

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

CARA WESSELS WELLS,
Plaintiff,

v.

**TEXAS TECH UNIVERSITY,
SAMUEL PRIEN, and LINDSAY
PENROSE,**
Defendants.

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CAUSE NO. 5:23-CV-00060-H

**DEFENDANT TEXAS TECH UNIVERSITY’S MOTION TO DISMISS PURSUANT TO
FEDERAL RULES OF CIVIL PROCEDURE 12(B)(1) AND 12(B)(6)**

TO THE HONORABLE U.S. DISTRICT JUDGE JAMES WESLEY HENDRIX:

Defendant Texas Tech University (“TTU”) files this Motion to Dismiss (“Motion”) pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), requesting the Court to dismiss Plaintiff’s claims against TTU raised in her Original Complaint and Demand for Jury Trial (“Complaint”). This Court should dismiss Plaintiff’s claims against TTU because they are barred by sovereign immunity, are time-barred, fail for lack of standing, and/or fail to state a legally cognizable claim.

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INTRODUCTION

Plaintiff's Complaint arises out of Plaintiff's student and employment relationships with TTU, and involves TTU professors, Drs. Prien and Penrose. Plaintiff worked as a graduate assistant of Drs. Prien and Penrose until graduating with her Ph.D. in 2017. Once she graduated with her Ph.D., Plaintiff no longer had either a student or an employment relationship with TTU. Plaintiff's only subsequent involvement with TTU was a short, unpaid volunteer position with the TTU Accelerator Hub, which ended in June 2022.

Nearly six years after she left the employment of TTU, Plaintiff filed this lawsuit alleging discrimination on the basis of sex, retaliation, and a host of intentional tort and other claims under federal and state law. Specifically, Plaintiff's "everything but the kitchen sink" complaint alleges causes of action under Title VII for sexual harassment, hostile work environment, and retaliation; Title IX of the Education Amendments of 1972 for sexual harassment; sexual harassment and retaliation under Chapter 21 of the Texas Labor Code; correction of inventorship under 35 U.S.C. § 256; declaratory judgment of patent invalidity under 28 U.S.C. § 2201; tortious interference with contractual relations; trade secret misappropriation; breach of contract; intentional infliction of emotional distress; unjust enrichment; breach of fiduciary duty; fraudulent concealment; negligent supervision and retention; and defamation *per se*.

As discussed in detail below, Plaintiff's claims against TTU should be dismissed in their entirety because: (1) many of Plaintiff's claims against TTU are jurisdictionally barred by sovereign immunity; (2) Plaintiff lacks standing for numerous claims; (3) Plaintiff's discrimination and retaliation claims are barred by failure to exhaust administrative requirements; and (4) Plaintiff has failed to allege sufficient facts showing a *prima facie* claim for many of her causes of action.

BACKGROUND

Plaintiff alleges she was a student of Drs. Prien and Penrose at TTU from 2009 until graduating with her Ph.D. in 2017. *See* Dkt. 1 ¶¶ 32, 33, 65. Plaintiff alleges that she worked as a graduate assistant for Dr. Prien while at TTU. *Id.* ¶¶ 7, 34. Plaintiff also alleges that she participated in an Accelerator Hub mentorship program at TTU during May and June of 2022. *Id.* ¶¶ 108, 110, 111.¹ Plaintiff does not allege that she had an employment relationship with TTU during her brief time as a mentor with the Accelerator Hub program, nor does she allege that she received any type of compensation or benefits as part of that program.

As a graduate assistant at TTU, Plaintiff conducted research. *Id.* ¶¶ 3, 7. Plaintiff alleges that she did not receive credit for her contributions to technological innovations, patents, and academic research. *Id.* ¶ 7. Plaintiff claims she was an inventor of patents for which TTU did not list her as an inventor, *id.* ¶¶ 102, 103, 114, 115, 162, and she is requesting this Court to correct inventorship and/or declare the patent invalid.

Plaintiff's last date of employment with TTU was in 2017 when she graduated with her Ph.D. *Id.* ¶¶ 65-66. Since that time, Plaintiff worked at Ovation Fertility and then with her own two companies, Embryotics and EmGenisys. *Id.* ¶¶ 70, 72-84. Plaintiff did not file her EEOC Charge, which was cross-filed with the TWC, until November 11, 2022, well beyond both the 300- and the 180-day limitation periods required by law for EEOC and TWC claims. *Id.*, Ex. A. The EEOC issued a Right to Sue letter on December 22, 2022. *Id.*, Ex. B.

