UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LINDA SUSAN MULLENIX, *Plaintiff*,	§	
v.	§	CASE NO. 1:19-CV-1203-LY
UNIVERSITY OF TEXAS AT AUSTIN, *Defendant*.	§	

THE UNIVERSITY OF TEXAS AT AUSTIN'S MOTION TO DISMISS RE-URGED CLAIMS OF RETALIATION

The University of Texas School of Law[1] awards pay raises to faculty based on its Budget Committee's annual process of peer review. After hours reviewing the performance of every tenured member of the faculty, that Committee (composed of both men and women) has consistently recommended raises for Linda Mullenix—bringing her current salary to $337,418 for the 2019-2020 academic year. Mullenix brings this suit to object to the size of those raises because she has a higher opinion of her work than her colleagues do. This Court has already once dismissed Mullenix's attempts to claim retaliation as "merely alleg[ing] a list of retaliatory acts without providing a date or any connective facts."[2] In her Amended Complaint, Mullenix re-urges many of those same complaints and fails to connect any of her allegations to a legally cognizable claim of retaliation. As such, those claims fail once again.

[1] While The University of Texas at Austin is the true defendant in this action, the facts giving rise to this action originate at the School of Law. For simplicity's sake, references to the Law School encompass UT Austin as well.

[2] ECF 18 at 4.

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INTRODUCTION

The Law School's judgments about Mullenix's recent performance and compensation are professional, appropriate, and made through fair and sound procedures. Through its evaluation-by-committee process, high performing faculty of both genders have historically received considerable raises. Mullenix even affirmatively pleads that at least eight female professors received larger raises than the male professors that she takes aim at in this case—raises that put many of these women into the upper tier of compensation.

If this is how salary decisions are made, why are those decisions being challenged? Mullenix simply finds it incredible and unacceptable that she has received smaller raises than some colleagues to whom she feels she is equivalent or superior in ability. She therefore infers that there must be an invidious explanation.

As was the case with her Original Complaint, several of Mullenix's claims in her Amended Complaint fail at the pleading stage. Mullenix largely repeats her prior allegations—many of them verbatim—that this Court has already dismissed. This motion will, in kind, largely repeat the arguments that led to the earlier dismissal.

First, the Amended Complaint yet again fails to set out a plausible retaliation claim under either Title VII or the Equal Pay Act. In several instances, it fails to allege acts rising to the level of a materially adverse employment action. In others, it fails to sufficiently set out facts demonstrating causation.

Second, many of Mullenix's alleged acts of retaliation are time-barred or released. Mullenix is attempting to recover under Title VII for retaliation that allegedly occurred as far back as 1994. However, all acts that allegedly occurred

before May 11, 2018 are untimely because they fall outside the 300-day window preceding her charge of discrimination. Additionally, she complains of alleged acts that occurred prior to the two-year statute of limitations associated with her Equal Protection Act claim and alleged acts that occurred before she released her right to *any* claim prior to 2016. This Court should dismiss these belated claims and issue an order making it clear that she cannot recover for any claim that accrued prior those dates.

The University of Texas at Austin now respectfully asks this Court to dismiss any retaliation claim under Title VII or the Equal Pay Act as well as any untimely claim.

BACKGROUND

Mullenix alleges that in 2010 she first learned that some of her male colleagues made more money than her.[3] Armed with this information and using the threat of litigation, she extracted a $20,000 raise; $10,000 in attorney's fees; and a $250,000 "forgivable" loan from the Law School.[4] This loan was "forgivable" because she was not required to pay it back.[5] In exchange for this package, she released all her claims based on the pay differences existing at that time.[6]

[3] *See* Plaintiff's First Amended Complaint & Jury Demand (hereinafter "Complaint") at ¶¶ 24–30.

[4] *Id.* at ¶¶ 34–35.

[5] *Id.* at ¶ 35.

[6] *Id.* at ¶¶ 35-36. Notably, the Promissory Note also required Mullenix to execute an annual release from 2012-2020 in order to avoid her obligation to pay back the $250,000.

