

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

CARA WESSELS WELLS,
Plaintiff

v.

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

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

**PLAINTIFF’S OPPOSITION TO INDIVIDUAL DEFENDANTS’
MOTION TO DISMISS**

Plaintiff Cara Wessels Wells submits this Opposition to the Motion to Dismiss the First Amended Complaint of Defendants Samuel Prien (“Dr. Prien”) and Lindsay Penrose (“Dr. Penrose,” and together, “Individual Defendants”) pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6):

I. PRELIMINARY STATEMENT

This dispute originates with the discriminatory and malicious behavior of two TTU professors, Dr. Prien and Dr. Penrose, towards their former student and colleague Dr. Wells. Having made good on their mission to effect lasting harm on Dr. Wells, these two professors now seek full dismissal from this lawsuit based on a patchwork of applicable and inadequate defenses. Contrary to the Individual Defendants’ assertions, Dr. Wells’ complaint adequately alleges her claims, none of which are barred by election of remedies or state immunity. Their motion to dismiss should be denied.

II. FACTS

In 2009, Dr. Wells began her career in animal sciences at TTU. (Amended Compl. Dkt. 19 (“Compl.”) ¶ 32) Early on, Dr. Prien seemed to show an interest in Dr. Wells work. (Compl. ¶ 34) However, as time went on, it became clear that Dr. Prien’s interest was far from scholastic and/or

professional. (Compl. ¶¶ 35, 39, 41, 44, 51) Indeed, with the assistance of his associate Dr. Penrose, Dr. Prien repeatedly coerced Dr. Wells into demeaning and uncomfortable situations. (Compl. ¶¶ 37, 40, 45, 52, 55, 56, 58, 60) As Dr. Prien became increasingly jealous and possessive, Dr. Wells made it clear that she was not interested—and was capable of succeeding on her own. (Compl. ¶¶ 46, 54, 57) In retaliation, Drs. Prien and Penrose made it their mission to harm Dr. Wells career in any way they could, including, but not limited to, taking credit for Dr. Wells' work, interfering in Dr. Wells' career opportunities, and pursuing financial opportunities to which they were not entitled. (Compl. ¶¶ 46, 60, 65-70, 96-104) During her involvement with the school, Dr. Wells reported this behavior to TTU on numerous occasions. (Compl. ¶¶ 105-107) The University failed to investigate, offer any protection, or honor commitments to patents she invented. (Compl. ¶ 107) More egregious still, in June 2022, TTU fired Dr. Wells from her mentorship role and retaliated further by blacklisting Dr. Wells from University and related endeavors. (Compl. ¶ 112). As recently as February 2023, Dr. Prien, fully backed by TTU, has continued to spread false and defamatory lies about Dr. Wells, further harming her reputation in a small community. (Compl. ¶ 117) Defendants actions resulted and continue to result in real harm to Dr. Wells. (Compl. ¶¶ 45, 56, 67, 90, 101-104, 112, 114-115, 117)

On November 11, 2022, 300 days after January 15, 2022, Dr. Wells filed a Charge of Discrimination with the EEOC. (Compl. ¶ 30) On December 22, 2022, the EEOC issued a Notice of Right to Sue. (Compl. ¶ 31) ON March 22, 2023, Dr. Wells filed her original complaint, alleging numerous causes of action against Defendants TTU, Dr. Prien, and Dr. Penrose. (Dkt. 1) On June 22, 2023, Dr. Wells filed her First Amended Complaint (Dkt. 19) On July 6, 2023, TTU moved to dismiss Dr. Wells' Amended Complaint pursuant to Rule 12(b)(6) (Dkt. 24), and Dr. Prien and Dr. Penrose moved to dismiss pursuant to Rule 12(b)(1) and Rule(b)(6) (Dkt. 25). The Court stayed discovery on July 19, 2023. (Dkt. 33)

III. STANDARD OF REVIEW

Defendants seek dismissal pursuant to Rule 12(b)(1). A motion challenging subject matter jurisdiction should only be granted “if it appears certain the plaintiff cannot prove any set of facts that would entitle her to recovery.” *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (citing *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998)).