¹ Defendants request the Court to take judicial notice of the TTU Innovation Hub at Research Park website page showing that mentors are experienced in their trade and offer their experience as “mentors” to the TTU Innovation Hub: depts.ttu.edu/research/research-park/meet/iTTUmentors.php. *See* Fed. R. Evid. 201(b)(2) (permitting the Court to take judicial notice of “a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned”).

STANDARD OF REVIEW

A. Rule 12(b)(1)

Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a case is properly dismissed when the court “lacks the statutory or constitutional power to adjudicate the case.” *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998) (quoting *Nowak v. Ironworkers Loc. 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir. 1996)). “The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction.” *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). “Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist.” *Id.* (citing *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980)). Claims barred by sovereign immunity are properly dismissed under Federal Rule of Civil Procedure 12(b)(1). *Warnock v. Pecos Cnty., Tex.*, 88 F.3d 341, 343 (5th Cir. 1996).

B. Rule 12(b)(6)

“To survive a Rule 12(b)(6) motion, the plaintiff must plead ‘enough facts to state a claim to relief that is plausible on its face.’” *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (citations, quotations, and brackets omitted). “Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Katrina Canal*, 495 F.3d at 205 (quoting *Twombly*, 550 U.S. at 555). The Court is not required to conjure up unpled allegations in order to save a complaint, and “conclusory allegations or legal conclusions masquerading as

factual conclusions will not suffice . . .” *Fernandez-Montes v. Allied Pilots Ass’n*, 987 F.2d 278, 284 (5th Cir. 1993).

When reviewing a motion to dismiss for failure to state a claim, “[t]he court’s review is limited to the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint.” *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010); *see also Sullivan v. Leor Energy, LLC*, 600 F.3d 542, 546 (5th Cir. 2010). The Court may also consider facts subject to judicial notice under Federal Rule of Evidence 201. *Walker v. Beaumont Indep. Sch. Dist.*, 938 F.3d 724, 735 (5th Cir. 2019).

ARGUMENT

I. MOST OF PLAINTIFF’S CLAIMS AGAINST TTU ARE JURISDICTIONALLY BARRED BY SOVEREIGN IMMUNITY.

The Eleventh Amendment protects States from citizen suits brought in federal court without the State’s consent. *See* U.S. Const. amend. XI; *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (“[A]n unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state.”) (internal quotation marks omitted). Such protection extends to state agencies and applies regardless of the type of relief sought. *Pennhurst State School & Hosp.*, 465 U.S. at 100.

As a state university and an arm of the State of Texas, TTU is entitled to the State’s sovereign immunity. *See Wallace v. Tex. Tech Univ.*, 80 F.3d 1042, 1047 n.3 (5th Cir. 1996) (“Texas Tech, as a state institution, clearly enjoys Eleventh Amendment immunity.”); *see also United States v. Tex. Tech Univ.*, 171 F.3d 279, 289 n.14 (5th Cir. 1999) (“The Eleventh Amendment cloaks Texas Tech University and Texas Tech University Health Sciences Center with sovereign immunity as state institutions.”). To overcome TTU’s sovereign immunity,

Plaintiff must show that “the state has waived sovereign immunity or Congress has expressly abrogated it” for each of her causes of action. *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019). Plaintiff cannot make such a showing for most of her claims.

