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

DEFENDANT TEXAS CHRISTIAN UNIVERSITY'S REPLY BRIEF TO PLAINTIFFS' OBJECTION TO CONVERSION TO SUMMARY JUDGMENT AND OMNIBUS RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Defendant Texas Christian University ("TCU") presents its reply brief to Plaintiffs' Response [Doc. 46] to TCU's 12(b)(6) motions to dismiss [Doc. 23–25].[1]

Plaintiffs' allegations are insufficient to support or allow the Court to draw any reasonable inference of intentional discrimination.

In their response, Plaintiffs make little to no effort to address the arguments advanced by TCU in its motions to dismiss. The response offers no additional support from which this Court can reasonably infer that the complained of conduct by TCU was motivated by race or sex.[2] Plaintiffs have not alleged facts revealing evidence of direct

[1]Pursuant to the Court's order of June 26, 2020 [Doc. 43], the parties were advised that the Court would consider the Defendants' pending motions to dismiss as applying to the Plaintiffs' Third Amended Complaint ("complaint") [Doc. 44].

[2]To support an unequal treatment claim, a plaintiff must make "sufficient, non-conclusory allegations plausibly linking the [action at issue] to the discrimination on the basis of sex." *Austin v. Univ. of Oregon*, 925 F.3d 1133, 1138 (9th Cir. 2019). "Just saying so is not enough. A recitation of facts without plausible

discrimination.[3] Moreover, Plaintiffs' allegations are simply insufficiently detailed to plausibly show that nearly identical individuals were treated better or more favorably than Plaintiffs. For instance, they complain that the Title IX office ignored their discrimination complaints. Assuming the allegation is true, Plaintiffs do not allege that white male or female students (or other members of a protected class) received more attention, were afforded a better investigation, or were the recipients of more favorable treatment from the Title IX office. This is but just one example. Having failed to show an inference of discriminatory intent,[4] Plaintiffs allege that discrimination should be inferred because TCU was founded by two brothers who were in the Confederate Army and TCU has a "history" with respect to race. But historical revelations and ancient anecdotal revelations do not infer discriminatory intent on the part of TCU.

The response neither address or analyzes the cases TCU cited in its motions that support dismissal. A glaring example involves their failure to flesh out their allegations as to how, when and where each of the Plaintiffs were actually excluded from or denied any tangible education benefit or program at TCU due to unlawful discrimination. The survival of Plaintiffs discrimination claims—even at this early stage in the case—depends entirely on whether they state plausible claims they were each excluded from participation in, denied the benefits of or subject to discrimination under an education program. *See* 42 U.S.C. § 2000d (Title VI); 20 U.S.C. § 1681 (Title IX); 42 U.S.C. § 12182 (ADA); 29 U.S.C. § 794(a)(Section 504 of the Rehabilitation Act). Instead of addressing this head on in their

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connection to gender is not cured by labels and conclusory statements about sex discrimination." *Id*.

[3]Direct evidence is evidence which, "if believed, proves the fact [in question] without inference or presumption." *Fabela v. Socorro Indep. Sch. Dist*., 329 F.3d 409, 415 (5th Cir. 2003).

[4]Courts may only draw a reasonable inference of discrimination "when the plaintiff pleads [sufficient] factual content." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

response, they deflect and state the obvious: Plaintiffs are African-American women, thus members of a protected class, and that TCU is subject to federal discrimination laws because it receives some federal funding. [Doc. 46, p.19]. This is not enough to state a discrimination claim. They have missed the opportunity to offer additional insight showing how they lost any educational opportunity. Despite Doe 1's protestations to the contrary, her case *is* about academic misconduct and Doe's receiving a no credit ("NC") grade for the Washington, D.C. pass/fail course. Sifting through all of her allegations, the NC grade is the sole alleged adverse action that could possibly be argued to support her contention that she was excluded from participation in or denied the benefits of an educational program. Doe 1 still fails to allege in her current complaint that she did not plagiarize.[5]

Doe 2 fails to allege what educational opportunity or program was lost to her, choosing instead, to re-urge that TCU was deliberately indifferent to her complaint and the Title IX office inadequately investigated. [Doc. 46, p. 21]. Doe 2's factual allegations defeat her claim inasmuch as they reveal that TCU did investigate her complaint against Dr. Schoolmaster. [*See* TCU's argument, Doc. 24, II.A.1.c., pp. 8–10]. In her response, Doe 2 agrees that TCU did investigate. It reached a decision as to her complaint against Dr. Schoolmaster that she characterizes as a slap on the wrist. [Doc. 46, p. 21]. Because Doe 2's allegations essentially rebut that TCU was deliberately indifferent to her report of harassment, dismissal is appropriate.

