No. 23-10072

In the United States Court of Appeals
for the Fifth Circuit

Cheryl Butler,

Plaintiff – Appellant

v.

Jennifer M. Collins; Steven C. Currall; Roy P. Anderson; Julie P. Forrester; Harold Stanley; Paul Ward; Southern Methodist University,

Defendants – Appellees.

On Appeal from the United States District Court,
for the Northern District of Texas, Dallas Division
No. 3:18-cv-37, Hon. Ada Brown, Presiding

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Oral Argument Conditionally Requested

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following list of persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is neither necessary nor useful in this employment discrimination case. Butler's claims were either dismissed under well-established Rule 12(b)(6) standards or adjudicated under well-established summary-judgment standards. However, if the Court desires argument, Defendants-Appellees request the opportunity to participate.

TABLE OF CONTENTS

Page

Certificate of Interested Persons 2

Statement Regarding Oral Argument 7

Table of Contents 8

Table of Authorities 12

Statement of Issues 17

Statement of the Case 18

I. The district court granted Defendants' motion to dismiss certain claims as preempted by the Texas Commission on Human Rights Act 19

II. Butler continued to prosecute her remaining claims. 20

A. Butler's tenure consideration was governed by Guidelines and Bylaws incorporated in her employment contract. 20

B. Over the course of her employment, Butler consistently failed to meet the high-quality teaching standards that are one of the two preeminent tenure criteria. 21

1. Upon the renewal of her Contract, Butler was informed that her teaching did not meet the tenure teaching standard. 21

2. Butler's first tenure committee raised concerns about her continued failure to meet the tenure teaching standard. 22

3. Butler approved of the second tenure committee. 22

C. The second tenure committee personally observed Butler's continued failures to meet the tenure teaching standard. 23

D. SMU accommodated Butler's untimely submission of tenure materials by postponing the tenure vote meeting 25

TABLE OF CONTENTS *(cont'd)*

Page

E. The Tenure Committee concluded that Butler's teaching did not meet the required standard. 25

F. A faculty tenure vote held in accordance with applicable guidelines and bylaws resulted in a negative tenure recommendation. 27

G. Butler appealed the faculty's negative tenure recommendation. 27

H. SMU's Provost and Provost Advisory Committee did not make a positive tenure recommendation for Butler. 29

I. Butler did not appeal the Provost's negative tenure recommendation, which became final. 30

III. In her lawsuit, Butler engaged a succession of lawyers in this lawsuit. 30

IV. Butler repeatedly sought extensions and delays during Attorney Dunlap's representation. 32

V. Butler's efforts to delay deadlines reached a fever pitch with the appearance of Attorney Young in January 2022. 34

VI. The March 8, 2022 hearing transcript highlights the context in which the district court denied withdrawal. 39

VII. The district court granted Defendants' summary-judgment motion in a reasoned opinion based on analysis of the summary-judgment record. 39

Summary of the Argument 40

Argument 42

I. The trial court correctly applied well-established Rule 12(b)(6) standards in partially dismissing Butler's claims. 42

A. The standard of review is *de novo*. 42

B. Butler does not challenge the dismissal as it pertains to SMU. 42

TABLE OF CONTENTS *(cont'd)*

Page

C. As the district court correctly concluded, Butler's claims of fraud, defamation, and conspiracy to defame fail to state a claim. 43

II. The trial court properly exercised its discretion in denying Attorney Dunlap's motion for withdrawal....49

A. The standard of review is abuse of discretion. 49

B. The district court explained the reasons supporting its ruling. 49

C. The district court acted within its discretion in denying withdrawal. 51

III. The district court acted properly throughout the process of determining Defendants' summary-judgment motion. 54

A. The district court properly exercised its discretion in denying Butler's Rule 56(d) motion. 54

1. The standard of review is abuse of discretion. 54

2. The denial of Butler's Rule 56(d) motion falls squarely within the district court's discretion. 55

a. Butler did not set forth a plausible basis for believing that the tenure-box materials had not already been produced or that she could not present essential facts. 55

b. Butler did not establish diligence in pursuing the tenure-box materials in discovery. 57

B. The district court properly exercised its discretion to deny Butler's fourth request to extend the summary-judgment response deadline. 58

1. The standard of review is abuse of discretion. 58

2. The district court did not abuse its discretion. 60

TABLE OF CONTENTS *(cont'd)*

Page

C. The district court correctly applied well-established summary-judgment standards in granting summary judgment. 63

1. The standard of review is *de novo*. 63

1. The district court correctly applied the standards for accepting a movant's facts as undisputed. 64

2. The district court correctly determined that Counts 18 and 19 in Butler's complaint are legally uncognizable. 65

a. Count 18: "segregation in the workplace".....66

b. Count 19: "associational discrimination".....67

3. Defendants were not required to present evidence to support Butler's opposition to summary judgment. 68

4. Butler was required to present evidence to create a genuine fact dispute on the elements Defendants challenged for "no evidence."....71

IV. Butler has not established the extraordinary circumstances required for reassignment, even if she had shown any basis to remand.....74

1. The standards for reassigning a case on remand are extraordinarily high.....74

2. Butler has not met either test for reassignment. 75

Conclusion 76

Certificate of Service 77

Certificate of Compliance.....78

TABLE OF AUTHORITIES

Page(s)

Cases

Adams v. Travelers Indem. Co.,
465 F.3d 156 (5th Cir. 2006) 62

Am. Family Life Assur. Co. v. Biles,
714 F.3d 887 (5th Cir. 2013) 54, 55

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986).....63, 64, 72

Austin v. Kroger Tex., L.P.,
864 F.3d 326 (5th Cir. 2017) 63, 69, 71

B.C. v. Steak N Shake Operations, Inc.,
512 S.W.3d 276 (Tex. 2017) 43, 44, 46, 47

Bailey v. KS Mgmt. Servs., L.L.C.,
35 F.4th 397 (5th Cir. 2022) (per curiam) 55, 58

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....42

Besser v. Tex. Gen'l Land Office,
834 F. App'x 876 (5th Cir. 2020) (unpublished).....68

Broughten v. Voss,
634 F.2d 880 (5th Cir. 1981) 51, 54

Celotex Corp. v. Catrett,
477 U.S. 317 (1986).....63, 69, 71, 74

CenterPoint Energy Hou. Elec. LLC v. Harris Cty. Toll Road Auth.,
436 F.3d 541 (5th Cir. 2006) 50

Chavez v. McDonald's Corp.,
No. 3:99–CV–1718D, 1999 WL 814527 (N.D. Tex. Oct. 8, 1999).....45

TABLE OF AUTHORITIES *(cont'd)*

Page(s)

City of Waco v. Lopez,
259 S.W.3d 147 (Tex. 2008) 44, 47

Culbertson v. Lykos,
790 F.3d 608 (5th Cir. 2015) 42

In re DaimlerChrysler Corp.,
294 F.3d 697 (5th Cir. 2002) 74, 75, 76

E.E.O.C. v. Amego, Inc.,
110 F.3d 135 (1st Cir. 1997).....69

Eversley v. MBank Dallas,
843 F.2d 172 (5th Cir. 1988) 64, 65

F.T.C. v. Intellipay, Inc.,
828 F. Supp. 33 (S.D. Tex. 1993).....51, 54

Geiserman v. MacDonald,
893 F.2d 787 (5th Cir. 1990) 58, 59, 62

Grimes v. Wal-Mart Stores Tex., L.L.C.,
505 F. App'x 376 (5th Cir. 2013) (unpublished).....66, 68

Harvey v. Blake,
913 F.2d 226 (5th Cir. 1990) 45

Hassell v. Axium Healthcare Pharmacy, Inc.,
No. 4:13-cv-746-O, 2014 WL 1757207 (N.D. Tex. May 2, 2014) 45

Hoffman-La Roche Inc. v. Zeltwanger,
144 S.W.3d 438 (Tex. 2004) 45

Household Credit Servs., Inc. v. Driscol,
989 S.W.2d 72 (Tex. App.—El Paso 1998, pet. denied).....43

Jacked Up, LLC v. Sara Lee Corp.,
854 F.3d 797 (5th Cir. 2017) 55, 58

TABLE OF AUTHORITIES *(cont'd)*

Page(s)

Kapche v. City of San Antonio,
176 F.3d 840 (5th Cir. 1999) 73

Kitchen v. BASF,
952 F.3d 247 (5th Cir. 2020) 59, 63

Laxton v. Gap Inc.,
333 F.3d 572 (5th Cir. 2003) 70

Littell v. Hous. Indep. Sch. Dist.,
894 F.3d 616 (5th Cir. 2018) 42

Lujan v. Nat'l Wildlife Fed'n,
497 U.S. 871 (1990).....60, 62

McCarty v. Thaler,
376 F. App'x 442 (5th Cir. 2010) (per curiam) (unpublished).....59, 61, 62

Megill v. Bd. of Regents of State of Fla.,
541 F.2d 1073 (5th Cir. 1976) 69

Mobil Oil Corp. v. Ellender,
968 S.W.2d 917 (Tex. 1998) 43

Nikolova v. Univ. of Tex.,
No. 1:19-CV-877-RP, 2022 WL 466988 (W.D. Tex. Feb. 15, 2022) 70

NME Hosps., Inc. v. Rennels,
994 S.W.2d 142 (Tex. 1999) 66

Pioneer Inv. Servs. Co. v. Brunswick Assocs.,
507 U.S. 380 (1993).....59

Ragas v. Tenn. Gas Pipeline Co.,
136 F.3d 455 (5th Cir. 1998) 64

Reeves v. Sanderson Plumbing Prods., Inc.,
530 U.S. 133 (2000).....70

TABLE OF AUTHORITIES *(cont'd)*

Page(s)