A. Sovereign immunity bars Plaintiff’s claims under Chapter 21 of the Texas Labor Code (Counts 5 and 7).

Plaintiff asserts claims against TTU for discrimination and retaliation (Counts 5 and 7) in violation of Tex. Labor Code § 21.002, *et seq.* See Dkt. 1 ¶¶ 147-59. It is well-established that sovereign immunity bars suits against state universities (like TTU) in federal court under Chapter 21 of the Texas Labor Code (“Chapter 21”). *King v. Tex. A&M Eng’g Extension Serv.*, No. 4:21-CV-1005, 2022 WL 2328853, at *5 (E.D. Tex. June 28, 2022); *see also Pendleton v. Prairie View A & M Univ.*, 121 F. Supp. 3d 758, 762 (S.D. Tex. 2015). Chapter 21 does not expressly waive sovereign immunity in federal court. *Pendleton*, 121 F. Supp. 3d at 762–63 (“Texas also has not consented to suit in federal court on claims under the Texas Labor Code.”); *Dugger v. Stephen F. Austin State Univ.*, 232 F. Supp. 3d 938, 953–54 (E.D. Tex. 2017) (“The State of Texas has not provided a clear and unambiguous waiver of its immunity from suit in a federal court with regard to retaliation claims under . . . the Texas Labor Code, nor has Congress abrogated the State’s right under the Eleventh Amendment not to be so sued.”). Further, Plaintiff cannot point to any other Texas statute that waives the State’s sovereign immunity against Chapter 21 claims in federal court. *See Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 839 (Tex. 2007) (“It is up to the Legislature to institute such a waiver, and to date it has not seen fit to do so.”). Because TTU is immune from suit and liability on Plaintiff’s Chapter 21 claims, this Court lacks jurisdiction over these claims and must dismiss them under Rule 12(b)(1).

B. Sovereign immunity bars Plaintiff's state law negligence and intentional tort claims (Counts 13, 16-18, 20).

Plaintiff brings a variety of negligence and intentional tort claims against TTU: (1) intentional infliction of emotional distress (“IIED”) (Count 13); (2) breach of fiduciary duty (Count 16); (3) fraudulent concealment (Count 17); (4) negligent supervision and retention (Count 18); and (5) defamation *per se* (Count 20). Dkt. 1 ¶¶ 180-86, 195-212, 219-224. Each of these claims are barred by sovereign immunity and should be dismissed.

The Texas Legislature has waived sovereign immunity for certain limited types of tort claims against state entities in the Texas Tort Claims Act (“the TTCA”). *See State v. Shumake*, 199 S.W.3d 279, 283 (Tex. 2006). The TTCA waives sovereign immunity only where the alleged personal injury either “arises from the operation or use of a motor-driven vehicle or motor-driven equipment,” Tex. Civ. Prac. & Rem. Code § 101.021(1)(A), or is “caused by a condition or use of tangible personal or real property,” *id.* § 101.021(2). *See City of Hempstead v. Kmiec*, 902 S.W.2d 118, 122 (Tex. App.—Houston [1st Dist.] 1995). Neither of those waivers applies to Plaintiff's various negligence and intentional tort claims, as Plaintiff's allegations do not involve the use of motor-driven equipment or a condition or use of property.

Regarding Plaintiff's intentional tort claims, the TTCA expressly provides that it does *not* apply to claims “arising out of assault, battery, false imprisonment, or any other intentional tort.” Tex. Civ. Prac. & Rem. Code Ann. § 101.057(2). Thus, Plaintiff's intentional tort claims (Counts 13, 16, 17, and 20) are specifically recognized by the Legislature as being categorically barred by sovereign immunity. Indeed, courts have consistently recognized that sovereign immunity bars the types of intentional torts Plaintiff has pleaded here. *See, e.g., Gillum v. City of Kerrville*, 3 F.3d 117, 122–23 (5th Cir. 1993) (holding that sovereign immunity is not waived when the claim arises out of an intentional tort, such as defamation or IIED); *Shipula v. Tex. Dep't of Fam. Protective*

Servs., No. CIV.A. H-10-3688, 2011 WL 1882521, at *12 (S.D. Tex. May 17, 2011) (holding the TTCA does not waive sovereign immunity for intentional torts such as fraud, breach of fiduciary duty, IIED, and conspiracy); *Jones v. Performance Serv. Integrity*, 492 F. Supp. 2d 590, 598 (N.D. Tex. 2007) (noting that defamation and IIED are “both intentional torts for which sovereign immunity is not waived.”).

