

**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

**DEFENDANT TEXAS TECH UNIVERSITY’S REPLY TO ITS MOTION
DISMISS PLAINTIFF’S FIRST AMENDED COMPLAINT PURSUANT
TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6)**

TO THE HONORABLE JAMES WESLEY HENDRIX:

Defendants Texas Tech University (“TTU” or the “University”) files Defendant Texas Tech University’s Reply to its Motion to Dismiss Plaintiff’s First Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(B)(6). This Court should dismiss Plaintiff’s Title VII and Title IX claims as a matter of law.

1. Plaintiff’s Title VII claims are time-barred and should be dismissed as a matter of law.

Plaintiff has the burden of pleading sufficient facts to show that her Title VII claims are not time-barred, and she has failed to meet that burden.

a. Wells has not been a TTU employee since 2017, and her Title VII claims are time-barred.

Despite Plaintiff’s valiant efforts at trying to transform the Hub mentorship role into an “employee” position, her allegations fail to support these assertions and legal conclusions.

Importantly, the Fifth Circuit has adopted the threshold-remuneration test to determine whether allegations support an individual being a volunteer or an employee within the meaning of

Title VII. *Juino v. Livingston Parish Fire District No. 5*, 717 F.3d 431, 435 (5th Cir. 2013) (relying on *O'Connor v. Davis*, 126 F.3d 112, 113 (2d Cir. 1997) and *Graves v. Women's Pro. Rodeo Ass'n, Inc.*, 907 F.2d 71, 72 (8th Cir. 1990)). The threshold-remuneration test is “a two-step inquiry [] requiring that a volunteer first show remuneration as a threshold matter before proceeding to the second step—analyzing the putative employment relationship under the common law agency test.” *Juino*, 717 F.3d at 435. “Remuneration may consist of either direct compensation, such as a salary or wages, or indirect benefits that are not merely incidental to the activity performed.” *Id.*

In *O'Connor*, the Second Circuit found that plaintiff was not an “employee” because the plaintiff “did not receive remuneration such as a salary, wages, health insurance, vacation, or sick pay.” *O'Connor*, 126 F.3d at 116. The Eighth Circuit similarly found no employer-employee relationship when “no compensation [was] made, only prize money [was] won.” *Graves*, 907 F.3d at 73. The *Graves* court relied on the dictionary definition of “employee”:

an employer is someone who pays, directly or indirectly, wages or a salary or other compensation to the person who provides services—that person being the employee. Compensation by the putative employer to the putative employee in exchange for his services is not a sufficient condition, but it is an essential condition to the existence of an employer—employee relationship.

Id.

Plaintiff argues that she alleges facts that “establish an employment relationship with TTU during her time as a mentor.” Dkt. 35 at 4. She claims that executing a mentor agreement, undergoing interviews and background checks, onboarding procedures, and a photo on the TTU website establish Wells as an “employee.” *Id.*; see Dkt. 19 ¶¶ 108-110. Wells also asserts that the “Accelerator Hub was used to transform mentors into full-time roles or partnerships, which Dr. Wells alleges she anticipated pursuing.” Dkt. 35 at 4; Dkt. 19 ¶ 111.

Those are the extent of the allegations that Plaintiff claims establish her as an “employee” when she was a Hub mentor in 2022. Nowhere in her lengthy complaint does she allege even one fact that would suggest that she received any remuneration for her time as a Hub mentor. Dkt. 19. She never alleges she was paid any salary or wages or was eligible for health or workers’ compensation benefits. *Id.* Nor does she allege she received vacation or sick time. *Id.* Under *Juino*, a photo on the TTU website would not be considered an incidental benefit let alone remuneration. *Juino*, 717 F.3d at 435. As such, Wells completely fails the first step of the threshold-remuneration test.