Schwarz v. Folloder,
767 F.2d 125 (5th Cir. 1985) 50, 51

Shepherd v. City of Shreveport,
920 F.3d 278 (5th Cir. 2019) 63

Skotak v. Tenneco Resins, Inc.,
953 F.2d 909 (5th Cir. 1992) 64

Spencer v. FEI, Inc.,
725 F. App'x 263 (5th Cir. 2018) (unpublished).....66, 68

Streetman v. Lynaugh,
674 F. Supp. 229 (E.D. Tex. 1987).....51, 54

Tilton v. Marshall,
925 S.W.2d 672 (Tex. 1996) 48

Univ. of Pa. v. EEOC,
493 U.S. 182 (1990).....70

Waffle House, Inc. v. Williams,
313 S.W.3d 796 (Tex. 2010) 43, 45, 46, 47

Williams v. Tarrant Cty. Coll. Dist.,
717 F. App'x 440 (5th Cir. 2018) (unpublished).....66

Winters v. Chubb & Sons, Inc.,
132 S.W.3d 568 (Tex. App.—Houston [14th Dist.] 2004, no pet.) 45

Matter of Wynn,
889 F.2d 644 (5th Cir. 1989) 49, 51

Yul Chu v. Miss. State Univ.,
592 F. App'x 260 (5th Cir. 2014) (unpublished).....70

TABLE OF AUTHORITIES *(cont'd)*

Page(s)

Statutes and Rules

42 U.S.C. §1981 ..... 18, 19, 20

42 U.S.C. §12112(b)(1) 67

FED. R. CIV. P. 6(b) 41, 58, 59, 65

FED. R. CIV. P. 6(b)(1)(B) 59

FED. R. CIV. P. 12(b)(6) 17, 42, 49

FED. R. CIV. P. 26 37

FED. R. CIV. P. 54 50

FED. R. CIV. P. 56 74

FED. R. CIV. P. 56(a) 63

FED. R. CIV. P. 56(c) 69

FED. R. CIV. P. 56(d) 17, 41, 54, 55, 57, 58, 65, 70

FED. R. CIV. P. 56(e) 65

FED. R. CIV. P. 60(b) 19

N.D. TEX. L.R. 7.1(e) 33

STATEMENT OF ISSUES

1. Partial dismissal under Rule 12(b)(6): Did the district court properly dismiss Butler's common-law tort claims under well-established Rule 12(b)(6) standards?

2. Denial of attorney's motion to withdraw: Do the district court's stated reasons support the exercise of its discretion to deny Butler's fourth attorney's motion to withdraw, particularly when Butler's sixth attorney still needed information and materials from him in the face of impending pretrial deadlines and trial?

3. Summary-judgment on remaining claims:

   a. Did the district court act within its discretion in denying Butler's Rule 56(d) request for discovery as to the "tenure box" in light of Butler's lack of diligence and failure to demonstrate that Defendants had not already produced the tenure-box materials?

   b. Do the stated reasons for denying Butler's fourth request to extend the summary-judgment response deadline, after granting two previous extensions, support the district court's exercise of its discretion?

   c. Having properly exercised its discretion to deny Butler's fourth extension request, did the district court correctly apply well-established

standards in granting summary judgment on the remaining claims against Defendants?

4. Request for reassignment: If Butler had identified any reversible error, would she be entitled to the extraordinary remedy of reassignment on remand?

STATEMENT OF THE CASE

This lawsuit is founded on allegations of discrimination and retaliation during Butler's employment as an SMU Dedman School of Law ("Law School") professor. ROA.1152; Appellant.Br.18.[1] In her Second Amended Complaint, Butler alleged claims against:

(A) SMU and its then-Provost (Currall), Law School Dean (Collins), Associate Provost (Forrester), and Vice-President for Executive Affairs (Stanley) (collectively, "Defendants"); and

(B) SMU's General Counsel (Ward) and the Law School professor who chaired Butler's tenure committee (Anderson) (collectively, the "Dismissed Defendants").

ROA.595-96. She asserted common-law claims for breach of contract, fraud, defamation, conspiracy-to-defame, and negligent supervision, and statutory claims under 42 U.S.C. §1981, the Family Medical Leave Act ("FMLA"), the Rehabilitation Act ("RA"), and the Americans with Disabilities Act ("ADA"). ROA.688-726, 898.

[1] Citations to Appellant's Brief reference the ECF/PDF page number at the top of each page.

I. The district court granted Defendants' motion to dismiss certain claims as preempted by the Texas Commission on Human Rights Act.

Based on preemption under the Texas Commission on Human Rights Act ("TCHRA"), Defendants and Dismissed Defendants moved to dismiss Butler's tort claims for:

- negligent supervision against SMU; and
- fraud, defamation, and conspiracy-to-defame against the individual defendants (*i.e.*, Currall, Collins, Forrester, Stanley, Ward, and Anderson).

ROA.1152. The motion also sought dismissal of Butler's FMLA and section 1981 claims against Defendants. ROA.1152.

Upon obtaining an unopposed extension of time, Butler filed a response that did not comply with local rules and contained multiple, incorrect citations that obscured the relevance of the referenced authorities. ROA.12 [Dkt.19], ROA.944-45, 947, 1155 n.2, ROA.1155-56. Nonetheless, the district court (Judge Lindsay) considered Butler's response. ROA.1156. The court denied the motion to dismiss the FMLA and section 1981 claims but dismissed the other claims. ROA.1158. No claims remained pending against Ward or Anderson. *See id.*

Because Butler's motion for reconsideration relied on Federal Rule of Civil Procedure 60(b), which did not apply to the interlocutory partial dismissal, the district court denied the motion without prejudice. ROA.1228-29. After the case

was transferred from Judge Lindsay to Judge Brown, Butler's second amended reconsideration motion was denied. ROA.1425, 1468, 1474.

II. Butler continued to prosecute her remaining claims.

Butler continued to prosecute her remaining claims for breach of contract and violations of the FMLA, RA, ADA, and section 1981 against Defendants (SMU, Collins, Currall, Stanley, and Forrester). ROA.701-26, 1887. Butler alleged race discrimination, a racially hostile work environment, and retaliation. ROA.704-26, 1887.

A. Butler's tenure consideration was governed by Guidelines and Bylaws incorporated in her employment contract.

SMU hired Butler in 2011 as an Assistant Professor of Law without tenure. ROA.922, 1887. The employment contract she signed (the "Contract") incorporated SMU's Guidelines for the Award of Tenure ("Guidelines") and the Bylaws of the Dedman School of Law on Tenure and Promotion ("Bylaws"). ROA.1887, 2047. If the Contract were renewed after the initial three-year appointment, Butler would be considered for tenure in the 2015-16 academic year. ROA.1887, 2045. If she were denied tenure, SMU would pay her salary for a terminal year. ROA.1887, 2057.

Under the Guidelines and Bylaws, SMU evaluates three criteria in deciding whether to award tenure: teaching, scholarship/research, and service. ROA.1888, 2048. Teaching and scholarship are the "preeminent responsibilities" and given equal weight. ROA.1888, 2048. Tenure is awarded to faculty members who are

"outstanding" in either teaching or research and whose performance in the other category is "high quality." ROA.1888, 2048. A candidate may appeal a negative tenure recommendation. ROA.1888, 2049.

B. Over the course of her employment, Butler consistently failed to meet the high-quality teaching standards that are one of the two preeminent tenure criteria.

Butler taught Torts I and II, Employment Discrimination, and Critical Race Theory at the Law School. ROA.1887, 2048. Over the entire length of her SMU teaching career, Butler failed to meet the high-quality teaching standards required to achieve tenure. ROA.1889. As shown below, the deficiencies detailed as reasons for not recommending tenure were consistent with persistent problems Butler had opportunities to correct but was unable to resolve.

1. Upon the renewal of her Contract, Butler was informed that her teaching did not meet the tenure teaching standard.

As Butler's initial three-year appointment drew to a close, SMU evaluated whether to renew her Contract. ROA.1889, 1956. The Advisory Committee on Contract Renewal determined that Butler met the scholarship and service standards but not the teaching standard. ROA.1956-57, 2049. The Law School faculty expressed optimism that Butler's teaching problems "could be corrected" to the high-quality standard required for tenure. ROA.1957, 2049. Accordingly, SMU renewed Butler's Contract. ROA.2049.

2. Butler's first tenure committee raised concerns about her continued failure to meet the tenure teaching standard.

As usual under the Bylaws, Butler would be considered for tenure in her fifth year (2015-16). ROA.1888, 2072. In March 2013, the previous Law School dean appointed a three-member tenure committee to work with Butler. ROA.2049. The tenure committee assigned to each candidate reviews her teaching and scholarship, counsels her in these areas, and is generally available to her during the tenure process. ROA.1888. The three members of the Advisory Committee on Contract Renewal also served as Butler's first tenure committee. ROA.1889.

Over the many months the committee worked with Butler, they raised concerns that she continued to fail to meet the high-quality teaching standard. ROA.1889, 2050. When the committee apprised Butler of its concerns, she accused the members of discrimination and violating her civil rights. ROA.2050. The members resigned from this committee in Fall 2015. ROA.2050.