Regarding Plaintiff’s negligence claim (Count 18), besides the plain language of the TTCA itself, courts have generally held that the TTCA does not waive sovereign immunity for negligent supervision. *See, e.g., Univ. of Tex. MD Anderson Cancer Ctr. v. Contreras*, 576 S.W.3d 439, 444 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (holding that sovereign immunity barred “a claim for negligent supervision of a governmental employee or agent”); *El Paso Mental Health & Mental Retardation Ctr. v. Crissman*, 241 S.W.3d 578, 582 (Tex. App.—El Paso 2007, no pet.) (“Allegations of negligent supervision do not satisfy the limited waiver of immunity contained within the Tort Claims Act.”); *City of Waco v. Williams*, 209 S.W.3d 216, 232 (Tex. App.—Waco 2006, pet. denied) (“The [TTCA] does not waive sovereign immunity for negligent supervision and training.”).

Because the TTCA does not waive sovereign immunity for any of the negligence or intentional tort claims pleaded by Plaintiff, Plaintiff cannot carry her burden to show a legislative waiver of sovereign immunity for those claims. Accordingly, the Court should dismiss these claims (Counts 13, 16-18, 20) against TTU for lack of subject matter jurisdiction.

C. Sovereign immunity bars Plaintiff’s claims related to patent inventorship against TTU (Counts 8-9).

Pursuant to 35 U.S.C. § 256, Plaintiff requests the Court to determine the correct inventorship of U.S. Patent No. 11,169,064 (“064”) and to allegedly correct the patent either by adding Plaintiff as a joint inventor, or alternatively, by rendering the patent invalid as failing to

name the proper inventors. *See* Dkt. 1 ¶¶ 160-66. Specifically, Plaintiff claims that she made independent conceptual contributions to the inventions claimed in the '064 patent; and that through omission, inadvertence, or error, Plaintiff is not listed on the '064 patent as an inventor. *Id.* ¶¶ 161-62. Plaintiff's patent claims are barred by sovereign immunity.

Sovereign immunity protects a state university from lawsuits by private individuals seeking to correct inventorship under 35 U.S.C. § 256. *Xechem Int'l, Inc. v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 382 F.3d 1324 (Fed. Cir. 2004). In *Xechem*, a private party filed suit against a state university in federal court to change the inventorship of university-owned patents that resulted from a joint research project. Because the university did not consent to the suit, the district court found that sovereign immunity barred the plaintiff's claims for determination and correction of inventorship pursuant to 35 U.S.C. § 256, and the Federal Circuit affirmed. *Xechem Int'l, Inc. v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, No. CIV.A. H-02-1013, 2003 WL 24232747, at *9 (S.D. Tex. Mar. 19, 2003), *aff'd sub nom. Xechem Int'l, Inc. v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 382 F.3d 1324 (Fed. Cir. 2004).

The same rule applies here. Just as in *Xechem*, Plaintiff here is a private party suing a state university and requesting the Court to correct the inventorship of a patent owned by the university. Moreover, Plaintiff's alternative requested relief that seeks a declaration of patent invalidity is likewise based on Section 256 of the Patent Act. But TTU has not consented to suit for such claims, and Plaintiff cannot identify any statute waiving or abrogating TTU's sovereign immunity against such claims. *City of Austin*, 943 F.3d at 997; *see also Tegic Commc'ns Corp. v. Bd. of Regents of Univ. of Tex. Sys.*, 458 F.3d 1335, 1340 (Fed. Cir. 2006) (finding that Eleventh Amendment immunity applies to suits pertaining to violations of federal patent laws in suit brought by private party against State university system for a declaratory judgment of patent invalidity and

unenforceability); *Univ. of Utah v. Max-Planck-Gesellschaft Zur Forderung Der Wissenschaften E.V.*, 734 F.3d 1315, 1319 (Fed. Cir. 2013) (“[A] state university generally may not be sued for infringement, nor may it be forced to defend against an action for declaratory judgment of invalidity or non-infringement.”). Thus, sovereign immunity bars Plaintiff’s patent inventorship and invalidity claims (Counts 8-9), and this Court should dismiss them for lack of jurisdiction.

II. PLAINTIFF LACKS STANDING FOR HER CLAIM FOR CORRECTION OF INVENTORSHIP, OR IN THE ALTERNATIVE, A DECLARATION OF INVALIDITY (COUNTS 8-9).