Defendants also seek dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Such motions to dismiss are “viewed with disfavor” and “rarely granted.”¹ Facts alleged must be accepted as true as well as viewed in the light most favorable to the plaintiff.² While a complaint must state more than conclusions, it “need not contain detailed factual allegations.”³

IV. ARGUMENT

A. Plaintiff's Claims Are Not Barred By Section 101.106(E) Of The Texas Torts Claims Act.

The Individual Defendants assert that the tort claims against them should be dismissed based on Section 101.106(e) of the Texas Torts Claims Act (“TTCA”). That argument is without merit. The Individual Defendants fail to meet their burden, as they must, to establish that the conduct alleged was within the scope of their employment.

Section 101.106 is an election of remedies provision. Section 101.106(e) provides: “If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the government unit.” Section 101.106(f) provides, “[i]f a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only.” “§ 101.106 [of the Texas Tort Claims Act] expressly limits its scope to suits

¹ See *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011).

² *Id.*

³ *Id.*

against ‘an employee of a governmental unit’ and requires dismissal only if it is ‘based on conduct within the general scope of that employee’s employment.’”⁴

In Texas, intentional torts “perpetrated by [an] employee...are not ordinarily within the course and scope of an employee’s authority or employment.”⁵ The TTCA defines “scope of employment” as “the performance of a task lawfully assigned to an employee by a competent authority.”⁶ Texas courts analyzing the scope of employment issue often look to the Restatement (Third) of Agency.⁷ The Restatement states “An employee’s act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.” Restatement (Third) of Agency § 7.07(2). The burden of proof that the complaint alleges conduct objectively within the scope of defendants’ employment rests with the defendants.⁸

In their motion, Individual Defendants put forth *no evidence* that they acted within the scope of their employment in connection with the misconduct alleged by Plaintiff. Therefore, they fail to meet their burden of proof and all tort claims against them should proceed.⁹

Individual Defendants’ failure to even attempt to prove that their tortious misconduct was outside the scope of their employment is unsurprising in light of the allegations:

- Tortious Interference with Contractual Relations (Count 8): Dr. Wells alleges that Dr. Prien’s interference with her contract with Simplot violated his contract with TTU and thus, he was acting in his individual capacity. (Compl. ¶¶ 96-100)

⁴ *Jackson v. Texas S. Univ.*, 997 F. Supp. 2d 613, 633 (S.D. Tex. 2014).

⁵ *Wrenn v. G.A.T.X. Logistics, Inc.*, 73 S.W.3d 489, 494 (Tex. App. 2002) (granting summary judgment on the issue of respondeat superior based on holding that intentional tort was not within scope of employment).

⁶ Tex. Civ. Prac. & Rem. Code § 101.001(5).

⁷ *Alief Indep. Sch. Dist. v. Velazquez*, No. 01-22-00444-CV, 2023 WL 3555495, at *7 (Tex. App. May 18, 2023).

⁸ *Cai v. Chen*, No. 14-20-00588-CV, 2022 WL 2350049, at *2 (Tex. App. June 30, 2022). (stating that in order to prove immunity, defendants must “present conclusive evidence that [Plaintiff’s] suit (1) is based on conduct within the scope of [defendants’] employment with [a governmental unit] and (2) could have been brought against the governmental unit under the Tort Claims Act.”).

⁹ *Id.* at *5.

- Trade Secret Misappropriation (Count 9): Dr. Wells alleges that Dr. Prien's interference with her contract with Simplot violated his contract with TTU and thus, he was acting in his individual capacity. (Compl. ¶¶ 96-100)
- Unjust Enrichment (Count 11): Dr. Wells alleges that Individual Defendants personally benefitted from, *inter alia*, patent inventions and reputational gains which belonged to Dr. Wells. (Compl. ¶¶ 46, 61, 101-103, 115)
- Fraudulent concealment (Count 13): Dr. Wells alleges that Individual Defendants intentionally concealed information with respect to patents on which they are individually part inventors. (Compl. ¶¶ 101-103)
- Defamation per se (Count 14): Dr. Wells alleges that Individual Defendants made false statements regarding intellectual property theft and academic misconduct.¹⁰ (Compl. ¶¶ 56, 91, 102, 104, 112, 117)

A. Sovereign Immunity Does Not Bar Dr. Wells' Claims For Violation Of Section 1983 Equal Protection, Correction Of Inventorship, Or Patent Invalidity.