3. Butler approved of the second tenure committee.

Collins appointed a second tenure committee (the "Tenure Committee") that included Anderson and two others. ROA.1890, 2050. Collins did not share with the Tenure Committee the reasons for the previous members' resignations or make any negative statements about Butler. ROA.2050. Collins advised Butler to report any concerns regarding possible discrimination or civil rights violations to SMU's Office of Institutional Access and Equity, which handles such complaints. ROA.2050.

Contrary to her brief (at 25), Butler approved of the new Tenure Committee members. ROA.2089. She informed Collins that she was "grateful" for them and "happy" that Anderson was serving as its chair. ROA.2050, 2089. Similarly, Butler "expressed delight" when meeting with Anderson and thanked him for agreeing to serve. ROA.1957.

In over 51 years as a Law School professor, Anderson had served on many tenure committees and supported diverse candidates who achieved tenure. ROA.1945, 1956. For example, in Spring 2015, Anderson had served on the tenure committee of Jessica Weaver, an African-American female law professor awarded tenure. ROA.1956. The same policies and procedures governed the consideration of Weaver's and Butler's tenure. ROA.1890.

The same policies and procedures also governed the other candidates in Butler's tenure class. ROA.1894. The Law School's 2015-16 tenure class consisted of Butler, David Taylor, and Keith Robinson, an African-American male. ROA.2020, 2053. The only consideration of race in the tenure evaluation was SMU's commitment to diversity in its faculty. ROA.1894.

C. The second tenure committee personally observed Butler's continued failures to meet the tenure teaching standard.

During the Fall 2015 semester, the Tenure Committee evaluated Butler under the tenure criteria. ROA.1892, 2051. Tenure Committee members, Collins, and other tenured Law School faculty reviewed Butler's research/scholarship and

personally visited her classes to observe her teaching. ROA.1892, 1954-55, 1960, 2007, 2055-56. During this process, the Tenure Committee identified concerns about whether Butler was meeting the high-quality teaching standard. ROA.1890, 2050. When the Tenure Committee apprised Butler of these concerns, she sought to extend her tenure vote to the next academic year. ROA.1890-91, 2050.

The Tenure Committee could not address extension issues. ROA.1891. Instead, Butler was directed to Stanley, the Interim Provost, for determination of her extension request. ROA.1891. For questions she raised regarding the FMLA and the ADA, she was directed to SMU's Office of Human Resources ("HR") and Office of Institutional Access and Equity, respectively. ROA.1891.

Butler was untimely in providing the reasons for her extension request. ROA.1891, 2092. Ultimately, her stated reasons did not support an extension, which was denied. ROA.1891, 2052, 2092. To the extent that Butler had alluded to health concerns, Stanley advised Butler to address those questions with HR. ROA.2052. At Butler's request, SMU approved FMLA leave in November/December 2015, with intermittent leave approved through June 2016. ROA.2146. However, the tenure decision would not be based solely on Butler's 2015-16 academic year, but rather on her teaching, scholarship, and service during all her years at SMU. ROA.1891, 2092.

D. SMU accommodated Butler's untimely submission of tenure materials by postponing the tenure vote meeting.

In advance of the tenure vote, tenure candidates must submit supporting materials. ROA.1892. These materials include detailed resumes, syllabi, teaching evaluations, and the candidate's personal statement. ROA.1892, 2052. The colloquial term for the collection of tenure materials is the "tenure box." ROA.2052.

Candidates Taylor and Robinson submitted their tenure boxes on time. ROA.2052. Butler did not. ROA.2052. Yet she insisted that the tenure vote occur at the same time for the entire tenure class. ROA.2052-53. Collins and Stanley accommodated this request and Butler's untimeliness by postponing the Law School faculty tenure vote from December 2015 to January 2016. ROA.2053.

Despite this accommodation, Butler continued to submit information in an untimely fashion. ROA.1894. Indeed, she failed to submit her current resume altogether. ROA.1894.

E. The Tenure Committee concluded that Butler's teaching did not meet the required standard.

After evaluating Butler under the applicable criteria, the Tenure Committee concluded in its Tenure Report that Butler's scholarship and service met SMU's tenure standards. ROA.2053. However, consistent with previous concerns expressed over the years of Butler's employment, the Tenure Report concluded that Butler's teaching did not meet SMU's tenure standards. ROA.2053. Although one

member abstained from voting on the recommendation, she did not disagree with any of the Tenure Committee's conclusions. ROA.1953. The Tenure Report, signed by all three members, provided a detailed basis for its negative tenure recommendation. ROA.1953, 1991-2011.

For instance, Butler's student evaluations identified concerns confirmed by faculty members who visited Butler's classes for observation. ROA.1987-2007. Among the concerns were Butler's unpreparedness for class and lack of good command of tort law. ROA.1954-55, 1996-2007. After visiting Butler's classes, Anderson agreed with the faculty and student assessments that Butler did not demonstrate a mastery of torts. ROA.1960. Other examples of Butler's lack of commitment to or achievement of high-quality teaching included:

- making statements about cases and legal rules that she later contradicted;
- acting unprofessionally by berating, belittling, and expressing anger at various students;
- 100% failure to submit her grades timely, knowing that students' job interviews hinged on timely receipt of first-semester grades; and
- using the identical exam two years in a row, such that students taking the exam in the second year could prepare for the questions in advance.

ROA.1954-55, 1996-2007, 2055-56.

The Tenure Committee's interactions with Butler also revealed a troubling propensity for untruthfulness. ROA.1893, 2010. The Tenure Committee noted that

Butler engaged in mischaracterizing colleagues' statements and made statements she likely knew were untrue. ROA.2010. In his many years serving on tenure committees, Anderson had never experienced Butler's level of untruthfulness, which extended even to situations in which the untruths did not seem "even relevant or necessary." ROA.1952.

F. A faculty tenure vote held in accordance with applicable guidelines and bylaws resulted in a negative tenure recommendation.

The January 13, 2016, special meeting for the tenure vote was called, held, and conducted per the Guidelines and Bylaws. ROA.1894. As the person designated under the Guidelines to consider any appeal of a negative tenure recommendation, Collins did not participate in the vote. ROA.1894.

Anderson made the presentation regarding Butler, with the other two Tenure Committee members present. ROA.1894. A quorum of tenured Law School faculty members voted by secret, unsigned ballots. ROA.1894. The faculty voted to recommend tenure to Robinson and Taylor, but not Butler. ROA.1956, 2053. Per the Guidelines and Bylaws, Collins notified Butler of the negative tenure recommendation. ROA.2054.

G. Butler appealed the faculty's negative tenure recommendation.

Butler appealed the negative tenure recommendation, as the Guidelines permitted. ROA.1894. Consideration of the appeal was abated until she completed FMLA leave. ROA.1894. On April 5, 2016, Collins notified Butler that, after her

FMLA leave ended on April 11, she needed to submit any supporting materials in her appeal by April 25. ROA.1894-95, 2054-55. Butler did not submit any materials. ROA.2055.

On May 4, 2016, Collins notified Butler that her appeal was denied and that Collins would submit a negative tenure recommendation. ROA.2055. As required by the Guidelines, Collins presented the negative recommendation to SMU's Provost (Currall). ROA.1895, 2055. Collins outlined the reasons for the negative recommendation, none of which involved Butler's race:

- Despite Butler's outstanding scholarship and service, she failed to meet SMU's high-quality teaching standard.
- Deficiencies in her teaching included:
    - problems with her class syllabi, assignments, exams, and teaching;
    - lack of classroom preparation;
    - excessively reviewing materials she had previously taught; and
    - a lack of knowledge of substantive tort law that manifested in misstatements of law and confusing contradictions in class.
- These deficiencies were:
    - reflected in student evaluations;
    - confirmed by faculty members who personally observed Butler's teaching; and
    - further confirmed by Collins' personal classroom visits, during which she observed the same issues.

- In the Spring 2015 student evaluations of all Law School faculty, Butler had the lowest scores for the mandatory, foundational 1L torts class.
- Throughout her SMU teaching career, Butler consistently had some of the lowest Law School teaching evaluations.

ROA.1895, 2097-2102.

H. SMU's Provost and Provost Advisory Committee did not make a positive tenure recommendation for Butler.

SMU's Provost, in consultation with the Provost Advisory Committee, reviews tenure and promotion recommendations. ROA.1896. This merit-based consideration is both standardized and rigorous. ROA.1896. The Advisory Committee consists of professors from each of SMU's schools. ROA.1896.

During the Spring 2016 semester, the Provost (Currall) and Advisory Committee considered the Law School faculty's and Dean Collins's tenure recommendations regarding Butler. ROA.1896, 2014, 2016, 2022. In considering the three tenure criteria as applied to Butler, the Provost and Advisory Committee had full access to her "tenure dossier" (*i.e.*, the Tenure Report, candidate personal statement, resume, and evaluations). ROA.2014, 2016, 2022. They applied the same tenure standards to Butler's consideration as to their consideration of the other Law School tenure candidates. ROA.1896, 2021. They afforded Butler the opportunity to return from FMLA leave, present supporting materials in her appeal, and obtain a decision in the appeal before the Provost made a recommendation to SMU's President. ROA.1896.

Ultimately, Currall informed Butler by letter that he could not make a positive tenure recommendation. ROA.2035. He notified her that she had three weeks to appeal the tenure recommendation to SMU President R. Gerald Turner. ROA.2035.

I. Butler did not appeal the Provost's negative tenure recommendation, which became final.

Butler did not appeal Currall's tenure recommendation. ROA.1897. The recommendation became final. ROA.1897.

Pursuant to the Contract, Butler continued as a fully paid Law School professor during her terminal academic year (2016-17). ROA.2024. During this paid terminal year, she was free to work on research/scholarship or seek new employment. ROA.2057.

