Tech and Plaintiff."

Plaintiff's First Amended Complaint at ¶ 174.

This paragraph in Plaintiff's live pleading is devoid of any statement indicating TTU's intent to be bound by the department handbook or any other "written policies of Texas Tech." Moreover, it fails to identify any enforceable contractual right.

Additionally, while a heightened pleading standard is not applied to Section 1981 claims, this allegation is masquerading as both a conclusory allegation and a legal conclusion. Indeed, a court need not accept as true "conclusory allegations, unwarranted factual inferences, or legal conclusions." *Great Lakes Dredge & Dock Co. LLC v. La. State*, 624 F.3d 201, 210 (5th Cir. 2010). This allegation is also impermissibly vague thus failing to provide any reasonably sufficient or specific language in any TTU written materials that demonstrate the existence of a contractual relationship.

Also significant is the fact that, as one department within TTU, the Chemical Engineering department is a non-jural entity incapable of suing or being sued. Thus, TTU's Chemical Engineering department has no legal authority to enter in a contractual relationship on behalf of TTU with Plaintiff or anyone else for that matter. Stated another way, a contractual relationship cannot exist between Plaintiff and TTU based on what is allegedly contained in TTU's Chemical Engineering department handbook.

TTU's Chemical Engineering department is not a named defendant in this action, and even if Plaintiff had named the department as a separately named defendant, it would be subject to dismissal pursuant to FED. R. CIV. P. 12(b)(1) and FED. R. CIV. P. 12(b)(6) as a non-jural entity.

Also, an offhand comment allegedly made to Plaintiff by an unidentified person at TTU should also be rejected since he failed to name this person much less allege that this individual has the legal authority to bind the university in any way whatsoever.

Plaintiff's argument attempting to assert a Section 1981 claim against the individual Defendants should also be rejected. First, Plaintiff lodged allegations against the individual Defendants as persons that "themselves engaged in discriminatory behavior against [him]" that endorsed and facilitated Dr. Simon's discriminatory behavior towards him. Plaintiff's First Amended Complaint at ¶¶ 3, 79. Hence, for Plaintiff to now label them as "nominal third parties" is a blatant misrepresentation of allegations contained in his own live pleading. See Plaintiff's Response at p. 19.

Finally, the *Perry v. VHS San Antonio, L.L.C.*, 990 F.3d 918 (5th Cir. 2021) case cited by Plaintiff does not apply here since that case did not involve an alleged contract between a state university and a student, but rather an employee-physician and a private hospital. The nature of the contract in issue in that case was a "physician agreement." *Id.* at 932. Furthermore, the "third party" addressed in *Perry* was a non-party to the contract in issue being sued for interference with the plaintiff's right to make and enforce a contract. *Id.*

Here, all of the individual Defendants sued by Plaintiff were employees of TTU. Thus, the individual Defendants cannot be properly considered outside "third parties" since they were TTU employees. Accordingly, the connection between TTU and the individual Defendants was inextricably intertwined in an employer-employee relationship thus rendering *Perry* completely inapplicable.

E. Plaintiff's response fails to overcome dismissal of his Title VI claim

Plaintiff's Response has failed to set forth any basis to overcome dismissal of his Title VI

claim. First, Plaintiff makes no argument regarding the existence of an official policy of intentional discrimination. See Plaintiff's Response at pgs. 19-20. Thus, he is relegated to alleging an "appropriate person" had actual knowledge of the discrimination and responded with deliberate indifference by failing to institute corrective measures. While Plaintiff alleges that several individual Defendants had knowledge of the alleged discrimination, he fails to allege that any of them were the "appropriate person" authorized to institute corrective measures but that s/he responded with deliberate indifference. As such, TTU cannot be held vicariously liable for the allegedly discriminatory actions by Dr. Simon.

Even more significantly, Plaintiff has failed to articulate any material harm or injury to his status as a TTU student in support of a Title VI claim. In this regard, he does not and cannot allege that he was denied participation in or denied the benefits as a Ph.D. student at TTU since he was never suspended or expelled from the university. He was a student in good standing from the time that he first enrolled at TTU to the time that he graduated.

Additionally, Plaintiff's Response fails to cite to any legal authority that a mere seven-month delay in graduation based on his "opinion" when he should have graduated constitutes a Title VI violation. He cannot do so because no such legal authority exists.

F. Plaintiff has failed to overcome dismissal of his Title VI retaliation claim

Plaintiff's Response simply ignores Defendants' arguments in support of dismissal of this claim. More specifically, Plaintiff "overlooks" his own allegations that the alleged adverse actions against him occurred long *before* any protected activity. Thus, his factual allegations are not in the proper sequence to support a retaliation claim – the protected activity must occur before the adverse action. Plaintiff ignores the most basic and fundamental tenet of a retaliation claim.