In 2016, Mullenix, again dissatisfied with her pay, went back to the same playbook.[7] This time she got $16,000.[8] And, again, knowing that this extra money would not make her salary on par with her purported comparator's salary, she agreed to her then-adjusted salary and released all her claims related to the existing salary structure.[9]

Despite this second release, Mullenix commenced this lawsuit.[10] She fixates on the same comparator and compares the raises they each received during the period of 2017–2019.[11] She not only seeks to recover the difference in raises, but she also wants to recover based on the underlying difference in salaries that existed when she released her claims in 2016.[12]

She does not stop there. She then tries to scrape together stray comments, insufficient airtime on the law school website, denial of a seat on the University's private plane, and other examples of her hurt feelings in the hopes of cobbling together a retaliation claim.[13] She also strangely alleges that giving other female professors larger raises than her purported comparator somehow equates to retaliation and gender discrimination against *her*.[14]

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[7] *Id.* at ¶¶ 43-44.
[8] *Id.*
[9] *Id.* at ¶ 45.
[10] *See generally id.* at ¶¶ 1-154.
[11] *See generally* id. at ¶¶ 47-122.
[12] *Id.* at ¶ 67.
[13] *See generally id.* at ¶¶ 102-108.
[14] *Id.* at 117.

APPLICABLE STANDARDS OF REVIEW

This motion is analyzed under Fed. R. Civ. P. 12(b)(6).[15] Such a motion hinges on whether the plaintiff pled a "plausible" (as opposed to just a "possible") claim for relief—*i.e.*, whether the plaintiff pled "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[16] If "a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'"[17]

ARGUMENT

1. Mullenix's Amended Complaint merely repackages speculation, subjective beliefs, and conclusory allegations that this Court has already dismissed.

To state a retaliation claim, Mullenix must allege facts showing: (1) that she engaged in protected activity; (2) she suffered an adverse employment action; and (3) that but-for causation exists between the protected activity and the adverse employment action.[18] Those are required elements for Mullenix's retaliation claim under both Title VII and the Equal Pay Act.[19]

Mullenix largely repeats allegations that this Court has already held as "insufficient" to support a claim of retaliation.[20] As in her Original Complaint, she claims that she suffered the following:

- She gets assigned to "do-nothing committees;"

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[15] *See Anderson* v. *Valdez*, 845 F.3d 580, 589 (5th Cir. 2016).
[16] *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009).
[17] *Id.* (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007)) (quotations omitted).
[18] *Fabela* v. *Socorro Indep. Sch. Dist.*, 329 F.3d 409, 414 (5th Cir. 2003), *overruled on other grounds by Smith* v. *Xerox Corp.,* 602 F.3d 320, 338 (5th Cir. 2010).
[19] *See Wiley v. Am. Elec. Power Serv. Corp.*, 287 F. App'x. 335, 339 (5th Cir. 2008) (per curiam).
[20] ECF 18 at 4.

- She has not been appointed Associate Dean of Research or assigned to the Budget Committee;
- New faculty are told not to interact with her because she is "poison" due to her prior complaints;
- She has never been awarded university or law-school awards;
- She is held out as an example of what happens when a faculty member complains;
- She has been described as someone who causes problems for the University.

Mullenix repeats those claims in her Amended Complaint despite this Court previously dismissing her retaliation claims because she failed to "provid[e] a date or any other connective facts."[21]

Certainly, Mullenix's laundry list of general grievances in her Amended Complaint is now longer. But it does not cure the deficiencies identified by the Court. First, Mullenix does not solve the temporal problems with many of her allegations. As this Court acknowledged, the "alleged adverse compensation occurred nearly two years after Mullenix's 2016 settlement."[22] ECF 18 at 3. As such, "the timing is not close enough to permit a plausible inference that her low compensation was causally connected to her reporting of equal-pay violations at the law school."[23]

Mullenix further fails to plead facts that could plausibly give rise to a causal connection between her 2016 settlement or her March 7, 2019 charge and the allegedly retaliatory acts of her not winning a teaching award, getting assigned to