III. In her lawsuit, Butler engaged a succession of lawyers in this lawsuit.

Ultimately, Butler filed this lawsuit and engaged a succession of lawyers to represent her. First, she was represented by labor-and-employment lawyer Alfonso Kennard. ROA.1502. Butler later substituted (without opposition) another labor-and-employment lawyer, Kenneth Barrett. ROA.804, 1503. Six months later, Butler substituted (without opposition) Terrance Robinson as her counsel. ROA.1067, 1503.

A year later, on the eve of the discovery and dispositive-motion deadlines, Robinson moved to withdraw. ROA.1486, 1504. Without any supporting evidence,

the motion recited that "an irreconcilable conflict has arisen" making the representation impossible. ROA.1486-90.

Defendants opposed this withdrawal based on the disruption and delay it would cause. ROA.1504-08. With discovery and dispositive-motion deadlines drawing near, Butler had failed to produce some basic discovery and had asserted unconventional objections to written discovery requests. *See, e.g.*, ROA.1269-70, 1505-07; *see also* ROA.1555-57. And despite previous assertions that her deposition would go forward, Butler announced that she would "no longer be available" on the noticed date. ROA.1511-12.

The district court set a status conference on the withdrawal motion and required Butler to appear. ROA.1496. Butler acknowledged that Robinson e-mailed the order to her twice, at seven and three days before the conference. ROA.1522 ¶1; *see also* ROA.1531 ¶16. Yet on the appointed day, after the conference had begun, Butler filed a continuance motion and opposition to the motion to withdraw. ROA.1520-23, 1525-54, 1562.

Butler asserted concerns about Robinson's "failure to prosecute her case," including filing discovery requests and "dispositive motions (which counsel had already agreed to file)" before scheduled deadlines. ROA.1525. At the same time, Butler asserted Robinson had "coerc[ed] [her] in doing the bulk of the legal research and writing of dispositive motions in the case." ROA.1525-26. Butler contended

that Robinson engaged in "bullying" that included "insulting and berating Plaintiff and threatening to withdraw from representation." ROA.1526.

Nevertheless, Butler acknowledged telling Robinson "that I was terminating his representation." ROA.1533 ¶29, ROA.1558. The district court granted Robinson's motion to withdraw. ROA.1558. Shortly thereafter, Dunlap appeared in the case as Butler's counsel. ROA.1564.

IV. Butler repeatedly sought extensions and delays during Attorney Dunlap's representation.

To accommodate settlement discussions Butler had commenced, Defendants filed an agreed motion to extend the deadlines for Butler's deposition and dispositive motions. ROA.1744-45. The district court extended the deadlines. ROA.1746. Then, the day before the agreed deposition date, Butler filed a suggestion of bankruptcy, which automatically stayed the case. ROA.1750.

A year later (February 2021), the bankruptcy court lifted the automatic stay to allow this case to proceed. ROA.1759-60. Upon reopening the case, the district court set deadlines to complete mediation and discovery (September 27, 2021), a dispositive-motion deadline (October 25, 2021), and a trial setting (April 5, 2022). ROA.1771, 1777.

After repeated attempts to schedule Butler's deposition, she agreed to September 17, 2021. ROA.1795. As this date and the discovery deadline approached, Butler announced that she would seek to depose two Defendants and

three other persons. ROA.1795. Defendants filed an agreed motion to extend the discovery deadline by one month (to October 29, 2021) to conduct Butler's requested depositions after her September 17 deposition. ROA.1796, 1798.

To accommodate the short discovery extension, the parties also moved to extend the mediation deadline to October 29, 2021, and the dispositive motions deadline to November 30, 2021. ROA.1796. These limited extensions, which the district court granted, would not affect the other pretrial deadlines or trial setting. ROA.1796-97, 1803. Defendants filed their summary-judgment papers according to the new deadline. ROA.1868-74, 1876-1936; *see also* 1937-2271.

Butler's summary-judgment-response deadline was December 20, 2021. *See* N.D. TEX. L.R. 7.1(e). On December 16, 2022, she moved for an extension to January 3, 2022. ROA.2272. As good cause, Butler offered an excuse that should have been anticipated: her end-of-semester professorial duties interfered with assisting her counsel in drafting the response. ROA.2272. Nevertheless, Defendants did not oppose the extension, which the district court granted. ROA.22 [Dkt.130], 2272.

On January 3, 2022, Butler moved for a second extension of her summary-judgment-response deadline, to January 7, 2022. ROA.2274-75. Butler offered the same reasons and asserted she was "in the process of grading tests for her Law Students." ROA.2274. The motion further represented that "Plaintiff has completed

her brief but needs to complete her declaration and finish compiling her exhibits." ROA.2274.

Over Defendants' opposition, the district court granted the second extension. ROA.22 [Dkt.134], ROA.2276-79.

V. Butler's efforts to delay deadlines reached a fever pitch with the appearance of Attorney Young in January 2022.

On January 6, 2022, Attorney Young filed an application for admission *pro hac vice* to appear as Butler's counsel.[2] ROA.2281-90. The same day, Butler filed a third motion to extend the summary-judgment-response deadline. ROA.2291-2300. Contrary to the statements in the second extension motion, she asserted that Dunlap had not finalized the summary-judgment opposition brief, had not assembled supporting documents, and had not completed a supporting declaration in advance of the following day's deadline. *Compare* ROA.2274 *with* ROA.2292. The new excuse echoed her assertion in connection with Attorney Robinson's 2019 withdrawal that he had failed to "file dispositive motions (which counsel had already agreed to file) before the deadlines set forth in the Scheduling Order." *Compare* ROA.1525 *with* ROA.2292.

[2] Between Dunlap's appearance and Young's appearance, additional counsel for Butler, John Green, also had appeared in the case. ROA.1804.

Butler also asserted that she had prepared partial drafts of filings after "Dunlap advised Butler in late 2021 that he did not have capacity to draft merits briefs in this matter…." ROA.2293. This assertion echoed her 2019 accusation that Robinson had "coerc[ed] Plaintiff in doing the bulk of the legal research and writing of dispositive motions in the case." *Compare id. with* ROA.1525-26. The third extension motion represented that, based on Young's review of Butler's partial drafts and the docket, "I believe that I can ensure that her opposition brief and supporting exhibits and declaration [will] be completed and docketed by January 20, 2022." ROA.2293.

Defendants opposed the third extension request. ROA.2293, 2297-98. By January 2022, the district court had granted at least three withdrawal/substitution motions on Butler's behalf. Before and after Butler's lengthy bankruptcy stay, the district court had extended discovery and dispositive motions deadlines multiple times to accommodate Butler's changing cast of lawyers and to address deficiencies in Butler's discovery responses. ROA.1750, 1759-60. And the April 5, 2022 trial setting was only four months away. ROA.1777, 2291.

The district court granted Young's motion to appear *pro hac vice*, but denied the third motion to extend Butler's summary-judgment-response deadline. ROA.22-23 [Dkts.136 & 141].

Dunlap moved to withdraw. ROA.2306. The motion summarily stated that "Plaintiff notified above Counsel that she terminated his services on January 7, 2022[.]" ROA.2306. Butler filed a proposed order substituting Young for Dunlap. ROA.2307. The district court denied the motions to withdraw and substitute. ROA.23 [Dkts.144-45]. Young was free to represent Butler in the case, but Dunlap remained responsible for the representation, as well. *See* ROA.22-23 [Dkt.136 & 144].

Butler moved to reconsider. ROA.2311. The statements in this motion contrasted sharply with statements in Butler's third extension motion filed just seven days earlier. In her third extension motion, Butler characterized her dissatisfaction with Dunlap's representation as emergent:

- She had contacted Young in late 2021 not to replace Dunlap, but to assist in settlement negotiations.
- Without urgency, she and Young agreed he would appear in the case sometime after the summary-judgment response was filed by Dunlap.
- On January 5, 2022 had she learned that Dunlap was not prepared to file.

ROA.2292.

Yet in the reconsideration motion, Butler stated without supporting detail that she had "experienced serious problems with Mr. Dunlap for more than a year." ROA.2311. Butler assured the district court that allowing Dunlap to withdraw would

not create more delay. ROA.2313-14. She asserted that Dunlap's continued presence in the case was a waste of time. ROA.2314. This assertion contrasted sharply with her statement in the third extension motion that Young needed "two weeks' time to ***work with Mr. Dunlap*** to obtain copies of all discovery produced in this matter and review it with Professor Butler and file clean, well-researched and evidence supported opposition filings in this matter." ROA.2293 (emphasis added).

In seeking the third extension, Butler had assured the district court that her summary-judgment "opposition brief and supporting exhibits and declaration [will] be completed and docketed by January 20, 2022." ROA.2293. Nevertheless, on January 20, 2022, Butler sought a fourth extension, asking the district court to set a new deadline of February 18, 2022. ROA.2321. Butler contended that transfer of the client file from Dunlap to Young had been "slow going." ROA.2324. Based on Young's professional judgment in light of the piecemeal file transfer, Butler contended that a new and final deadline of February 18 "is both realistic and necessary under the circumstances." ROA.2325; *see also* ROA.2327.