Plaintiff also ignores and fails to respond to the fact that he did not allege that Dr. Simon

had knowledge of any of his protected activity, which is also required to support a retaliation claim. “Fifth Circuit precedent requires evidence of knowledge of the protected activity on the part of the decision maker and temporal proximity between the protected activity and the adverse employment action.” See *Ramirez v. Gonzales*, 225 Fed.Appx. 203, 210 (5th Cir.2007).

Furthermore, Plaintiff does not allege he was suspended or dismissed and has failed to plead any adverse action against him *after* any alleged protected activity. Indeed, the two things that Plaintiff admits happened in the Fall of 2021 is that the “two-publication” requirement was waived for him and he graduated with a Ph.D. Plaintiff’s First Amended Complaint at ¶¶ 21, 118. Then, in January 2022, he began working as a senior chemist for ECC in Pewaukee, Wisconsin.¹ Without a doubt, Plaintiff had this job lined up with this employer prior to graduating. He has no damages.

Plaintiff has no valid basis to oppose Defendants’ arguments on this claim, which is the reason why he simply ignores them and did not respond to them in his Response.

G. Plaintiff has failed to overcome dismissal of his Title VI teacher on student harassment claim

Plaintiff’s Response to Defendants’ argument for dismissal consists of only 4 sentences and without citation to any legal authority. He tries to “explain away” what he means by this claim, but a teacher on student harassment claim is exactly what he alleged. The Fifth Circuit does not recognize such a claim and it should be dismissed.

H. Plaintiff failed to show he is entitled to master’s degree as a form of relief

Plaintiff’s assertion that a state university such as TTU can keep a degree a “secret” and, not only that, award it only to one particular class of individuals – Asian students – is so absurd

¹ The average salary for a Senior Chemist is \$99,495.00 per year in Wisconsin.

and ridiculous so as to render it utterly implausible that it does not raise a right to relief above the speculative level or to permit this court to infer more than mere possibility of misconduct. *Twombly*, 550 U.S. at 555. This allegation about a “secret degree” only available to Asian students simply does not meet the plausibility standard under *Iqbal/Twombly*.

The fact that Plaintiff makes such a preposterous argument does not render it “facially plausible” as he so disingenuously contends. Plaintiff also erroneously argues that awarding him a master’s degree is prospective injunctive relief, which demonstrates a fundamental misunderstanding of the difference between relief based on past harm vs. prospective relief. This point is easily illustrated by the fact that a degree that was never earned cannot be “backdated” to 2021 when Plaintiff claims it should have been awarded to him.

Plaintiff has also failed to cite to any legal authority that would entitle him to such relief. Neither a state nor federal court has the authority to “order” a state university to confer a degree upon an individual who did not earn it. Plaintiff cites to FED. R. CIV. P. 65 yet he fails to provide any explanation whatsoever how “injunctions and restraining orders” even applies to a master’s degree as a form of relief in this case. Moreover, evidencing Plaintiff’s penchant for misrepresenting legal authority, the *Spallone v. United States*, 493 U.S. 265, 276 (1990) case cited by Plaintiff has nothing to do with state universities or the award of a master’s degree as a form of relief, equitable or otherwise. Rather, it involves an allegation regarding the failure to pass a public housing ordinance required in a consent decree in a civil rights suit. *Id.*

I. Plaintiff attempts to mischaracterize allegations made in his own live pleading – “long history of discrimination” allegation made to bolster his claims

Without dispute, Plaintiff makes allegations of a “long history of discrimination” to improperly bolster his own claims, and for no other reason. Indeed, he admits this by stating that he “supplements his factual allegations with a discussion of the Department’s history because it

adds additional factual support for the proposition that the decisions made related to Plaintiff arose out of discriminatory motivations.” Plaintiff’s Response at p. 24. Controlling Fifth Circuit law simply does not permit Plaintiff to do so because this is neither a class action claim nor one brought by the federal government to protect students from some type of discriminatory practice by TTU. Thus, to the extent Plaintiff seeks to hold TTU liable for a pattern and practice of discrimination or offers this in support of his claims, the law of this circuit does not permit such a claim to be made. Accordingly, Plaintiff’s “pattern and practice” of discrimination argument should be flatly rejected.

J. Plaintiff has no right to injunctive relief

Plaintiff’s request for injunctive relief is non-sensical. He has already graduated from TTU and is no longer a student. Since he no longer has any ties with TTU, his request for “continued enforcement against Plaintiff [sic] of discriminatory policies and practices” by refusing to award him a retroactive degree that he did not earn is without legal basis. Plaintiff’s Response at p. 25.

K. Plaintiff is not entitled to punitive damages

For the reasons stated above, Plaintiff has failed to overcome qualified immunity to which the individual Defendants are clearly entitled. Accordingly, he is not entitled to punitive damages.

II. CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Defendants respectfully request that this motion be granted thereby dismissing with prejudice all claims asserted by Plaintiff. Defendants further request all other relief both at law and in equity to which they may be justly entitled, including but not limited to attorney fees and costs.

Respectfully submitted.

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