[21] *Id.*
[22] *Id.* at 3.
[23] *Id.* at 4; *see also See Swanson v. Gen. Servs. Admin.*, 110 F.3d 1180, 1188 (5th Cir. 1997); *see also Benfield v. Magee*, 945 F.3d 333, 338 (5th Cir. 2019) (explain that a plaintiff's burden is to "bridge th[e] gap with a chronology of events that permits such an inference" of causation).

committees that she subjectively thinks are not good enough, and receiving lower raises than other employees. While this Court must accept well-pleaded facts as true and view them in the light most favorable to her, "a legal conclusion couched as a factual allegation" need not be accepted as true.[24] "Gauzy allegations that offer only 'labels and conclusions' or 'naked assertion[s] devoid of further factual enhancement' do not suffice" under the 12(b)(6) plausibility standard.[25]

Take, for instance, one of her new claims: that her alleged professional accomplishments have been inadequately "publicized by the law school on its webpage."[26] She fails to plead that being "invited as a speaker" is the type of information that the law school typically publishes on its website, where it should have been published on its website and for how long, and who made the decision not to publish that alleged accomplishment of Mullenix. Nor does she plead whether the decision-maker even knew she had previously complained about her pay. She pleads no facts beyond her subjective belief to allege that this was done in retaliation.

The same is true for her allegation that, since filing her charge of discrimination, she has been "intentionally excluded from specific aspects of institutional life."[27] ECF 25 ¶ 117. Despite her claim of specificity, she provides no examples of who decided to exclude her, whether that person knew of her prior claims of discrimination, when those exclusions occurred, whether she was qualified to

[24] *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 268 (1986)).
[25] *Doe* v. *McKesson*, 945 F.3d 818, 841 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part) (citing *Edionwe* v. *Bailey*, 860 F.3d 287, 291 (5th Cir. 2017)).
[26] ECF 25 ¶ 117.
[27] *Id.*

participate in such events, or whether those alleged exclusions occurred because of her prior reports of discrimination.

The same questions plague her committee placements, teaching awards, and the decisions to pay others more. Instead of pleading facts to connect the causal dots between these actions and her charge of discrimination, Mullenix relies on threadbare recitals and legal conclusions—leaving this Court to guess whether it is plausible that these acts were connected to protected activity. She must at least lay out enough "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[28] Because her Amended Complaint is devoid of well-pleaded factual allegations on causation, it falls short of plausibility and therefore fails to set out a cognizable claim for relief.

Second, to be actionable, the act in question must be of the type that "a reasonable employee would have found . . . materially adverse, which in this context, means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[29] Stray comments and the employee's own perception of feeling ostracized, do not "[a]s a matter of law . . . rise to the level of material adversity but instead fall into the category of petty slights, minor annoyances, and simple lack of good manners that the Supreme Court has recognized are not actionable retaliatory conduct."[30]

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[28] *Iqbal*, 556 U.S. at 678.

[29] *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 68 (2006) (quotation omitted).

[30] *Stewart* v. *Miss. Transp. Comm'n*, 586 F.3d 321, 331-32 (5th Cir. 2009) (quotation omitted); *Aryain* v. *Wal-Mart Stores Tex. LP*, 534 F.3d 473, 484-85 (5th Cir. 2008) (allegations of being treated poorly and rudely are not enough as a matter of law to state a retaliation claim); *King* v. *La.*, 294 F. App'x. 77, 85 (5th Cir. 2008) (per curiam) ("allegations of unpleasant work meetings, verbal reprimands, improper work requests, and unfair treatment do not constitute actionable adverse

Furthermore, Dean Farnsworth offering her a pay increase in exchange for her eventual retirement is likewise insufficient.[31] No reasonable person would view being offered nearly $400,000 a year for two years as materially adverse. Mentioning retirement does not transform this settlement discussion into a materially adverse act. Courts have held that much more egregious statements, even those about "getting rid" of an employee because they were "creating problems," fall short.[32] Nothing here even comes close to that.

Similarly, Mullenix's complaints about not being allowed on a private plane, not being featured on the website enough, not being chosen for a keynote address at a conference, the decision to give large raises to other female faculty, and her blaming her colleagues for her not getting jobs at other schools fall into the category of bruised ego—not actionable retaliation.