The new requested deadline would have afforded Butler "a total of eighty days to respond to Defendants' summary judgment motion…." ROA.2326. It would have moved the summary-judgment-response deadline past the February 8, 2022 deadline for Rule 26 pretrial disclosures and the reply deadline to the same day as the deadline to submit pretrial materials. ROA.2332. Butler contended that her offer

to jointly seek extensions of other deadlines made any prejudice to Defendants "a non-issue…." ROA.2327. However, the new deadline would have drastically curtailed the district court's opportunity to consider and rule on the summary-judgment motion before the April 5, 2022 trial setting. *See* ROA.2331-32.

On February 8, 2022, Defendants timely filed their pretrial disclosures. ROA.2332, 2378-87. The next day, Butler moved to extend her pretrial-disclosure deadline. ROA.2388-2405. She contended that her counsel (Young) "inadvertently missed this filing deadline" while attempting to secure Defendants' agreement to extended deadlines. ROA.2388. But rather than a short extension to address an inadvertent calendaring error, Butler requested a 28-day extension of time to March 8, 2022. ROA.2388; *see also* ROA.2390.

In addition, Butler now contended that the April 5, 2022 trial setting was "unworkable…." ROA.2313-14, 2392. She asserted that the parties, witnesses, and Young were "law school professors and administrators and April is a work intensive month in the Spring term." ROA.2392. Butler then attempted to use the specter of a trial continuance to nullify any prejudice from her extension request. ROA.2392.

February 18, 2022, the new summary-judgment-response deadline Butler had requested in her fourth extension motion, came and went. *See* ROA.24. The next day, Butler filed a summary-judgment response, brief, and appendix. ROA.24 [Dkts.159-61].

In a detailed order and memorandum opinion, the district court denied Butler's motion to file her summary-judgment opposition out of time. ROA.2444-53.

VI. The March 8, 2022 hearing transcript highlights the context in which the district court denied withdrawal.

On March 8, 2022, the district court held a status conference on pending motions. ROA.3455-56. Butler's counsel (Young) volunteered that he was "happy to address" Butler's pending issues, including the motion to reconsider the withdrawal/substitution ruling "still before the Court." ROA.3457. The district court allowed him to do so, admonishing his repeated interruptions of the court but then allowing him to present his argument. *See, e.g.*, ROA.3468-71, 3472, 3479-81, 3503-05. Ultimately, the district court stated four reasons on the record for denying the withdrawal and substitution: the case's age, Butler's history of delay, Young's need for information and materials from Dunlap, and prejudice to Defendants from further delaying case deadlines and trial. ROA.3528-29, 3532.

VII. The district court granted Defendants' summary-judgment motion in a reasoned opinion based on analysis of the summary-judgment record.

Butler moved to reconsider the denial of her fourth request to extend the summary-judgment response deadline. ROA.2488-2591, 2592-2700, 2949. The district court denied reconsideration. ROA.2879-82. Butler moved a second time to reconsider the fourth extension's denial. ROA.2883-94. The district court again

denied reconsideration. ROA.2948-67. The district court also stayed the case pending its summary-judgment ruling. ROA.2967.

The district court did not grant a default summary judgment based on Butler's failure to file timely summary-judgment-response papers. ROA.3132-33. Instead, the district court reviewed the summary-judgment record and concluded that Defendants had established their right to summary judgment on Butler's remaining claims. ROA.3121-76. From the district court's final judgment, Butler appealed. ROA.3177.

SUMMARY OF THE ARGUMENT

The district court correctly applied Texas law precluding plaintiffs from obtaining remedies not available under TCHRA based on alleged workplace discrimination/retaliation. TCHRA does not afford remedies against individual coworkers except in narrow circumstances not alleged here. Accordingly, TCHRA preempts Butler's common-law claims against her coworkers based on alleged workplace discrimination/retaliation, which were properly dismissed.

The district court also properly exercised its discretion to deny Butler's fourth attorney's motion to withdraw after allowing Butler's sixth attorney to appear *pro hac vice*. The record conclusively establishes that Young still needed information and materials from Dunlap less than a month before trial. Butler did not provide

exceptional reasons to justify the unwarranted delay and hardship that would result from Dunlap's withdrawal.

Moreover, in determining Defendants' summary-judgment motion, the district court applied the proper legal standards. For example, in exercising discretion to deny Butler's Rule 56(d) motion to permit "tenure box" discovery, the district court properly considered Butler's failure to establish that the tenure-box materials had not been produced already, that she needed any unidentified materials to present essential facts, or that she had exercised diligence in seeking the materials during discovery. The district court also properly exercised its broad discretion under Rule 6(b) to deny Butler's fourth (and third) extension requests after granting two extensions of the summary-judgment-response deadline. And the district court correctly accepted Defendants' uncontested facts as true in determining their entitlement to summary judgment, in accordance with this Court's precedent.

Even if Butler had established any reversible error, she has not met the standard for invoking the extraordinary power to reassign a case on remand. The district court in this case did not exhibit any bias by concluding that Butler asserted meritless claims, repeatedly missed deadlines and made extension requests, and offered excuses that were contradictory, conclusory, and unavailing. These conclusions were based on a well-documented record.

The district court's judgment should be affirmed.

ARGUMENT

I. The trial court correctly applied well-established Rule 12(b)(6) standards in partially dismissing Butler's claims.

A. The standard of review is *de novo*.

The Court reviews *de novo* Rule 12(b)(6) motions to dismiss for failure to state a claim. *Littell v. Hous. Indep. Sch. Dist.*, 894 F.3d 616, 622 (5th Cir. 2018). To survive a motion to dismiss, the plaintiff must allege claims that are plausible on their face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the pleaded facts allow the court to draw reasonable inferences that point to the defendant's liability for the alleged misconduct. *Culbertson v. Lykos*, 790 F.3d 608, 616 (5th Cir. 2015).

B. Butler does not challenge the dismissal as it pertains to SMU.

On appeal, Butler challenges the dismissal of claims "against Individual Defendants." Appellant.Br.2 (Issue 1); *see also id.* at 37. Thus, there is no basis to review the district court's dismissal with prejudice of Butler's negligent-supervision claim against SMU. *See* ROA.1157. Likewise, there is no basis to review the district court's determination that Butler had not pleaded defamation or fraud claims against SMU and would not be permitted to add such claims by amendment. *See* ROA.1157.

C. As the district court correctly concluded, Butler's claims of fraud, defamation, and conspiracy to defame fail to state a claim.

Butler contends that TCHRA can preempt claims against an employer but not against fellow employees. Appellant.Br.37-38. She cites two Texas Supreme Court opinions: *B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 276 (Tex. 2017), and *Waffle House, Inc. v. Williams*, 313 S.W.3d 796 (Tex. 2010). These opinions do not support Butler's argument.

Texas law recognizes the fundamental principle that a corporation cannot act except through natural persons who are its employees or agents. *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex. 1998); *Household Credit Servs., Inc. v. Driscol*, 989 S.W.2d 72, 83 (Tex. App.—El Paso 1998, pet. denied). Butler alleged claims against the individual defendants as SMU's employees, identifying the individual defendants as follows:

- "Defendant Jennifer M. Collins is a Professor of Law at SMU Dedman School of Law."
- "Defendant Steven C. Currall is the Provost and Vice President for Academic Affairs at SMU."
- "Defendant Roy R. Anderson is the Vinson & Elkins Distinguished Teaching Fellow and Professor of Law at SMU Dedman School of Law."
- "Defendant Julia Patterson Forrester is the Associate Provost and Professor of Law at SMU. At the time of the events giving rise to Plaintiff's claims, Ms. Forrester was Dean *ad interim* of the SMU

> Dedman School of Law and, initially a member of Plaintiff's Tenure and Promotion Committee."
>
> - "Defendant Harold W. Stanley is the Vice President for Executive Affairs and Guerin-Pettus Distinguished Professor in American Politics at SMU. At the time of the events giving rise to Plaintiff's claims, Mr. Stanley was the Provost *ad interim* at SMU and was later promoted to Vice-President of Executive Affairs."
> - "Defendant Paul J. Ward is the Vice President for Legal Affairs, General Counsel, and Secretary of the Board of Trustees of SMU."

ROA.595 ¶¶2-4, 6, 10-11.

To support her claims, Butler alleged the individual defendants performed activities in their various official capacities. *See* ROA.599-688 (allegations), ROA.688-99 (claims). She did not allege any actions outside the scope of their employment duties. *See* ROA.599-699. On the contrary, all of the alleged acts were connected with the tenure decision-making process. *See* ROA.599-699.

The Texas Legislature enacted TCHRA "to create a remedy for Texans" asserting employment discrimination and retaliation. *B.C.*, 512 S.W.3d at 282; *City of Waco v. Lopez*, 259 S.W.3d 147, 151, 156 (Tex. 2008). TCHRA provides "a comprehensive remedial scheme that grants extensive protections to employees in Texas, implements a comprehensive administrative regime, and affords carefully constructed remedies." *Lopez*, 259 S.W.3d at 153-54.

Like Title VII, TCHRA allows for employer liability, but "[i]t is well established in Texas that an individual cannot be held personally liable under the TCHRA." *Winters v. Chubb & Sons, Inc.*, 132 S.W.3d 568, 580 (Tex. App.—Houston [14th Dist.] 2004, no pet.). To the extent that TCHRA provides for relief against supervisory employees in some circumstances, such relief is available against the supervisor in her *official* capacity based on the agency relationship between the supervisor and employer. *Chavez v. McDonald's Corp.*, No. 3:99–CV–1718D, 1999 WL 814527, at *2-3 (N.D. Tex. Oct. 8, 1999); *see also Harvey v. Blake*, 913 F.2d 226, 227-28 (5th Cir. 1990) (discussing same principle in analogous Title VII situation).