Plaintiff further lacks standing to assert the correction of inventorship and patent invalidity claims (Counts 8-9). Whether a plaintiff has Article III standing “is the threshold question in every federal case, determining the power of the court to entertain the suit.” *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To establish standing, a plaintiff must “show that she has suffered an injury-in-fact, that the injury is traceable to the conduct complained of, and that the injury is redressable by a favorable decision.” *Chou v. Univ. of Chicago*, 254 F.3d 1347, 1357 (Fed. Cir. 2001) (citing U.S. Const. art. III and *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). “Under federal law, a lack of standing deprives a court of subject matter jurisdiction because standing is an element of such jurisdiction.” *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444–45 (Tex. 1993).

In *Chou*, the plaintiff sought correction of inventorship under § 256, citing the fact that she, if identified as an inventor, would be entitled to university royalties, licensing revenue, and equity in start-up companies. 254 F.3d at 1354–55. Although the *Chou* court found that a plaintiff need not have an ownership interest at stake in the suit to have standing, it nevertheless demanded that a plaintiff have a “concrete financial interest” in the patents. *Id.* at 1359; *see also Larson v. Correct Craft, Inc.*, 569 F.3d 1319, 1321 (Fed. Cir. 2009) (holding that because the plaintiff had no concrete financial interest in the correction of inventorship, as he had assigned away all of his patent rights, there was no standing under § 256).

Here, Plaintiff fails to allege that she has any ownership or financial interest in the patent. Indeed, she has none—under TTU’s policy, Plaintiff is required to assign her rights in any intellectual property to TTU. The TTU policy expressly states as follows:

Except as specifically provided in research agreements sponsored by third parties, and as provided in Section 10.03.3, intellectual property created by covered persons with the use of TTUS (Texas Tech University System) resources or during the course of covered persons’ TTUS responsibilities is automatically owned by TTUS. All covered persons must, and do hereby, assign their rights in such intellectual property to TTUS ²

Because Plaintiff does not own or have a financial interest in the patent, she lacks standing to bring a claim under 35 U.S.C. § 256 to correct the patent or to declare it invalid. Because Plaintiff lacks standing, the Court should dismiss her claims (Counts 8 and 9) for lack of jurisdiction.

III. PLAINTIFF FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED UNDER FED. R. CIV. P. 12(B)(6).

Plaintiff’s claims should be dismissed as being time-barred for failure to exhaust administrative remedies, failure to file within the required statute of limitations, and for failure to state a claim. Accordingly, Plaintiff’s Title VII (Counts 1-3), Title IX (Count 4), Chapter 21 (Counts 5 and 7), correction of inventorship (Count 8), and patent invalidity (Count 9) claims should be dismissed.

A. Plaintiff’s Title VII and Chapter 21 claims (Counts 1-3, 5, 7) are time-barred because Plaintiff failed to exhaust her administrative remedies.

Plaintiff alleges sexual harassment, hostile work environment, and retaliation under Title VII (Counts 1-3) against TTU. She also alleges retaliation and unlawful employment practice

² Defendants request the Court to take judicial notice of Texas Tech University System, Rules and Regulations of the Board of Regents, Chapter 10 – Intellectual Property Rights at 10.03.1, publicly available at <https://www.texastech.edu/board-of-regents/regents-rules/chapter-10-intellectual-property-rights.pdf> (last revised October 9, 2015). *See* Fed. R. Evid. 201(b)(2) (permitting the Court to take judicial notice of “a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned”).

(Counts 5 and 7) in violation of Chapter 21 of the Texas Labor Code.³ All of these Title VII and Chapter 21 claims should be dismissed as time-barred because Plaintiff did not file her EEOC charge within either the 180- or 300-day limitations period.

Both Chapter 21 and Title VII direct that a “charge . . . shall be filed” no later than the 180th (or, in the case of Title VII, the 300th) day “after the alleged unlawful employment practice occur[s].” Tex. Labor Code § 21.202(a); 42 U.S.C. § 2000e-5(b), (e)(1). For complaints concerning a practice occurring in a State or political subdivision that has a fair employment agency of its own empowered “to grant or seek relief,” such as the Texas Workforce Commission, Title VII instructs the complainant to file his charge first with the state or local agency. 42 U.S.C. § 2000e-5(c). The complainant then has 300 days following the challenged practice, or 30 days after receiving notice that state or local proceedings have ended, “whichever is earlier,” to file a charge with the EEOC. 42 U.S.C. § 2000(e)(1).

