IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JANE DOE NO. 1, JANE DOE NO. 2, AND JANE DOE NO. 3, PLAINTIFFS, v. TEXAS CHRISTIAN UNIVERSITY, DR. DIANE SNOW, DR. ANDREW SCHOOLMASTER, DR. ROB GARNETT, DR. DARRON TURNER, RUSSELL MACK, J.D., LEIGH HOLLAND and AARON CHIMBEL, DEFENDANTS.	§ § § § § § § § § § § § § §	CIVIL ACTION NO. 3:20-cv-00106-M

DEFENDANTS' RESPONSE AND BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Pursuant to the Court's Order [Doc. 41], Defendants file this response and brief in opposition to Plaintiffs' Motion for Leave to File Third Amended Complaint.

I. INTRODUCTION

On January 15, 2020, Plaintiff Jane Doe No. 1 ("Doe 1") filed her original complaint against TCU and other individual defendants. On March 23, 2020, all defendants named in the original complaint filed motions to dismiss. Rather than respond to those motions, on April 13, 2020, Doe 1 filed her first amended complaint and added plaintiffs Jane Doe No. 2 ("Doe 2") and Jane Doe No. 3 ("Doe 3") and Andrew Schoolmaster and Leigh Holland as defendants. On May 20, 2020, Defendants filed motions to dismiss the first amended complaint. On June 10, 2020, the parties filed their Joint Report [Doc. 37]. In the Joint Report, Plaintiffs disclosed there was a

"reasonable likelihood" that other plaintiffs might be added to the suit. [Doc. 37, ¶ 2, p.18]. In an emerging pattern, Does 1, 2 and 3 failed to respond to the Defendants' motions to dismiss; instead, later that same evening, they filed their second amended complaint adding Jane Doe No. 4 ("Doe 4") and Jane Doe No. 5 ("Doe 5") as plaintiffs. On June 15, 2020, the Court struck the second amended complaint. [Doc. 39]. Plaintiffs now seek leave to file their third amended complaint adding Does 4 and 5 and their respective new claims, which Defendants oppose. [Doc. 40]. Plaintiffs' motion offers no valid arguments that this amendment is proper under Rule 15. They also fail to adequately analyze how Does 4 and 5 are properly added under Rule 20, which governs permissive joinder. Although this case has been on file for over five months, Plaintiffs have adroitly avoided having to meaningfully respond to Defendants' motions to dismiss. Denying the motion for leave will allow the case to go forward and focus on the merits of the suit. Conversely, granting leave to amend for a third time, thereby allowing Does 4 and 5 to pursue their unrelated claims, will result in undue prejudice to the Defendants, cause unnecessary delay of the case and would ultimately be futile. Plaintiffs' motion should be denied.

II. STANDARD OF REVIEW UNDER FED. R. CIV. P. 15

While leave to amend a complaint should be granted when "justice so requires," the trial court has discretion to deny it and take into account any prejudice suffered by the opposing party. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). Pleadings may be amended once as a matter of course before a responsive pleading is served and thereafter, only by leave of court. FED. R. CIV. P. 15(a). But leave "is by no means automatic." *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993). Factors the court may consider when deciding to grant leave to file an

amended pleading include undue delay, bad faith, dilatory motive, failure to cure deficiencies, undue prejudice to the opposing party and futility of amendment. *Id*. Leave to amend should be denied when it might cause "undue prejudice to the opposing party…," or when the amendment would be futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

III. ARGUMENT AND AUTHORITIES

Allowing joinder of Does 4 and 5's unrelated claims will unfairly prejudice the Defendants, protract the litigation, over-complicate and expand the scope of discovery and adversely impact the trial.