2. Many of the alleged retaliatory acts are untimely and released.

Mullenix, like all other plaintiffs asserting a Title VII claim, must exhaust her administrative remedies before pursuing these claims in federal court.[33] This exhaustion requirement was met for some of her claims when she filed her charge of discrimination with the EEOC on March 7, 2019, and received a notice of right to sue

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employment actions" for retaliation claims); *Muniz* v. *El Paso Marriott*, 773 F. Supp. 2d 674, 682 (W.D. Tex. 2011) (ostracism by fellow employees is not a materially adverse employment action that constitutes retaliation).

[31] This interaction, on the face of Mullenix's pleading, appears to be an inadmissible settlement discussion, as it occurred after she filed her 2019 charge with the EEOC. As such, it cannot be a basis for her to claim retaliation.

[32] *See*, *e.g.*, *Holloway* v. *Dept' of Veterans Affairs*, 309 F. App'x 816, 819 (5th Cir. 2009) (per curiam) (listing examples of workplace encounters that do not rise to the level of a materially adverse action).

[33] *Taylor* v. *Books A Million, Inc.*, 296 F.3d 376, 378-79 (5th Cir. 2002).

thereafter.[34] However, in a deferral state such as Texas, she had to file this charge within 300 days from the date of the occurrence of the act that supports her claim.[35] And this 300-day lookback period applies not only to purported employment discrimination acts, but also to retaliation acts.[36]

Here the applicable cutoff is May 11, 2018—300 days prior to her March 7, 2019 charge. However, the Amended Complaint now includes alleged retaliatory acts that fall outside this window. For instance, she claims that in 2015, she was denied a seat on the University's private plane to attend a funeral. Also, she claims that in 2012, Dean Farnsworth made comments about her. These alleged occurrences fall outside of the 300-day window prior to the charge of discrimination and are without a doubt untimely.

Additionally, Mullenix admits that she released all her claims under the Equal Pay Act and Title VII accruing prior to December 2016. And any Equal Pay Act claims prior to December 12, 2017, are barred by the statute of limitations and sovereign immunity.[37]

Accordingly, this Court should issue an order making it clear that she cannot recover for anything that occurred prior to May 11, 2018.

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[34] *Id.*

[35] *Sosa* v. *Guardian Indus. Prods.*, No. H-06-1614, 2007 WL 1300463, at *2 (S.D. Tex. May 3, 2007) (citing *Chapman* v. *Homco, Inc.*, 886 F.2d 756, 758 (5th Cir. 1989) (per curiam); *Merrill* v. *S. Methodist Univ.*, 806 F.2d 600, 604-05 (5th Cir. 1986)).

[36] *See Eberle* v. *Gonzales*, 240 F. App'x 622, 626 (5th Cir. 2007) (per curiam) (requiring employee to exhaust his administrative remedies before raising retaliation claim under ADEA, where alleged retaliation occurred before employee filed discrimination charge with EEOC).

[37] 29 U.S.C. § 255(a).

CONCLUSION

For all the reasons stated above, The University of Texas at Austin respectfully requests this Court dismiss the Title VII retaliation and Equal Pay Act retaliation claims for failure to state a claim.

AFFIRMATIVE DEFENSES

While the filing of a motion to partially dismiss suspends the time for filing an answer and while they are not the crux of this Motion,[38] The University of Texas at Austin, in an abundance of caution, asserts the following defenses herein to ensure they are preserved moving forward:

- Mullenix has released all or part of her claims;
- The business decisions made related to Mullenix were unrelated to gender and would have occurred regardless of any alleged protected activity;
- Pay decisions at the Law School are made pursuant to a system based on merit and quality of performance, not gender or any other impermissible basis;
- Mullenix has failed to properly exhaust her administrative remedies; and
- Mullenix's claim(s) are barred in whole, or in part, by the applicable statute of limitations.

The University of Texas at Austin reserves the right to amend or supplement these affirmative defenses as this case proceeds.

[38] *See* 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1346 n.18 (3d ed. 2019).

January 8, 2021

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent by electronic notification through ECF by the United States District Court, Western District of Texas, Austin Division, on January 8, 2021, to the following.

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