Federal law is clear. Before a plaintiff may pursue a cause of action under Title VII, she must exhaust her administrative remedies. *Hall v. Cont’l Airlines, Inc.*, 252 F. App’x 650, 653 (5th Cir. 2007); *see also Taylor v. Books A Million*, 296 F.3d 376, 378-79 (5th Cir. 2002), *cert. denied* (2003). A court may entertain a Title VII lawsuit *only* if the aggrieved party has (1) exhausted his or her administrative remedies and (2) has filed suit within the time permitted after receiving a notice of a right to sue. *Id.* Filing an EEOC charge is a mandatory “claim-processing rul[e] that must be timely raised to come into play.” *Fort Bend Cnty., Tex. v. Davis*, 139 S. Ct. 1843, 1846 (2019). “A claim-processing rule may be ‘mandatory’ in the sense that a court must enforce the

³ Even if Plaintiff’s Chapter 21 claims were not barred by sovereign immunity (which they are), they are time-barred for similar reasons. Texas law requires Chapter 21 complaints to be filed in an even shorter time frame (180 instead of 300 days) and enforces that time requirement similarly. *See Specialty Retailers, Inc. v. DeMoranville*, 933 S.W.2d 490, 492 (Tex. 1996) (finding that the time limit for filing a complaint under TCHRA with the TWC is mandatory, and “the commission shall dismiss an untimely complaint.”).

rule if a party ‘properly raise[s]’ it. *Id.* (quoting *Eberhart v. U.S.*, 546 U.S. 12, 19 (2005) (per curiam)).

Plaintiff graduated from TTU in 2017 with a Ph.D. *See* Dkt. 1 ¶ 65. After graduation in 2017, Dr. Prien offered Plaintiff an unpaid position in his lab, but she declined the offer. *Id.* ¶ 66. Plaintiff never alleges that she was a paid employee of TTU after graduation. *Id.* ¶¶ 66-116. Since her last date of employment at TTU, Plaintiff worked at Ovation Fertility, Embryotics, and then at EmGenisys. *Id.* ¶¶ 70, 72-87.

Accordingly, Plaintiff’s last date of employment with TTU was in 2017, and the limitations period began to run on any Title VII or Chapter 21 claims in 2017. However, Plaintiff’s EEOC Charge was not filed until November 11, 2022, well beyond the 300-day limitations period for a Title VII charge. For charges brought under Title VII, the deadline for filing was no later than October 27, 2018. For claims under Chapter 21, the deadline was even earlier.

Plaintiff did not file her Charge alleging discrimination on the basis of sex and retaliation with the EEOC until November 11, 2022, which is 1,776 days (almost five years) after December 31, 2017. Therefore, Plaintiff’s Chapter 21 complaint and her EEOC Charge were not timely filed under either state or federal law, and Plaintiff’s Chapter 21 claims for unlawful employment practice (Count 5) and retaliation (Count 7), as well as her Title VII claims for sexual harassment (Count 1), hostile work environment (Count 2), and retaliation (Count 3), should be dismissed.

B. Plaintiff’s Title IX claim is barred by the statute of limitations (Count 4).

Plaintiff alleges sexual harassment under Title IX (Count 4) against TTU. However, the statute of limitations bars her claim because she filed over three years too late.

The Fifth Circuit has held that the two-year statute of limitations applied to § 1983 claims is applied “with equal force to Title IX claims.” *King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 759 (5th Cir. 2015). A Title IX claim begins to accrue when plaintiff is aware of the existence

of circumstances that would lead a reasonable person to investigate further. *Id.* at 762. A “‘plaintiff need not know that she has a legal cause of action’ for her claim to accrue; ‘she need know only the facts that would ultimately support a claim.’” *Id.* “[A]wareness for accrual purposes does *not* mean actual knowledge; rather, all that must be shown is the existence of circumstances [that] would lead a reasonable person to investigate further.” *Id.* (citation and internal quotation marks omitted). The statute of limitations requires dismissal where it is evident “from the plaintiff’s pleadings that the action is barred and the pleadings fail to raise some basis for tolling or the like.” *Jones v. Alcoa, Inc.*, 339 F.3d 359, 366 (5th Cir. 2003).