Rather than proceed to the merits, Plaintiffs seem more interested in burying Defendants in additional claims, including those of Does 4 and 5, whose factual allegations are entirely unrelated to those of Does 1, 2 and 3. If a proposed amendment would complicate a case by adding parties or issues that expand the scope of the litigation, it unduly prejudices the nonmovant. *Ross v. Houston Indp. Sch. Dist.*, 699 F.2d 218, 229 (5th Cir. 1983); *Davis v. U.S.*, 961 F.2d 53, 57 (5th Cir. 1991). An amended complaint that seeks to join new parties and adds new factual allegations to an already complicated case will increase the cost and complexity of discovery, undermine potential defensive strategies, and will inevitably delay an efficient resolution of the dispute. *Ross*, 699 F.2d at 229, (holding that adding new parties and claims would prejudice the nonmovants, reasoning that the amended complaint would require new discovery, additional hearings, and, likely, more appeals and that the proposed new plaintiffs could file a separate lawsuit); *Davis*, 961 F.2d at 57[1].

[1] In *Davis*, the district court refused to allow the plaintiff to join new parties to the suit finding it would be prejudicial to the defendant as it would have "complicated the district court proceedings, as well as the [defendant's] ability to prepare a case which initially involved fewer parties."

Allowing the Plaintiffs to join Does 4 and 5 into an existing suit necessarily implicates and requires an analysis of Rule 20. Plaintiffs must show that the claims of Does 4 and 5 are properly joined and they arise "out of the same transaction, occurrence, or series of transactions or occurrences"; and a "question of law or fact common to all plaintiffs will arise in the action." FED. R. CIV. P. 20(a)(1). The allegation that Does 4 and 5 allege similar federal discrimination claims against TCU does not satisfy the rule for permissive joinder. *See Coughlin v. Rogers*, 130 F.3d 1348, 1351 (9th Cir. 1997)(mere fact that claims of added parties arise under the same law "does not necessarily establish a common question of law or fact.") Plaintiffs' motion is completely devoid of any analysis evidencing that the claims of Does 4 and 5 arise out of the same transaction or occurrence. Rather, they simply conclusory allege that their "claims are substantially similar" to those of Does 1, 2 and 3. [Doc. 40, p. 2]. To arise out of the "same transaction…" generally means to arise out of a "common nucleus of operative facts," or the same event. *Finley v. U.S.*, 490 U.S. 545, 547 (1989) (abrogated by Pub.L. 101–650 on other issues). When claims involve the actions of different people at different points in time, they do not normally arise out of the same transaction. If the claims of a plaintiff seeking to be added to an action involve different locations, different people, decision-makers or periods of time, they are normally not part of the same transaction. *See generally Acevedo v. Allsup's Convenience Stores, Inc.*, 600 F.3d 516, 522 (considering these factors to settle the question of joinder).

The following examples show the wide disparity of the factual differences of the claims of Does 4 and 5 and demonstrate that Plaintiffs cannot satisfy the test under Rule 20(a)(1). Doe 4 and 5's claims are completely different from those of Does 1, 2 and 3. Doe 1's claims primarily revolve around her Washington D.C. summer program

occurring in July 2019. Doe 2's case arose in April 2018. It is an inadvertent touching case, alleged to be a sexual assault claim, that has no relationship to the claims of Does 4 and 5. Does 1 and 3 allege claims of disability discrimination. Does 4 and 5 make no claims of disability discrimination or sexual harassment. Does 1, 2 and 3 are or were undergraduate students. Does 4 and 5 are graduate students. [Doc 40-1, ¶¶169, 172-173]. Doe 1 is (and Does 2 and 3 were) in the Honors College. Does 4 and 5's complaints center on TCU's Department of English which is in the AddRan College of Liberal Arts, a completely separate department from TCU's Honors College.

The claims of Does 4 and 5 cover a substantially different time period than the relevant time period of Does 1, 2 and 3. Does 4 and 5's initial complaints stretch back, respectively, to the spring of 2015 into the fall of 2016, and the spring of 2016 into the fall of 2016. [Doc. 40-1, *see generally* ¶¶ 168-169, 172, -177-176]. Doe 4 enrolled at TCU in the fall of 2015. Doe 5 enrolled at TCU in the fall of 2016. Doe 1's first semester at TCU was in the spring of 2018. [Doc. 19, ¶ 69] Allowing Does 4 and 5 to join this action would open up discovery to a much earlier period than would otherwise be the relevant period of discovery for the claims of Doe 1.