Likewise, Doe 3 fails to elaborate on what educational benefit or program she

[5]In Doe's response, Doe now appears to advance the proposition she did not plagiarize. [Doc. 46, p. 8]. This allegation should be disregarded. *See, e.g., Henthorn v. Dept. of Navy*, 29 F.3d 682, 688 (D.C. Cir. 1994) (court should not consider factual allegations in a plaintiff's response to motion to dismiss to accept a revised version of the facts more favorable to him, especially when they contradict facts set forth in the complaint). For further argument about the NC decision and grade appeal, see *infra*, p. 5.

alleges was foreclosed to her because of alleged intentional discrimination. [Doc. 46, p. 21]. Consistent with Doe 1 and 2's pleading deficiencies, Doe 3 still neglects to explain how her allegations support a contention she was excluded from a program or activity at TCU. In fact, they connote the exact opposite. Doe 3 kept her scholarship, makes no allegation she was ever denied registering or enrolling for a course, or was unable to complete her education, and she graduated. [See Doc. 25, II.A., pp. 11–12]. As with her co-plaintiffs, it is somewhat telling that Doe 3 cannot muster the necessary allegations to support an essential element of the claims they assert. A district court is not required to draw unreasonable inferences or "to accept as plausible wholly unrealistic assertions" in ruling on a Rule 12(b)(6) motion. *Brown v. Medtronic, Inc.*, 628 F.3d 451, 461 (8th Cir. 2010). Here, Plaintiffs have not alleged sufficient specific facts to establish intentional discrimination.

Plaintiffs pattern and practice theory is not cognizable.

Plaintiffs, being unable to allege plausible claims of individualized discrimination, now emphasize that TCU engages in a "pattern and practice of discriminating against racial minorities and women." [Doc. 46, p. 9]. Pattern and practice cases are normally associated with employment discrimination claims. *See Intl. Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). Assuming only for the purpose of deciding TCU's motions to dismiss that a pattern or practice theory can establish Title VI or Title IX discrimination and that this theory applies to Plaintiffs' allegation that TCU inadequately responded to their complaints of discrimination, (i.e. failure to properly investigate claims made by African-American females), the Plaintiffs must allege that the practice was pervasive and affected many individuals. *Id.* at 360. "[S]ingle, insignificant, isolated acts of

discrimination" are not enough to prove a pattern or practice; nor are "sporadic incident[s]." *Id*. at 336 n.16. Further, the allegations must reveal it was TCU's "regular rather than unusual practice"; *E.E.O.C. v. Bass Pro Outdoor World, LLC*, 826 F.3d 791, 797 (5th Cir. 2016). Here, Plaintiffs have not so alleged, nor do they allege any statistical evidence from which it can be inferred, that it was TCU's standard practice to avoid investigating or ignoring discrimination complaints made by African-American females. The allegations do not support that the alleged practice was pervasive. It defies common sense, logic, and reason that three students (all of whose claims were actually investigated) is a sufficient number to support an allegation that ignoring discrimination complaints is a routine procedure at TCU. At most, the allegations point to sporadic, isolated incidents. *See, e.g., E.E.O.C. v. Bass Pro Outdoor World, LLC*, 884 F. Supp. 2d 499, 517 (S.D. Tex. 2012) (dismissing pattern or practice claim at 12(b)(6) stage where complaint alleged only four instances of discrimination); *Krish v. Connecticut Ear, Nose & Throat, Sinus & Allergy Specialists, P.C.*, 607 F. Supp. 2d 324, 332 (D. Conn. 2009) (concluding that three instances of discrimination were insufficient to state a plausible pattern or practice claim). To the extent Plaintiffs seek to establish discrimination under a pattern or practice theory, this theory should be rejected.

In deciding TCU's motion to dismiss Doe 1's complaint, the Court is not limited to the four corners of the complaint.

TCU submits this Court should not decide TCU's motions as to Doe 1 in a vacuum. Doe 1 seeks to strike all or part of the record filed in support of Defendant Chimbel's Motions to Dismiss for Personal Jurisdiction and Failure to State a Claim [Doc. 31] and to convert one or more of the Defendants' motions to dismiss to a Rule 56 motion.[6] Courts

[6]Chimbel was undoubtedly entitled to furnish documents and records in support of his motion to dismiss