Plaintiff alleges that she graduated from TTU with her Ph.D. in 2017. *See* Dkt. 1 ¶ 65. Accordingly, the statute of limitations for Plaintiff’s alleged Title IX claim began to run on the last possible day she was a student at TTU, which (at the latest) could have been December 31, 2017. Under the applicable two-year statute of limitations, Plaintiff had until December 31, 2019, to file her claim. However, Plaintiff did not file a Title IX claim until she filed her Complaint on March 22, 2023, over three years too late. Because the statute of limitations bars her Title IX claim (Count 4), the Court should dismiss it.

C. Plaintiff fails to state a claim for sexual harassment, hostile work environment, and retaliation under Title VII (Counts 1-3).

Plaintiff’s Title VII claims are bare bones, conclusory, and fail to state a claim for sexual harassment, hostile work environment, and retaliation.

1. Sexual Harassment and Hostile Work Environment Under Title VII

To state a claim for sexual harassment under Title VII, a plaintiff must allege: “(1) that the employee belongs to a protected class; (2) that the employee was subject to unwelcome sexual harassment; (3) that the harassment was based on [sex]; and (4) that the harassment affected a ‘term, condition, or privilege’ of employment.” *See E.E.O.C. v. Boh Bros. Const. Co.*, 731 F.3d

444, 453 (5th Cir. 2013). Similarly, to state a claim for hostile work environment under Title VII, “the plaintiff must show that: (1) the victim belongs to a protected group; (2) the victim was subjected to unwelcome harassment; (3) the harassment was based on a protected characteristic; (4) the harassment affected a term, condition, or privilege of employment; and (5) the victim’s employer knew or should have known of the harassment and failed to take prompt remedial action.”). *Eyob v. Mitsubishi Caterpillar Forklift Am., Inc.*, 745 F. App’x 209, 215 n.2 (5th Cir. 2018), *as revised* (Aug. 10, 2018).

Here, Plaintiff generically alleges that “Defendant subjected Plaintiff to adverse employment actions” without actually identifying any specific adverse employment action or stating how any term, condition, or privilege of her employment with TTU was allegedly affected while she was an employee of TTU prior to her graduation in 2017. *See* Dkt. 1 ¶¶ 65, 124. Similarly, Plaintiff fails to describe how any alleged harassment supposedly affected a term, condition, or privilege of her employment with TTU in 2017 or earlier. Plaintiff’s “formulaic recitation of the elements of a cause of action” is legally insufficient to state a claim for sexual harassment or hostile work environment under Title VII. *See Twombly*, 550 U.S. at 555; *see also Fernandez-Montes*, 987 F.2d at 284 (noting that “conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice”). Thus, the Court should dismiss those claims (Counts 1 and 2).

2. Retaliation Under Title VII

To state a claim for retaliation under Title VII, Plaintiff must allege that “(1) the employee engaged in [an] activity protected by Title VII; (2) the employer took [an] adverse employment action against the employee; and (3) a causal connection exists between that protected activity and the adverse employment action.” *Cooper v. Dallas Police Ass’n*, 278 F. App’x 318, 320 (5th Cir.

2008) (quoting *Brazoria Cnty., Tex. v. E.E.O.C.*, 391 F.3d 685, 692 (5th Cir. 2004) (emphasis omitted) (internal quotation marks omitted).

In this case, Plaintiff makes bare bone, conclusory allegations that Plaintiff “engaged in opposition activity” and that “Defendant took adverse action against Plaintiff that a reasonable employee would consider adverse.” *See* Dkt. 1 ¶¶ 137-38. Again, such a “formulaic recitation of the elements of a cause of action” is legally insufficient to state a claim. *See Twombly*, 550 U.S. at 555; *Fernandez-Montes*, 987 F.2d at 284. Plaintiff has not identified any particular activity that she believes is protected under Title VII, nor when and how she engaged in that activity, nor any alleged retaliatory actions that she believes she experienced while employed at TTU in 2017 and before. Accordingly, Plaintiff fails to state a claim for retaliation under Title VII, and the Court should dismiss that claim (Count 3).