Although *Waffle House* did not involve claims against coworkers, it made clear that Texas law does not allow plaintiffs to use common-law remedies beyond TCHRA to "undermine the limitations placed on the legislative remedy directed at the same conduct." 313 S.W.3d at 808. If the gravamen of a plaintiff's complaint is a type of wrong the statute was meant to cover, a plaintiff cannot maintain a tort claim that would evade the statutory limits on recovery. *Id.*; *see also Hoffman-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 448 (Tex. 2004). For instance, if a common-law defamation claim is based on "'the same boorish and objectionable conduct'" covered by TCHRA, the defamation claim is preempted. *Hassell v. Axium Healthcare Pharmacy, Inc.*, No. 4:13-cv-746-O, 2014 WL 1757207, at *7 (N.D.

Tex. May 2, 2014) (quoting and applying *Waffle House*). Whomever the defendant may be, Texas law does not allow a plaintiff to recast discrimination/retaliation claims as common-law torts to avoid TCHRA's limitations. *Waffle House*, 313 S.W.3d at 808.

Nothing in *B.C.* changes these fundamental principles. On the contrary, the Texas Supreme Court recognized the "difference in the fundamental theory of employer liability" alleged in *B.C.* as opposed to *Waffle House*. *B.C.*, 512 S.W.3d at 281. In *Waffle House*, the plaintiff alleged sexual harassment. *Id.* The plaintiff's negligence claims were based on the same factual predicate for proving a hostile work environment, thus covered by TCHRA's remedial scheme. *Id.* at 281-82.

But in *B.C.*, the plaintiff alleged a single sexual assault. *Id.* at 281. TCHRA was enacted to provide a claim for individuals who have been subjected to discrimination and harassment by coworkers in the workplace. *Id.* at 282. But the person who assaulted B.C. was not merely a coworker or employee; he was an ***assailant*** engaged in criminal conduct. *Id.* at 281-82. The Texas Legislature did not intend for TCHRA to benefit "individual assailants" with statutorily-capped damages "simply because those assaults occurred in the workplace and not elsewhere." *Id.* at 282. Expanding TCHRA's reach to encompass criminal acts that also "can be characterized as sexual harassment" because they occurred in the

workplace would be "an extreme result" not supported by TCHRA's text or purpose. *Id.*

Nothing about this holding changes the fundamental principles discussed in *Waffle House* or supports a conclusion that Butler's claims against the individual defendants are permissible. Applying the *Waffle House* principles yields the conclusion reached by the district court: the fraud, defamation, and conspiracy-to-defame claims are based on alleged conduct (workplace discrimination and retaliation) that TCHRA is specifically designed to address. ROA.1156 (citing *Waffle House*, 313 S.W.3d at 808-09).

Although Butler sued the individual defendants personally, her Second Amended Complaint identifies them in their official capacities at SMU and alleges acts that occurred in connection with Butler's tenure process as they performed their duties as SMU employees. Her attempt to characterize her claims as against "coworkers" when those claims are all based on alleged acts by those persons as SMU employees is just another attempt to recast claims covered by TCHRA for alleged workplace discrimination and retaliation. *See B.C.*, 512 S.W.3d at 282; *Waffle House*, 313 S.W.3d at 808-09; *Lopez*, 259 S.W.3d at 153-54.

The gravamen of Butler's defamation and conspiracy-to-defame claims is the same alleged discriminatory and retaliatory scheme she contends was waged against her during her employment and consideration for tenure at SMU. Butler alleges that

the individual defendants' allegedly defamatory statements "have injured [Butler's] occupation as ***she was denied tenure*** as a direct result of Defendants' statements." ROA.691 ¶624, ROA.693 ¶¶634, 641, ROA.694 ¶649 , ROA.695 ¶655. All the alleged defamatory statements were made during or in connection with the tenure process. ROA.669 (alleged statements in Tenure Report and tenure vote meeting), ROA.672-73 (alleged statements about her FMLA status during the tenure process), ROA.675 (alleged statements regarding Butler's lying, as revealed during the Tenure Committee's work), 677 (alleged statement in the Tenure Report), 679 (same), 680 (alleged statements made to discourage faculty assistance in investigating claim of discrimination in the tenure process), 681 (alleged statements in the Tenure Report), 682-83 (alleged statements made by Tenure Committee), 683 (alleged statement "shortly before the tenure vote"), 684 (alleged statement regarding general scheme of defamation and retaliation), 685 (alleged statement regarding terminal year after tenure denial), 686-87 (alleged statements about teaching deficiencies noted during tenure consideration), 695 (alleged statements to tenure-committee members). *See also* ROA.692 ¶632, ROA.693 ¶639 (alleged defamatory statements published in Tenure Report). And her conspiracy-to-defame claim is derivative of the alleged defamation claims. *See Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996).

Likewise, Butler's fraud claim is predicated on the defamation claims that are predicated on the discrimination/retaliation claims. Butler asserts that the individual

defendants engaged in a scheme "to fraudulently conceal[] the defamatory and discriminatory statements made against Plaintiff during her tenure process." ROA.688 ¶607. She alleges the individual defendants "fraudulently concealed the defamatory and[/]or discriminatory statements by threatening members of the law faculty with retaliation and[/]or otherwise creating a climate of fear and intimidation to discourage faculty members from exposing the defamation and[/]or discrimination against Professor Butler." ROA.691 ¶621.

Because Butler's claims for fraud, defamation, and conspiracy to defame are preempted by TCHRA, those claims fail as a matter of law. The district court properly dismissed those claims under Rule 12(b)(6).

II. The trial court properly exercised its discretion in denying Attorney Dunlap's motion for withdrawal.

A. The standard of review is abuse of discretion.

An attorney's withdrawal in any given case is a matter entrusted to the district court's sound discretion. *Matter of Wynn*, 889 F.2d 644, 646 (5th Cir. 1989). This Court will overturn the district court's ruling only for an abuse of that discretion. *Id.*

B. The district court explained the reasons supporting its ruling.

Butler contends that a district court can never deny a motion without providing a written memorandum detailing the "rationales for denying the motion." AppellantsBr.39. For this proposition, she cites this Court's precedent requiring district courts to "give reasons for its decisions regarding attorney's fees" when those

fees are adjudicated under Rule 54. *Schwarz v. Folloder*, 767 F.2d 125, 133 (5th Cir. 1985); *see also CenterPoint Energy Hou. Elec. LLC v. Harris Cty. Toll Road Auth.*, 436 F.3d 541, 550-51 (5th Cir. 2006). But in denying Butler's lawyer's motion to withdraw, the district court was not disposing of the lawsuit, *e.g.*, by adjudicating attorneys' fees in connection with a final judgment. Instead, the district court was deciding an interlocutory motion.

Regardless, at the March 8, 2022 status conference, the district court did "give reasons for its decision[]" regarding the motion to withdraw. ROA.3528-29, 3532; *see also* ROA.3478-79, 3488-89, 3503-04. The reasons are not "mere aside[s]." *See Schwarz*, 767 F.2d at 133. The district court expressed the intent that its statements articulate the reasons for denying Dunlap's withdrawal. ROA.3528-29 (articulating three reasons), ROA.3532 (articulating fourth reason); *see also* ROA.26 (minute entry), ROA.3478-79 (providing additional detail). The district court's hearty explanation allows this Court to evaluate whether the decision was within the bounds of discretion or based on an erroneous legal theory. *See Schwarz*, 767 F.2d at 133. Indeed, after the district court detailed its reasons (ROA.3528-29), Butler's current counsel (Young) stated, "I don't want to consume any more of the Court's time, so we'll concede the reconsideration of Mr. Dunlap's withdrawal." ROA.3529.

C. The district court acted within its discretion in denying withdrawal.

Butler contends that she has the right "to choose who she does and does not work with." Appellant.Br.38. She cites no case for this proposition. *Id.* A litigant does not have an absolute right to work with the lawyer she desires, but rather "must be *afforded a fair opportunity to secure counsel of [her] choice*…." *Wynn*, 889 F.2d at 646 (emphasis in original). In this lawsuit, Butler secured multiple counsel of her choice, including Dunlap and Young. The district court did not preclude either Dunlap or Young from appearing in this case on Butler's behalf.

An attorney may withdraw from representation only upon leave of the court and a showing of good cause and reasonable notice to the client. *Wynn*, 889 F.2d at 646. When withdrawal will result in unwarranted delay, "the court should demand exceptional reasons before relieving the attorney of his duties." *Streetman v. Lynaugh*, 674 F. Supp. 229, 235 (E.D. Tex. 1987); *see also Broughten v. Voss*, 634 F.2d 880, 882-83 (5th Cir. 1981). For example, where replacing one attorney who "is thoroughly familiar with the record in this case" with a new attorney who would need time to "become equally familiar with the case" would "inject further delay" into a case, the hardship imposed on the trial court and defendant supports denial of the motion. *F.T.C. v. Intellipay, Inc.*, 828 F. Supp. 33, 34 (S.D. Tex. 1993); *Streetman*, 674 F. Supp. at 235. This hardship is exacerbated when the withdrawal is requested as trial approaches. *See Intellipay*, 828 F. Supp. at 34.