"have allowed consideration of matters incorporated by reference or integral to the claim, . . . items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned; *these items may be considered by the district judge without converting the motion into one for summary judgment*. These matters are deemed to be a part of every complaint by implication." 5B, Wright and Miller, *Fed. Prac. & Proc. Civ.* § 1357 (3d Ed.)(italics added). Doe admitted she plagiarized. [Doc. 31–14, CHIMBEL 0083]. It is appropriate for the Court to consider this same November 5, 2019 letter from Dr. Garrett to Doe 1 when ruling on the motion because Doe 1 relies on and references the November 5, 2019 grade appeal letter in her complaint. [Doc. 44, ¶ 171]. *See Lonestar Fund V. (U.S.) v. Barclays Bank PLC*, 594 F.3d 383,387 (5th Cir. 2010) (courts review of a Rule 12(b)(6) motion considers complaint, documents attached to the complaint and those attached to a motion to dismiss that are central to the claim and referenced in the complaint). The Court has discretion to accept or exclude documents filed on behalf of other parties in this case.[7] Doe 1 should not be allowed to invoke a document for one purpose that she believes to be favorable, but complain about an opposing party's use of the same document which contains information that if not considered at this time, may result in the Court indulging in an unreasonable inference that the NC grade was motivated by race or gender bias. In the case of Doe 1, one cannot

under Rule 12(b)(2). The Court is not required to put on blinders and ignore matters in the record that would have relevance or bearing on a co-litigant's substantive or procedural rights.

[7]TCU did not attach any extraneous documents to its motions to dismiss. Only Defendant Chimbel did so. Consequently, any implication that TCU's Rule (12)(b)(6) motion is subject to conversion to a Rule 56 summary judgment motion is misplaced. In any event, TCU reiterates that in ruling on its motion to dismiss as to Doe 1, it respectfully asks that the Court consider only those items that the Court is allowed to consider in ruling on a 12(b)(6) motion without converting the motion to dismiss to a summary judgment motion. *See Maloney Gaming Mgmt. LLC v. St. Tammany Par.*, 456 Fed. App'x. 336, 340 (5th Cir. 2011). TCU thus submits that reference to the November 5, 2019 letter is central to Doe 1's claims. *See In re Katrina*, 495 F.3d 191, 205 (5th Cir. 2007).

draw a reasonable inference that being accused of plagiarism was as a result of intentional discrimination when an alternative explanation shows otherwise; thus, it is unreasonable to infer that the NC decision and denial of her academic appeal was the product of race or gender bias. *See e.g., 16630 Southfield Ltd. Pshp. v. Flagstar Bank, F.S.B.* 727 F.3d 502, 505 (6th Cir. 2013) (explaining that an alternative explanation illustrates the unreasonableness of the inference sought and the claim's implausibility in analyzing Rule 12(b)(6) motion).

Doe 1's Title VII employment discrimination claim is not plausible on its face.

After TCU initially sought to dismiss Doe 1's student worker discrimination claim for failure to exhaust administrative remedies [Doc. 8, ¶ III., B, 6, pp. 15–17], on May 14, 2020, Doe signed an administrative charge with the Texas Workforce Commission and EEOC alleging she was paid less than white students and was subjected to different terms and conditions of employment as compared to other white students. [*See* TCU's Appendix, Ex. 1, filed contemporaneously with this reply]. Still urging dismissal because Doe pleads a legal conclusion that TCU's alleged employment actions were motivated by race and she does not sufficiently allege or identify a nearly identical or similarly situated white counterpart/comparator that was treated better or differently, TCU submits that dismissal is appropriate inasmuch as all of her alleged complaints about her work area, working hours, being present for Honors College tours, doing manual labor and cleanup and breaking down tables after tours, etc., [Doc. 44, ¶¶ 75-77] fall outside the applicable limitations period. Under Title VII, a plaintiff must file a charge of discrimination with the EEOC within 180 days of the date of the alleged discrimination, or within 300 days of the alleged discrimination if she institutes his action with the appropriate state agency. *Dao*

v. Auchan Hypermarket, 96 F.3d 787, 789 (5th Cir. 1996) (citing 42 U.S.C. § 2000e-5(e)(1). Assuming Doe 1 filed her charge on the day she signed the charge, i.e., May 14, 2020, counting back 300 days reveals that Doe 1 cannot seek relief for alleged acts of unlawful employment acts and practices or other employment discrimination prior to July 19, 2019. According to Doe 1's allegations, she was attending the D.C. summer program in July 2019. [Doc. 44, ¶ 92]. Her job complaints are alleged to have occurred earlier: (i) she was offered a job soon after being admitted to the Honors College (which was in the fall 2018 semester) [¶¶ 73, 75-76]; and (ii) between her date of hire and the end of the spring 2019 semester, she alleges being a "showpiece" for tours, doing manual labor and allegedly receiving a lower hourly wage. [¶ 77]. She alleges no other complaints after returning to campus for the fall semester in 2019 other than vague allegations that her hours were reduced [¶ 78] and the treatment by her boss "deteriorate[d]". [¶ 81]. Such vague allegations are insufficient to state a claim for employment discrimination. It should not go unnoticed that while Doe implies her hours were reduced after making a complaint with the Title IX office, she does not allege that the person reducing her hours knew Doe 1 made a complaint. Further, Doe does not allege that she actually wanted to work more hours, or that the Honors College office had available time slots to schedule Doe 1 to work that were *not* in conflict with Doe 1's class schedule. Also, Doe 1's retaliation claim should be dismissed. To establish a prima facie claim of retaliation, a plaintiff must demonstrate that (1) she engaged in protected activity; (2) an adverse employment action occurred; and (3) a causal link exists between the protected activity and the adverse employment action. *McCoy v. City of Shreveport*, 492 F.3d 551, 557 (5th Cir. 2007). Doe 1 does not sufficiently allege a causal connection between Doe 1 making a complaint