D. Plaintiff fails to state a claim for sexual harassment under Title IX (Count 4).

To state a claim for sexual harassment under Title IX, Plaintiff must allege that the school had “actual knowledge” of sexual harassment and that the school failed to adequately respond. *Doe v. Edgewood Indep. Sch. Dist.*, 964 F.3d 351, 358, 359 (5th Cir. 2020). For a school to “have knowledge, it is not enough that *any* employee knew of the harassment; it must be someone authorized to rectify it.” *Id.* at 359.

Plaintiff fails to allege any facts describing who she believes sexually harassed her, when and what that alleged harassment was, or who at TTU had actual knowledge of any alleged sexual harassment (and what authority that individual may have had to address it). *See* Dkt. 1 ¶¶ 140-46. As with her Title VII claims, Plaintiff’s conclusory and “formulaic recitation of the elements of a cause of action” is legally insufficient to state a claim. *See Twombly*, 550 U.S. at 555; *Fernandez-*

Montes, 987 F.2d at 284. Accordingly, this Court should dismiss Plaintiff’s Title IX claim (Count 4).

E. Plaintiff fails to state a claim for correction of inventorship and patent invalidity against TTU (Counts 8-9).

Even if Plaintiff’s correction of inventorship or declaration of invalidity under § 256 were not barred by Eleventh Amendment immunity (they are), Plaintiff fails to plead facts to state a claim for relief.

To state a § 256 claim, Plaintiff must plead facts supporting her conception (or co-conception) of the particular inventions claimed in the patent. To be an inventor, a person must have contributed to the original conception of the specific idea later claimed in the patent. *Burroughs Wellcome Co. v. Barr Lab’ys, Inc.*, 40 F.3d 1223, 1227–28 (Fed. Cir. 1994). Conception exists only when “a definite and permanent idea of an operative invention, including every feature of the subject matter sought to be patented, is known.” *Sewall v. Walters*, 21 F.3d 411, 415 (Fed. Cir. 1994). To show co-conception, “the qualitative contribution of each collaborator is the key—each inventor must contribute to the joint arrival at a definite and permanent idea of the invention as it will be used in practice.” *Burroughs Wellcome Co.*, 40 F.3d at 1229. Merely talking to inventors about the technology relating to the inventors’ patent does not necessarily make one an inventor. As the Federal Circuit has explained in *Ethicon, Inc. v. U.S. Surgical Corp.*, “[o]ne who simply provides the inventor with well-known principles or explains the state of the art without ever having ‘a firm and definite idea’ of the claimed combination as a whole does not qualify as a joint inventor.” 135 F.3d 1456, 1460 (Fed. Cir. 1998) (citations omitted).

Plaintiff’s threadbare § 256 claims do not identify Plaintiff’s alleged conception or co-conception of the particular subject matter claimed in TTU’s patent, nor do they properly allege collaboration. Plaintiff vaguely alleges that she “made independent conceptual contributions to the

inventions claimed in US Patent No. 11,169,064 (“the ’064 Patent”). Dkt. 1 ¶ 161. And in the background section, she states that the “concept behind the patent application was Dr. Prien’s but Dr. Wells did the hands-on work” and that Plaintiff’s contributions were “innovative.” *Id.* at ¶ 49. She further states that they “often discussed ideas that either of them might consider patentable” and that Dr. Wells brought up the “original concept for using embryo buoyancy to determine embryo sex based on the fact that X chromosomes weight more than Y chromosomes.” *Id.* at ¶ 51.

Plaintiff’s vague allegations do not provide any basis for distinguishing between the allegedly disclosed subject matter and what is claimed in the ’064 Patent. Similarly, Plaintiff does not allege any facts showing that her alleged disclosure was a “clearly defined” disclosure of the ’064 Patent claims. *See Burroughs Wellcome Co.*, 40 F.3d at 1228. Plaintiff’s description of the allegedly disclosed subject matter is insufficient to show how it somehow corresponds to the claimed elements of the ’064 Patent. Thus, the Court should dismiss Counts 8 and 9 for this additional reason.

CONCLUSION

For the foregoing reasons, Defendant TTU respectfully requests that this Court dismiss all of Plaintiff’s claims against TTU in their entirety.

Dated: May 18, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2023, the foregoing *Defendant TTU's Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6)* 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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