Individual Defendants argue that sovereign immunity bars Plaintiff's claims for violations of Section 1983 equal protection, as well as for correction of patent inventorship and invalidity. Individual Defendants are incorrect, because (1) the *Ex Parte Young* doctrine applies to the Section 1983 claims and correction of inventorship and invalidity claims.

In the context of suits against government employees, sovereign immunity has several important limitations. As an initial matter, it does not apply with respect to suit against government employees in their individual capacities. In addition, sovereign immunity is limited by important exceptions. One exception, as noted by Individual Defendants, is the *Ex Parte Young* doctrine. This

¹⁰ *Id.* (holding that Defendant failed to meet its burden of proof to show that defamatory statements were made inside the scope of employment); *Minyard Food Stores, Inc. v. Goodman*, 80 S.W.3d 573, 579 (Tex. 2002) (finding that there was no evidence to support jury's finding that defamatory statement was made in the scope of employment).

doctrine provides that “the Eleventh Amendment is not a bar to suits for prospective relief against a state employee acting in his official capacity.”¹¹ “This doctrine has existed alongside ... sovereign immunity jurisprudence for more than a century, accepted as necessary to permit the federal courts to vindicate federal rights.”¹² Courts conduct a “straightforward inquiry” to determine whether *Ex Parte Young* applies, asking whether the complaint (1) alleges “an ongoing violation of federal law”; and (2) “seeks relief properly characterized as prospective.” *Id.* at 255.

Plaintiff’s Section 1983 claim is not barred, because she alleges ongoing violations of federal law and seeks prospective relief in satisfaction of the *Ex Parte Younger* exception. First, Dr. Wells alleges that Individual Defendants continue to violate her rights by, *inter alia*, harming her career opportunities and retaliating against her based on her gender. (Compl. ¶¶ 46, 57-60, 65-70, 100-104, 109, 112-117) Second, Dr. Wells seeks declaratory relief finding that Dr. Prien and Dr. Penrose violated Dr. Wells rights as well as injunctive relief enjoining Dr. Prien and Dr. Penrose from harassing or otherwise discriminating on the basis of her gender. (Compl. ¶ 159)

Plaintiff’s patent inventorship and invalidity claims are also not barred, because she alleges ongoing violations of federal patent law and seeks prospective relief. Dr. Wells alleges that Individual Defendants continue to violate her intellectual property rights because she has been removed or excluded from patents on which she is an inventor. (Compl. ¶¶ 50, 76, 102-103) Dr. Wells seeks prospective equitable relief in the form of either the correction of inventorship on the patent at issue or declaration that the patent is invalid because of her omission as an inventor. (Compl. ¶¶ 160-168) As such, Individual Defendants’ argument based on sovereign immunity fails.

B. Plaintiff’s State Law Claims Are Not Barred By Official Immunity.

The Individual Defendants assert that Plaintiff’s claims are barred by the official immunity doctrine. In support, Individual Defendants argue that Plaintiff’s own allegations establish that

¹¹ *Nelson v. Univ. of Tex. at Dallas*, 535 F.3d 318, 321-22 (5th Cir. 2008); see *Ex Parte Young*, 209 U.S. 123 (1908).

¹² *Va. Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 254-55 (2011) (citation and internal quotation marks omitted).

Individual Defendants were acting within their discretionary duties as professors at TTU. Their argument fails.

“Government employees are entitled to official immunity from suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority.”¹³ It is the state employees’ burden to prove these elements.¹⁴ “Good faith” is a standard of objective reasonableness, which requires that the employee could have believe that his conduct was lawful.¹⁵ If defendant meets that burden, nonmovant must show that no reasonable employee could have thoughts the conduct was reasonable.¹⁶

Individual Defendants are not entitled to official immunity. As an initial matter, Individual Defendants fail to offer any evidence or even allegations in favor of their own affirmative defense that their conduct fulfills any of the three elements of official immunity. Importantly, Individual Defendants do not even state—no doubt because it would be laughable to do so—that they acted in good faith in carrying out their misconduct. Because they fail to offer *anything* to the Court in support of their bid of official immunity, the defense fails. Moreover, Dr. Wells’ allegations make clear that Individual Defendants’ conduct in support of her state law claims was not in good faith. (Compl. ¶¶ 96¹⁷, 46, 61, 76, 101-103¹⁸). Because Individual Defendants fail to meet the good faith requirement of official immunity, the state law claims against them are not barred.