about the D.C. summer program and her job. The alleged misconduct occurring during the D.C. program is wholly unrelated to Doe 1's activities as a student worker. Doe 1 has not set forth allegations that could enable the Court to reasonably infer that the Honors College assistant reduced Doe 1's work hours or discriminated against her because Doe 1 made a complaint to Dr. Turner about the D.C. program. In fact, the opposite happened; Doe 1 alleges the assistant actually raised Doe's hourly wage. Doe 1 offers only conclusory statements and alleges no facts demonstrating that the assistant's actions were motivated by race. Doe pleads no allegations of specific objective incidents of racial discrimination, such as racial comments made by the assistant or treatment different for nearly identical or similarly situated Honors College student workers outside of a protected class. *See Raj v. Louisiana State Univ.*, 714 F.3d 322, 331 (5th Cir. 2013) (affirming Rule 12(b)(6) dismissal where plaintiff "did not allege any facts, direct or circumstantial, that would suggest [defendant]'s actions were based on [plaintiff]'s race or national origin or that [defendant] treated similarly situated employees of other races or national origin more favorably").

Does 1 and 3's ADA and Rehabilitation Act claims are not plausible under either any theory.[8]

Does 1 and 3 appear to focus their argument that they each reported a disability and sought accommodations that were not received. [Doc. 46, p. 23]. To state a plausible claim, Plaintiffs must have alleged that TCU refused to provide a reasonable accommodation for Does 1 and 3 that resulted in their each not receiving the benefits of

[8]TCU addressed the insufficiency of Doe 1's pleading that she failed to allege how asthma excluded her from any educational benefit. [Doc. 23, III.A.7., pp. 18–20]. Likewise, Doe 3 does not allege plausible allegations that her diabetes excluded her from any program or activity at TCU. [Doc. 25, III.A.5., pp. 18–20].

an educational program. *D.A. ex rel. Latasha, v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 454 (5th Cir. 2010). It is not plausible that TCU refused a request for accommodation when neither Doe 1 or Doe 3 have alleged or identified the accommodation they sought. To the extent Does 1 and 3 posit their disability claims on the basis that TCU permitted a hostile environment to exist between its employees/faculty and Does 1 and 3, this claim also fails. The Fifth Circuit's holding in *Estate of Lance v. Louisville Indep. Sch. Dist*., 743 F.3d 982 (5th Cir. 2014) expressly applied only to student on student harassment, not harassment by employees of an educational institution against a student. To the extent Doe 1's claim is premised on the allegation that Dr. Snow questioned Doe 1 about the advisability of her decision to attend the Washington, D.C. summer program or allegedly harassed her about her inability to walk or asthma, Doe 1 has not stated a cognizable claim under the ADA or section 504 for hostile environment disability claims.

Finally, for Does 1 and 3 to prevail and recover compensatory damages, they must allege more than deliberate indifference to establish intentional discrimination. *See Cadena v. El Paso County*, 946 F.3d 717 (5th Cir. 2020) explaining that "something more than 'deliberate indifference'" is required to establish intentional disability discrimination, which they have failed to allege. *Id*. at 724.

For the reasons set forth in TCU's motions to dismiss and this reply, TCU requests that its motions to dismiss be granted.

DATED: July 27, 2020.

Respectfully submitted,

/s/ George C. Haratsis
George C. Haratsis
State Bar No. 08941000
gch@mcdonaldlaw.com

Rory Divin
State Bar No. 05902800
rd@mcdonaldlaw.com

Jennifer Littman
State Bar No. 00786142
jnl@mcdonaldlaw.com

McDONALD SANDERS,
A Professional Corporation
777 Main Street, Suite 2700
Fort Worth, Texas 76102
(817) 336-8651
(817) 334-0271 Fax

ATTORNEYS FOR DEFENDANT TCU

CERTIFICATE OF SERVICE

The undersigned counsel certifies that the above and foregoing Defendant Texas Christian University's Reply to Plaintiffs' Objection to Conversion to Summary Judgment and Omnibus Response to Defendants' Motions to Dismiss was served on all counsel of record receiving electronic notice from the court's ECF notification system.

/s/ George C. Haratsis
George C. Haratsis