The primary reason articulated by the district court for denying Dunlap's withdrawal was that Butler's new counsel had not become thoroughly familiar with the case and still needed information and materials from Dunlap. ROA.3478-79. The district court provided an example of a recent filing in which Butler's new counsel attached an e-mail chain from early March 2022 wherein he was seeking substantive information from Dunlap about the case. ROA.3478. The district court explained:

> And so, one of the reasons that I think kicking him off the case would be inappropriate is, as I see from your e-mails, you need him. You don't know everything about this case. You don't have all the materials you need or you wouldn't be e-mailing him, asking him for them.
>
> And if we go March 3rd or 4th, and you are still asking for materials, you can't do this case on your own. And if I let you on and let him off – I'll let you talk when I'm finished – if I let him off, I would necessarily have to reschedule this [trial]. There is [no] way I could not. You would be ineffective assistance of counsel if I did not.

ROA.3478-79; *see also* ROA.3488, 3497.

Although Young protested that his communications with Dunlap were not because he "didn't know things, but to confirm" information, Young then provided two examples of instances in which he needed Dunlap to provide information or "confirm" what had happened in the case. *See* ROA.3482-84. Indeed, despite repeated efforts to obtain the client file, Young had only been "able to get ***some*** stuff from Mr. Dunlap." ROA.3495 (emphasis added), 3501. Although he contended that

he was "up to date on the docket" (ROA.3495), he was not staffed adequately to complete pretrial tasks without asking for a month's extension or to present the case at a three-week bench trial. ROA.3495-96, 3505, 3515.

The record also confirms the unwarranted delay that resulted from Young's attempt to represent Butler without Dunlap's assistance. Between Young's appearance on January 6, 2022 and the status conference on March 8, 2022, Butler:

- sought two summary-judgment-response extensions, which she indicated would necessitate extending other pretrial deadlines. ROA.2291-2300, 2321-29;
- sought extension of her pretrial disclosures deadline. ROA.2388-2405.
- indicated her belief that the trial setting would need to be continued. ROA.2392.

Unsupported attacks on counsel provided no support for withdrawal. The district court did not countenance unsupported attacks on any of the lawyers, whether counsel for Butler or for Defendants. *See, e.g.*, ROA.2963-64 (regarding Dunlap), ROA.3479 (regarding Robinson), ROA.3527-28 (regarding Dunlap and Defendants' counsel). Butler's assertions against Dunlap repeated earlier assertions she had made against Robinson, evidencing a pattern of using withdrawal and substitution to effect delay. ROA.3479.

Ultimately, the district court listed four reasons for denying Dunlap's motion to withdraw:

(1) This case is four years old. ROA.3528.

(2) Butler has a history of changing lawyers and injecting delay before significant case events. ROA.3528-29.

(3) Young needed Dunlap to stay on the case because Young did not know the case and was not ready for trial. ROA.3529.

(4) Delaying pretrial deadlines and trial would prejudice Defendants. ROA.3532; *see also* ROA.2446-47.

Butler did not provide exceptional reasons to justify the unwarranted delay and hardship that would result from Dunlap's withdrawal, especially in light of the impeding trial setting. *See Intellipay*, 828 F. Supp. at 34; *Streetman*, 674 F. Supp. at 235; *Broughten*, 634 F.2d at 882-83. The trial court acted within its discretion in allowing Young to appear *pro hac vice* but denying the request to allow Dunlap to withdraw before Young had obtained all the information and material he needed and had arranged for the legal assistance he required to meet deadlines and present the case for trial. *See Intellipay*, 828 F. Supp. at 34; *Streetman*, 674 F. Supp. at 235.

III. The district court acted properly throughout the process of determining Defendants' summary-judgment motion.

A. The district court properly exercised its discretion in denying Butler's Rule 56(d) motion.

1. The standard of review is abuse of discretion.

The Court reviews a district court's denial of a Rule 56(d) motion for abuse of discretion. *Am. Family Life Assur. Co. v. Biles*, 714 F.3d 887, 894 (5th Cir. 2013). Although such motions are liberally granted, the movant must set forth a plausible

basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist…." *Id.* The movant also must indicate how the emergent facts, if adduced, will influence the outcome of the pending summary-judgment motion. *Id.*; *see also* FED. R. CIV. P. 56(d) (requiring party seeking discovery to show by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition). Additionally, the movant must show that she diligently pursued the discovery sought. *Bailey v. KS Mgmt. Servs., L.L.C.*, 35 F.4th 397, 401 (5th Cir. 2022) (per curiam); *Jacked Up, LLC v. Sara Lee Corp.*, 854 F.3d 797, 816 (5th Cir. 2017).

2. The denial of Butler's Rule 56(d) motion falls squarely within the district court's discretion.

a. Butler did not set forth a plausible basis for believing that the tenure-box materials had not already been produced or that she could not present essential facts.

A "tenure box" refers to the materials that are assembled for the tenure committee's consideration in evaluating a tenure candidate for a tenure recommendation. ROA.1892, 3568. These materials typically include detailed resumes, syllabi, teaching evaluations, and the candidate's personal statement. ROA.1892; *see also* ROA.2993 (in which Butler contends she turned in all of the documents that were requested and required for the tenure box).

Defendants produced tens of thousands of pages of documents in discovery. *See, e.g.*, ROA.3569, 3588. These documents included the materials included in

Butler's tenure box. ROA.3587. Butler's counsel, Young, reviewed "all the discovery that [he] could get" from Dunlap. ROA.3569. He contends that he "could not find the entire contents of the tenure box." ROA.3569.

However, Young does not know exactly what was placed in the tenure box. ROA.3569-70. Butler relies on her memory as to what she submitted for inclusion. ROA.3569-70. She does not know if she has a copy of what she had submitted. ROA.2994. She cannot recall whether she only submitted materials on paper or may also have e-mailed additional materials. ROA.2993-94.

Nevertheless, Butler has a list of the contents that should have been submitted. ROA.2997. And although Young contends he could not find the "entire contents" of the tenure box in Defendants' production (ROA.3569), the only documents identified as contained in the tenure box and missing from Defendants' production are the "hand labeled dividers" separating the substantive documents and a "table of contents." ROA.2978; *see also* Appellant.Br.23. Butler has not identified—in the district court or this Court—any substantive document that was, in fact: (1) submitted in her tenure box; but (2) not produced by Defendants in discovery. *See, e.g.*, ROA.3571-72.

Young acknowledges that Defendants produced in discovery all of the materials that the "decision makers" placed in the tenure box. ROA.3571. He also acknowledges that Defendants produced in discovery e-mails and attachments that

Butler sent to the Tenure Committee. ROA.3571. Young indicates that Butler also would have submitted "things that someone might only have one physical copy of, like a letter from a judge thanking someone for teaching a CLE, a letter from a client' handwritten cards from students thanking the professor for supervising them, that sort of thing." ROA.3568-69. But Young confirmed to the district court that "[w]e have all the letters that came from the box, Your Honor…." ROA.3485.

Although she contends that the tenure-box materials are "pertinent to the overarching question of whether Butler merited tenure but for illicit motives" was denied tenure (ROA.2979), Butler cannot say—much less prove—that any substantive tenure-box materials were not produced in discovery, and if so, what they are. Likewise, she cannot demonstrate that any unidentified, unproduced materials precluded her from presenting facts essential to her summary-judgment opposition, particularly in the face of all the tenure-box materials she acknowledges Defendants produced.

Because Butler failed to satisfy the Rule 56(d), the district court acted within its discretion in denying the motion.

b. Butler did not establish diligence in pursuing the tenure-box materials in discovery.

Butler contends that her diligence in pursuing the tenure-box materials in discovery is established by:

(1) her e-mails to Dean Collins before filing suit requesting the "return of her tenure box…." Appellant.Br.41.

(2) her counsel's e-mails to Defendants' counsel in March 2022 requesting "production" of the tenure box before filing the Rule 56(d) motion. *Id.*

Butler cannot point to a single written discovery request asking for the "tenure box." *Id.*; ROA.2968-85. Indeed, her Rule 56(d) motion "seeks leave to issue one request for production of her 'tenure box' from Defendants." ROA.2974-75.

E-mails sent before the lawsuit was filed do not support a conclusion that Butler diligently pursued ***discovery***, as required to obtain Rule 56(d) relief. *See Bailey*, 35 F.4th at 401; *Jacked Up*, 854 F.3d at 816. Furthermore, e-mails sent by Butler's counsel in March 2022, after discovery closed in September 2021, do not establish diligence in pursuing the discovery. ROA.3003-09. If anything, these e-mails establish that Butler was ***not*** diligent in pursuing the tenure-box materials during discovery.

Butler's failure to satisfy this aspect of the Rule 56(d) standard also establishes that the district court acted within its discretion in denying the motion.

B. The district court properly exercised its discretion to deny Butler's fourth request to extend the summary-judgment response deadline.

1. The standard of review is abuse of discretion.

The Court reviews the denial of a Rule 6(b) motion to extend a deadline for abuse of discretion. *Geiserman v. MacDonald*, 893 F.2d 787, 793 (5th Cir. 1990); *see also* FED. R. CIV. P. 6(b) (using permissive language). Any extension request

filed after a deadline may be granted only upon a finding of excusable neglect. *See* FED. R. CIV. P. 6(b)(1)(B). "Excusable" involves an equitable determination that considers all relevant circumstances surrounding the party's omission. *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 392 (1993). The relevant circumstances include "the danger of prejudice to the [nonmovant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the movant's reasonable control, and whether the movant acted in good faith." *Id.*; *see also* ROA.2446.