C. Plaintiff Adequately Pleads A Claim For Misappropriation Of Trade Secrets.

To show that a defendant misappropriated a trade secret, Plaintiff must establish: “(a) the existence of a trade secret; (b) a breach of a confidential relationship or improper discovery of the trade secret;

¹³ *Murillo v. Garza*, 904 S.W.2d 688, 690 (Tex. App. 1995), *writ denied* (Nov. 16, 1995)

¹⁴ *Id.*

¹⁵ *Id.* at 690.

¹⁶ *Id.*

¹⁷ Dr. Prien maliciously interfered with a contract to which he was not a party and Dr. Prien intentionally absconded with data from Wells’ research in connection with her own companies in violation of a non-disclosure agreement.

¹⁸ Individual Defendants profited personally from cutting Dr. Wells out of profitable royalties and misuse of her research and other labor and Individual Defendants purposefully concealed information in order to profit at Dr. Wells expense.

(c) use of the trade secret; and (d) damages.”¹⁹ Under the Texas Uniform Trade Secrets Act (TUTSA)²⁰, a trade secret is defined as:

information, including a formula, pattern, compilation, program, device, method, technique, process, financial data, or list of actual or potential customers or suppliers, that: (A) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (B) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.²¹

Plaintiff clearly and adequately alleges that the information subject to her agreement with Simplot was a trade secret because it derived independent economic value and was protected by efforts to keep the information secret. (Compl. ¶¶ 81, 96-98) Dr. Prien improperly acquired the trade secret in breach of his confidential relationship. (Compl. ¶¶ 96-99) Dr. Prien’s submission of the data as support for his abstract qualifies as use of the trade secret, and this use resulted in harm to Dr. Wells. (Compl. ¶¶ 96-100)

D. To The Extent Any Claims Are Dismissed, Plaintiff Requests Dismissal Without Prejudice And Seeks Leave To Amend.

If the Court grants any part of Defendants’ motion (it should not), Dr. Wells requests dismissal without prejudice and seeks leave to amend. Leave to amend is granted freely and courts are biased in favor of granting leave.²² Courts only deny leave where the amendment is a product of undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies, undue prejudice, or futility.²³ None of those factors is met here. Rather, Dr. Wells seeks precautionary leave to amend at the earliest

¹⁹ *Taco Cabana Int’l, Inc. v. Two Pesos, Inc.*, 932 F.2d 1113, 1123 (5th Cir. 1991), *aff’d sub nom. Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 112 S. Ct. 2753, 120 L. Ed. 2d 615 (1992).

²⁰ The Defend Trade Secrets Act (DTSA) definition of a “trade secret” is largely identical to the definition under the TUTSA.

²¹ Tex. Civ. Prac. & Rem. Code Ann. § 134A.002(6) (West Supp. 2013).

²² *Thomas v. Chevron USA, Inc.*, 832 F.3d 586, 590 (5th Cir. 2016) (noting that a formal motion for leave to amend is not required).

²³ *Id.*

opportunity—her opposition to the court’s first-considered motion to dismiss. Wells has only amended her complaint once as of right, and no discovery or other process has yet taken place to arguably prejudice Defendants. As argued herein, Dr. Wells’ claims have merit. However, to the extent any claims are ruled insufficiently pleaded, the opportunity to amend at this early stage is appropriate. For these reasons, if the Court dismisses any of Dr. Wells’ claims, leave to amend should be granted.

I. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants’ motion to dismiss. To the extent the court grants dismissal of any claim, Plaintiff respectfully requests, for the reasons specified herein, that the Court grant such dismissal without prejudice and with leave to amend.

Dated: August 3, 2023

Respectfully submitted,

**BREWER, ATTORNEYS &
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on all counsel of record on August 3, 2023, via the court's electronic filing system.

/s/ William A. Brewer, IV

WILLIAM A. BREWER IV