Allowing Does 4 and 5's claims to go forward would also greatly expand the number of witnesses who are alleged to have knowledge of the claims of Does 4 and 5, and who would likely have to be deposed. For instance, in the proposed third amended complaint, Does 4 and 5 identify no less than seventeen new witnesses. [Doc. 40-1, ¶¶ 167-207]. These seventeen witnesses would appear to have no relationship to the claims of Does 1-3.

These are but a few examples of the many factual differences among the claims of Does 4 and 5 when compared with the previously plead claims of Does 1, 2 and 3.

Aside from making a conclusory allegation that the claims are substantially similar, Plaintiffs' motion is completely silent on any specific examples of similarity. As evidenced from the above examples, it is glaringly apparent that they cannot satisfy Rule 20(a)(1)'s test of permissive joinder. Defendants have clearly established they will sustain considerable prejudice if the amendment is allowed. Even should the Court determine that Plaintiffs have satisfied the Rule 20 test, the Court still has the discretion to refuse joinder in the interest of avoiding prejudice and delay and safeguarding Defendants from principles of fundamental fairness. *Applewhite v. Reichhold Chems., Inc.*, 67 F.3d 571, 574 (5th Cir. 1995); *Acevedo*, 600 F.3d at 620, citing *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1296 (9th Cir. 2000).

Like in *Ross* and *Davis*, Does 1, 2 and 3's proposed third amended complaint would add new parties and unrelated claims to this lawsuit and inject many new facts and witnesses who have no relationship to the claims of Does 1, 2 and 3. It would transform an already unwieldy and complicated case into a chaotic case of five separate suits wedged into one lawsuit. Denying Plaintiffs' motion will not prejudice Does 4 and 5 as they may still file their own lawsuits should they choose to pursue their claims. *See Bamm, Inc. v. GAF Corp.*, 651 F.2d 389, 391 (5th Cir. 1981)(movants may show and court may consider prejudice to themselves if amendment is denied). Does 1, 2, and 3 offer no explanation of how they are prejudiced by a denial. This Court should deny Doe's motion to amend because (1) granting the motion would prejudice Defendants, and (2) denying the motion would not prejudice Does 4 and 5.

Adding Does 4 and 5 should be denied because the amendment would be subject to dismissal.

If a proposed amendment would be futile, the court may deny a parties' motion for leave of court. *Foman*, 371 U.S. 178, 182 (1962). An amendment is futile when it would be subject to dismissal if filed. *See Addington v. Farmers Elevator Mut. Ins. Co.*, 650 F.2d 663, 667 (5th Cir. 1981) ("if the complaint as amended would still be subject to dismissal, no abuse of discretion occurs when amendment is denied."). Doe 4 and 5's complaints are facially subject to a motion to dismiss for failure to state a claim.[2]

Doe 4 and 5's claims are subject to a Rule 12(b)(6) motion to dismiss. Doe 4's allegations generally all relate in one form or another to unsatisfactory classroom and educational interactions with faculty, staff and fellow students. [Doc. 40-1, *e.g.*, ¶¶ 169-171, 173, 178-180]. Doe 5 makes similar complaints. [Doc. 40-1, *e.g.,* ¶¶ 175, 178-180,]. For instance, Doe 5 alleges she was the recipient of "insensitive remarks and condescending directives from her professors." [Doc. 40-1, ¶ 175]. Does 4 and 5 complain about classroom work and reading assignments and alleged lack of support from one or more faculty members. [Doc. 40-1, *id.,* ¶ 179]. They further allege difficulties they had in forming a reading group they founded for American and African American literature which they felt was not fully supported or sufficiently funded by TCU's Department of English, and complain of lack of funding on other occasions. [Doc. 40-1, ¶¶ 183-185]. Essentially, Does 4 and 5 are unhappy with what they regard as insensitivity by faculty and students, but they do not plead specific allegations of intentional discrimination or that their educational opportunities were abridged by TCU based on race or gender discrimination.

