

decisions on her tenure application. Summary judgment is improper because Butler identified multiple breaches, and SMU does not redress those other than the handling of her tenure application. Moreover, there is evidence that SMU decisionmakers repeatedly broke the Bylaws and Guidelines in handling Butler's tenure application.

B. FMLA Claims (Counts 23–26)

1. **Retaliation (Count 24).** Defendants' pure legal challenge to this claim is fatally flawed. This is a retaliation claim which is in part supported by evidence of a hostile environment and FMLA retaliation claims are cognizable.
2. **Invasion of Privacy (Count 25).** Defendants' pure legal challenge to this claim is also infirm. A worker's submission of an FMLA request does not constitute a "voluntary disclosure" outside the statute's protective ambit.
3. **Individual Defendants.** Curral (Counts 24 and 25) and Collins (Counts 23–26) are not entitled to summary judgment on the claims brought against them as individuals because they are both statutory employers under the FMLA.
4. **FMLA Interference (Counts 23 and 26).** Defendants' challenge to the two interference claims is also infirm. Butler charges that Defendants interfered with her attempts to secure FMLA leave (Count 23) and after it was granted, interfered with her job restoration (Count 26). It is no defense that SMU eventually awarded some FMLA leave because Butler sought and

Defendants actively interfered with her obtaining more significant leave, Defendants otherwise interfered in the FMLA process delaying Butler's access to leave depriving her of the benefits of the FMLA, and when Butler's FMLA leave ended, they interfered with full job restoration.

- 5. FMLA retaliation (Count 25).** Defendants two attacks on this claim—that (a) there was no causal connection between Butler's protected activities and adverse actions and (b) Butler was otherwise unqualified for tenure—lack merit. Defendants' take a legally infirm position on what constitutes an adverse action—focusing only on tenure denial. Yet Butler grieves other adverse actions Defendants do not even attempt to challenge. This flaw also undercuts Defendants' causality argument, because they miss all of non-tenure FMLA adverse actions Butler grieves beyond the tenure denial. As to the tenure denial, Defendants misstate Butler's burden on summary judgment—she need not prove she meets all the objective criteria for tenure, she need only point to evidence that she possesses the necessary qualifications to perform the job sought which she has more than done. Even if Butler had to show she was qualified, the record taken in the light most favorable to Butler as nonmovant more than meets the mark.

C. ADA/Rehabilitation Act and TCHRA—Disability (Counts 18–20 and 29)

- 1. Discrete act discrimination (Counts 18, 19, 20, 29).** SMU charges that Butler's specifically pled workplace segregation (Count 18), associational (Count 19), and invasion of medical privacy (Count 20)

claims are not cognizable causes of action. It's wrong. These are all specific forms of discrete act disability discrimination. As with several other claims, SMU insists her TCHRA disability discrimination claim (Count 29) fails because Butler was not qualified for tenure, misstating Butler's burden on summary judgment. *See* B-5.

2. **Failure to accommodate (Count 21).** The challenge to Butler's failure to accommodate claim is purely legal and, once again, fatally flawed. SMU insists that the ADA does not require accommodations be given when workers are seeking a promotion. That is incorrect.
3. **Hostile environment (Count 16).** SMU charges this claim fails because there is no evidence of hostilities. But the record before this Court reflects that Butler was subjected to a barrage of hostilities in her last years at SMU law that are more than sufficient to survive summary judgment.
4. **Tenure denial (Count 17).** As with several other claims, SMU insists that this claim fails because Butler was not qualified for tenure, misstating Butler's burden on summary judgment. *See* B-5.
5. **Retaliation (Count 22).** SMU insists Butler fails to demonstrate causality because it asserts Butler did not request ADA accommodations until April 2016, three months after the Third Committee issued its Tenure Report. However, the record reflects that Butler requested reasonable accommodations both before and after the Tenure Report

was issued. Moreover, Butler grieves additional adverse actions other than the Tenure Report's negative recommendation.

D. Race: Section 1981, Title VII, and TCHRA Claims (Counts 10–15, 27 and 28)

1. **Section 1981 Individual Defendants (Counts 10, 11, and 12).** These § 1981 claims are properly brought against the Individual Defendants because they exercised control over Butler's position and title and otherwise acted in a scheme for and through the university. Alternatively, liability is proper under the cat's paw theory.
2. **Hostile environment (Counts 10, 13, and 27).** There is sufficient evidence that Butler was subjected to racial hostilities at SMU, so these claims survive.
3. **Tenure denial (Counts 11, 14, and 27).** As with several other claims, SMU insists that this claim fails because Butler was not qualified for tenure, misstating Butler's burden on summary judgment. *See* B-5.
4. **Retaliation (Counts 12, 15, and 28).** These claims allege that Defendants retaliated against Butler for lodging complaints in two ways (a) denying her tenure and (b) conducting sham investigations of her complaints. Defendants do not speak to the sham investigation charge at all, so all three claims should survive summary judgment. As to the retaliatory tenure denial charge, that line of these three claims also survives. The record reflects Butler complained about racial bias (protected activities). Tenure was denied close in time to those complaints (causal connection).

Lastly, there is considerable evidence that the nonretaliatory explanations are pretextual as to the tenure denial. As with several other claims, SMU insists that this claim fails because Butler was not qualified for tenure, misstating Butler's burden on summary judgment. *See* B-5.

E. Sex Discrimination Claim (Count 30)

Professor Butler also grieves a sexually hostile environment under Title IX (Count 30). Summary judgment is improper as a matter of law on this claim. SMU is flatly wrong that Title VII totally preempts Title IX.

CONCLUSION

For the reasons set forth above and in the accompanying Brief in Support of Plaintiff's Opposition to Summary Judgment, Professor Butler respectfully asks that the Court deny summary judgment on all claims.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2022, I electronically filed a copy of the foregoing with the Clerk of Court by using the CM/ECF system, which will automatically serve all counsel of record.

/s/ Ezra Young

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