Furthermore, the Fifth Circuit never recognized “potential future employment” as remuneration or even an incidental benefit. The reason is likely that future employment is so speculative that it can hardly be considered a present benefit. This Court should find that Wells fails the first step of the threshold-remuneration test and that she was a volunteer mentor in 2022 for the Accelerator Hub.

Plaintiff cites to three non-binding cases that are quite distinguishable and inapposite. In *Karns v. McDonough*, the plaintiff had worked for the VA for 3 years. 580 F.Supp.3d 398, 403 (W.D.Tex. 2022). She subsequently accepted a position as Clinical Research Coordinator for the Central Texas Veterans Research Foundation (“Foundation”) and was paid and received benefits from the Foundation. *Id.* She also held a “without compensation” position with the VA. *Id.* Applying the threshold-remuneration test, the district court found that she was an “employee” despite one of her two roles being a “without compensation” role. *Id.* at 405. The Court found that “Plaintiff, on the other hand, did not work for free. While her position with the VA was ‘without compensation,’ she received pay and benefits from the Foundation to work in a VA facility ‘under the direction and supervision of the VA.’” *Id.*

In *Bitterman v. Zinke*, the volunteers were “Campground Hosts” in a national park who were paid \$20 per day for their services, working 8:30 a.m. to 4:30 p.m. five days per week. 371 F.Supp.3d 974, 976, 981 (D.N.M. 2019). They were eligible for workers’ compensation benefits and received free parking valued at \$15 per day and received free utilities. *Id.* at 981. The court found that “it is plausible that the benefits afforded to Plaintiffs in return for their volunteer work could be considered remuneration” and that Plaintiffs were “employees” under Title VII. *Id.* at 983.

The Colorado District Court found that firefighters who were not paid but received many benefits were “employees.” *Johnston v. Espinoza Gonzalez*, 2016 WL 7188524 *6 (D. Colo. Dec. 12, 2016). Some of the benefits included workers’ compensation, funeral benefits, death benefits, reimbursement of pre-approved expenses, off-site travel, tuition benefits, and uniforms. *Id.* The Court found that “these benefits could constitute substantial remuneration sufficient to establish an employer-employee relationship under Title VII.”

Karns, *Bitterman*, and *Johnston* demonstrate that remuneration means actual benefits akin to receiving wages, salary, parking, or funeral benefits. Remuneration means benefits that have actual value in the present whereas Wells offers allegations that do not even rise to the incidental benefits.

Accordingly, because Plaintiff alleges that she graduated from TTU with her PhD in 2017 and ended her work as a graduate assistant at that time, the latest that Wells could have been an employee with TTU based on her pleadings is December 31, 2017. Dkt. 19 ¶ 64.

b. Plaintiff’s Title VII hostile work environment claim is time-barred, and the ongoing violation rule does not apply.

Plaintiff is incorrect in her assertion that the “ongoing violation” rule applies to her Title VII hostile work environment claim. The “ongoing violation” rule states that “[p]rovided that an

act contributing to the claim **occurs within the filing period**, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.” *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002) (emphasis added). The Supreme Court held that “[a] charge alleging a hostile work environment claim [] will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and **at least one act falls within the time period.**” *Id.* at 122. (emphasis added).

Plaintiff fails to allege that even one act that would rise to the level of hostile work environment took place within the 300-day limitations period as required by Title VII. Dkt. 19.¹ Because Wells alleged that the last time she was an employee of TTU as a graduate assistant was in 2017, 300 days after December 31, 2017, was October 27, 2018. Dkt. 19 ¶ 64. Wells’ time ran out on October 27, 2018. Given that Plaintiff has not been an employee since 2017 and that her limitations period ended in October 2018, Plaintiff fails to allege that at least one hostile work environment act falls within the *timely* filing period. The ongoing violation rule does not apply to Wells. Accordingly, her Title VII claim hostile work environment claim fails as a matter of law.

c. Plaintiff’s Title VII retaliation should be dismissed as the “former” employer rule does not alleviate her burden of filing an EEOC charge within 300 days of an alleged discriminatory act.