[2] In *Perez v. Brennan*, 766 Fed.Appx. 61, 66 (5th Cir. 2019), the plaintiff sought leave to amend his complaint and add new allegations of wrongdoing. Even with his new allegations, the plaintiff's complaint would have failed to allege a proper cause of action. The district court denied leave to amend because the proposed amendment would be futile and its ruling was upheld. *Id*.

Courts defer to schools to determine what speech is appropriate in the classroom. "'[T]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board…' rather than with the federal courts." *Hazelwood School Dist. V. Kuhlmeier*, 484 U.S. 260, 267 (1988).

Similarly, courts generally defer to schools in managing their classes and curriculum. "[A]cademic freedom would not long survive in an environment in which courts micromanage school curricula and parse singular statements made by teachers" and give much deference to a school's decision about curriculum. *Wood v. Arnold*, 915 F.3d 308, 314-315 (4th Cir. 2019). Consequently, even if Does 4 and 5 were subject to insensitive remarks in class directed to them by faculty or students, were unsatisfied with the English Department's methods and means of managing graduate courses and the curriculum, or the faculty's teaching methods, courts do not involve themselves with such matters as colleges and universities are in a superior and unique position to make the necessary subjective judgments about students' needs and abilities. *See Perez v. Texas A&M Univ. at Corpus Christi*, 589 Fed.Appx. 244, 250 (5th Cir. 2014).

For these and other reasons, because on the face of their pleadings, Does 4 and 5 fail to state valid claims, allowing amendment for Does 4 and 5 to bring these claims would be futile.

Furthermore, Doe 1's attempt to amend to file a Title VII claim should also be denied. Doe 1 was well aware of the facts forming the basis of her alleged employment discrimination claim long before she decided to institute suit on January 15, 2020. [Doc. 1,¶¶ 72-78]; *see Wimm*, 3 F.3d at 137 (leave to amend properly denied where plaintiffs knew of facts of their mislabeling claim prior to commencing action but waited nine months after initiating lawsuit to bring such claim); *Layfield v. Bill Heard Chevrolet Co.,*

607 F.2d. 1097, 1099 (5th Cir. 1980) (district court did not abuse discretion in denying motion to amend when all facts relevant to proposed second amendment adding three new claims known to plaintiff when lawsuit filed). Doe 1 did not exhaust administrative procedures before filing her complaint alleging employment discrimination. Additionally, when Doe 1 filed her first amended complaint [Doc. 19], she did not attempt to address the shortcomings of her original pleading raised by TCU in its initial motion to dismiss relative to her claim of alleged employment discrimination or invoke Title VII at that time. [*See* Doc. 8, TCU's Motion to Dismiss Employment Discrimination Claim, III, B.6., pp. 15-17]. Accordingly, Doe 1's Title VII claim is facially subject to dismissal and she should be denied leave to amend.

The claims of Does 4 and 5 are misjoined under Rule 21 and if allowed, are subject to severance; consequently, leave to amend should be denied.

Rule 21 provides that parties that are misjoined are subject to being added or dropped and the court may sever such claims. This Court should deny Doe 4 and 5's claims under a theory of misjoinder. As previously shown, Plaintiffs have not established the requisite elements of permissive joinder. An amendment that would improperly join parties and be subject to severance is just as futile as an amendment that would be subject to dismissal. *Wilson v. ABN Amro Mortg. Grp.*, 2005 WL 3508658, at *3 (D. D.C., Dec. 21, 2005) ("Noncompliance with party-joinder rules renders the proposed amendment futile and provides adequate justification for denying the Rule 15(a) motion.")

IV. CONCLUSION

It is within the Court's discretion to allow the amendment sought by Plaintiffs; but only when "justice so requires". Allowing the existing Plaintiffs leave to amend will not promote judicial economy or trial efficiency. It will likely result in Plaintiffs soliciting more

plaintiffs to join the suit, as was intimated by Plaintiffs in the Joint Report. As amply demonstrated, it is not in the interest of justice to permit leave to file the third amended complaint.

DATED: June 25, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that the above and foregoing Defendants' Response and Brief in Opposition to Plaintiffs' Motion for Leave to File Third Amended Complaint was served on all counsel of record receiving electronic notice from the court's ECF notification system.

/s/ George C. Haratsis
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