Wells mistakenly claims that because TTU is a “former employee” that she is excused from following the Title VII statutory rule of filing withing 300 days of any alleged discrimination. Dkt. 35 at 5. While the Supreme Court has recognized that the term “employee” under Title VII includes “former employees,” it did not hold that an “employee” or “former employee” need not file an EEOC charge within the statutory time limit of 300 days from the alleged discriminatory act.

¹ “[A] Title VII claim is timely under 42 U.S.C. § 2000e–5(e)(1) if it is filed within either 180 days or 300 days of the alleged discriminatory act.” *Niwayama v. Texas Tech Univ.*, 590 F. App’x 351, 355 (5th Cir. 2014).

Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997); *see also Fort Bend Cnty., Tex. v. Davis*, 139 S. Ct. 1843, 1846 (2019).

Plaintiff's other cited case is similarly unhelpful. In *Allen v Radio One of Texas II, L.L.C.*, the Fifth Circuit found that a former employee who filed an EEOC retaliation charge before being the alleged retaliatory act (termination) occurred was not a Title VII violation. 515 F. App'x 295, 302 (5th Cir. 2013) ("the contrary conclusion would constitute an impermissible extension of Title VII's protections"). Plaintiff's Title VII retaliation claim should therefore be dismissed.

2. Plaintiff's Title IX claims are time-barred and should be dismissed as a matter of law.

Plaintiff incorrectly claims that her employment status, which is also time-barred, controls her Title IX claim. Dkt. 35 at 6. It does not. Again, Plaintiff also has the burden of pleading sufficient facts to show that her Title IX claim is not time-barred, and she has failed to meet that burden. Nor has Wells provided any legal authority that recognizes a Title IX claim is viable outside the two-year statute of limitations. *King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 759 (5th Cir. 2015). Since Plaintiff alleged that she has not been a TTU student since 2017 when she graduated with her PhD, her claim is time-barred and should be dismissed. Dkt. 19 ¶ 64.

3. Wells fails to state a claim for all her Title VII claims.

Plaintiff fails to state a claim for sexual harassment, hostile work environment, or retaliation. All three Title VII claims fall short because she has not alleged that she has been an "employee" of TTU since 2017. Dkt. 19. Five years later, the facts remain the same. Plaintiff has not alleged the crucial element of all her Title VII claims, that she had formed an employer-employee relationship with TTU within the statute of limitations.

Therefore, because Wells has not alleged the essential factual element for all three Title VII claims, being an “employee” under Title VII, she fails to state a claim for sexual harassment, hostile work environment, and retaliation. All three claims should be dismissed.

4. Plaintiff also fails to state a claim for Title IX.

Wells also fails to allege who at TTU had actual knowledge of any alleged sexual harassment. *See Doe v. Edgewood Indep. Sch. Dist.*, 964 F.3d 351, 358, 359 (5th Cir. 2020). Plaintiff alleges that she reported the alleged conduct to Mark Sheridan in the fall of 2020, outside the statute of limitations for a Title IX claim. Dkt. 19, ¶ 106. Wells alleges that Dr. Sheridan is the Vice Provost for Graduate and Postdoctoral Affairs and Dean of the Graduate School, not a staff member working in the Office of Civil Rights. Accordingly, Plaintiff fails to state a claim for Title IX, and this claim should be dismissed.

CONCLUSION

For all the foregoing reasons, Texas Tech University respectfully requests that this Court grant Defendant Texas Tech University’s Reply to its Motion to Dismiss Plaintiff’s First Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(B)(6) and dismiss all of Plaintiff’s claims against Texas Tech University in their entirety.

August 15, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2023, the foregoing *Defendant Texas Tech University's Reply to its Motion to Dismiss Plaintiff's First Amended Complaint Pursuant to Federal Rule of Civil Procedure 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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