This discretion exists even when denying a requested extension will preclude the presentation of evidence essential to a plaintiff's case. In particular, these standards apply to summary-judgment response deadlines. *Kitchen v. BASF*, 952 F.3d 247, 254 (5th Cir. 2020). A "district court has discretion to refuse to accept a party's dilatory response to a motion for summary judgment" and "discretion to deny extending the deadline when no excusable neglect is shown." *Id.* A plaintiff's contention that materials are essential to her case actually underscores the importance of complying with the applicable filing deadline in the first place. *Geiserman*, 893 F.2d at 792. The materials' importance "cannot singularly override the enforcement of local rules and scheduling orders." *Id.*

Ultimately, even if good cause and excusable neglect are shown, the district court has discretion to deny any motion to extend time under Rule 6(b). *McCarty v.*

Thaler, 376 F. App'x 442, 443-44 (5th Cir. 2010) (per curiam) (unpublished) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 894-98 (1990)).

2. The district court did not abuse its discretion.

Over the four years from the lawsuit's filing to the denial of Butler's fourth motion to extend the summary-judgment-response deadline, the district court granted numerous extension requests occasioned by Butler's failure to meet deadlines. ROA.2446. Indeed, the district court granted Butler's first two motions to extend the summary-judgment-response deadline.

The detailed reasons stated by the district court in its order and memorandum denying the fourth motion support its exercise of discretion. ROA.2444-53. Among the reasons for the denial:

- Prejudice to Defendants: Extending the summary-judgment response deadline to February 18 would create a filing traffic-jam. Defendants' reply would be due March 5, all parties' pretrial materials due just three days later (March 8), and both of these deadlines would fall within one month of trial (April 5). The filing jam would impede Defendants' preparation of their summary-judgment reply, pretrial materials, and trial presentation. ROA.2446-47.
- Negative impact on judicial proceedings. The filing jam also would require the parties to juggle multiple deadlines despite Butler's proven inability to do so, leading inevitably to more deadline extensions in the four-year-old case. ROA.2447.
- No supportable reasons for further delay. Butler's repeated failures to meet court-ordered deadlines should not be rewarded after two previous

> extensions. ROA.2447-48. The reasons offered in the third extension motion contradicted reasons given in obtaining those earlier extensions. ROA.2448-49. The reasons offered in the third and fourth extension motions also did not establish a basis to grant more extensions. ROA.2449-51.

Butler takes issue with the district court's denial of her third extension request without a detailed memorandum opinion. Appellant.Br.43-44. Yet, in its Order and Memorandum Opinion denying Butler's fourth extension request, the district court detailed reasons for denying the third motion:

- The third motion was filed on the deadline that already had been extended twice. ROA.2448.
- The third motion made statements that conflicted with the second motion for extension, which had been granted. ROA.2448-49.
- A conclusory assurance that a two-week extension would be sufficient to complete the summary-judgment response (*i.e.*, good cause) was unsupported by any explanation of how it would be possible for Butler's new lawyer to learn the documents and the case quickly enough to draft a substantive response within 14 days. ROA.2449-50.

The record supporting the district court's findings and conclusions as to both the third and fourth extension requests is set forth in more detail in the Statement of the Case above (sections III through V). When reading through these relevant facts, this Court's observation in *McCarty* seems particularly apt: "These circumstances do not so much show excusable neglect as they show a party seeking to set [her] own deadlines." 376 F. App'x at 444.

Even if Butler had met the applicable standards, the district court still would have had discretion to deny the third and fourth extension requests. *See Lujan*, 497 U.S. at 894-98; *McCarty*, 376 F. App'x at 443. The district court had granted two previous extensions, affording Butler over a month to respond to Defendants' summary-judgment motion. *See Adams v. Travelers Indem. Co.*, 465 F.3d 156, 161 (5th Cir. 2006). The third requested extension would have allowed Butler approximately 50 days to respond, and the fourth requested extension would have afforded her "a total of eighty days to respond…." ROA.2326.

Repeatedly missing applicable deadlines "increase[s] the cost of litigation, to the detriment of the parties enmeshed in it" and "are one factor causing disrespect for lawyers in the judicial process…." *Geiserman*, 893 F.2d at 791. As this Court observed over thirty years ago:

> Adherence to reasonable deadlines is critical to restoring integrity in court proceedings. We will not lightly disturb a court's enforcement of those deadlines and find no reason for doing so here.

Geiserman, 893 F.2d at 792 n.9.

There was no abuse of discretion in denying the third and fourth requests. *See Adams*, 465 F.3d at 161-62. Indeed, if the district court on this record lacked discretion, it is difficult to imagine when a court would be permitted to deny an extension request. Such a determination would strip district courts of their power to

control their dockets by holding litigants to a schedule. *See Shepherd v. City of Shreveport*, 920 F.3d 278, 288 (5th Cir. 2019) (discussing power).

C. The district court correctly applied well-established summary-judgment standards in granting summary judgment.

1. The standard of review is *de novo*.

The Court reviews a district court's grant of summary judgment *de novo*. *Kitchen*, 952 F.3d at 252. Summary judgment is proper when the movant demonstrates there is no genuine dispute as to any material fact and entitlement to judgment as a matter of law. *Kitchen*, 952 F.3d at 252; FED. R. CIV. P. 56(a). A movant seeking summary judgment on a nonmovant's claim may meet this standard in either of two ways: (1) submitting evidence negating the existence of an essential element; or (2) arguing there is no evidence to support one or more essential elements. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In response to a "no evidence" ground, the nonmovant must present evidence creating a genuine dispute of material fact on that element. *Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 335 (5th Cir. 2017).

A genuine dispute of material fact does not arise merely based on contrary allegations or assertions that specific facts are disputed. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Rather, there must be sufficient summary-judgment evidence to show a material fact dispute requiring a factfinder to resolve the differing versions at trial. *Id.* There is no triable issue without sufficient evidence for a jury

to return a verdict for the nonmoving party. *Id.* at 249. If the evidence is merely colorable or not significantly probative, summary judgment may be granted. *Id.* at 249-50.

1. The district court correctly applied the standards for accepting a movant's facts as undisputed.

The lack of a response does not allow the grant of summary judgment by default. *See Eversley v. MBank Dallas*, 843 F.2d 172, 174 (5th Cir. 1988). However, when the summary-judgment record contains no competent, competing evidence, courts may accept the movant's facts as undisputed. *See id.* Moreover, the district court is not required to sift through the summary-judgment record in search of evidence that might support a nonmovant's summary-judgment opposition. *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998); *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n.7 (5th Cir. 1992).

Butler argues in Section VI(B) of her brief that the district court should not have accepted Defendants' facts as undisputed because she was more proactive than the plaintiff in *Eversley*. Appellant.Br.50. But the district court properly denied Butler's third and fourth extension requests. *See* Argument §II, *supra*. Thus, as in *Eversley*, there was no summary-judgment response to consider.

Butler also argues that the time it took the district court to issue a memorandum order and opinion nullifies the discretion to deny her third and fourth extension requests. Appellant.Br.51-52. She cites no case law to support her

position. *Id.* Nor does she provide any support for rewriting the Rule 6(b) standard to examine events occurring ***after*** an extension is denied in determining whether a district court properly exercised its discretion ***at the time of the denial***. *See id.*

Far from ignoring this Court's precedent, the district court repeatedly examined and explained the proper interpretation and application of *Eversley* and other case law. ROA.2451, 2881, 2951-53. And as Butler acknowledges, Rule 56(e) expressly confers discretion to consider a fact undisputed for summary-judgment purposes if "a party fails to 'properly address another party's assertion of fact….'" Appellant.Br.50. The district court acted within its discretion in accepting Defendants' facts as undisputed in the face of Butler's failure to timely file a summary-judgment response.[3] *See* FED. R. CIV. P. 56(e); *Eversley*, 843 F.2d at 174; *see also* Argument §III(B), *supra*.

2. The district court correctly determined that Counts 18 and 19 in Butler's complaint are legally uncognizable.

The district court determined that three counts against SMU in Butler's complaint are legally uncognizable. ROA.3146-47 (Counts 18 and 20), ROA.3147-48 (Count 19). Butler challenges two of these rulings. Appellant.Br.49-50 (Counts 18 and 19).

[3] Butler cannot create material fact disputes in this Court with evidence that was not in the summary-judgment record. *See, e.g.*, Appellant.Br.32-33 (referencing hearsay statements from colleagues (ROA.3018, 3021), attached to her Rule 56(d) motion (ROA.2968)).

a. Count 18: "segregation in the workplace"

Count 18 alleges violations of the RA and ADA based on alleged "segregation in the workplace."[4] ROA.714-15, 3146; *see also* Appellant.Br.49. This claim relates to SMU's fulfillment of its contractual obligation to pay Butler for a terminal year after she did not achieve tenure. ROA.714-15, 1897. During her paid terminal year, Butler was not assigned any classes to teach and instead was free to work on research/scholarship or to seek new employment. ROA.1897. Butler contends that this action amounts to "segregation in the workplace" and "indicated that [SMU] regarded [Butler] as disable[d] and discriminated against her based on their unsubstantiated assumptions about her disability." ROA.714-15.

This Court has not recognized a cause of action under the RA or ADA for "segregation in the workplace" based on disability. *Cf. Spencer v. FEI, Inc.*, 725 F. App'x 263, 267 (5th Cir. 2018) (unpublished) (agreeing with *Grimes* that Court had not explicitly recognized a discrimination claim based on association with a handicapped individual); *Grimes v. Wal-Mart Stores Tex., L.L.C.*, 505 F. App'x 376, 380 n.1 (5th Cir. 2013) (unpublished) (observing that the Court had not explicitly recognized, nor should its opinion be construed as recognizing, an RA or ADA claim

[4] TCHRA claims based on alleged disability discrimination are interpreted in accordance with ADA disability-discrimination claims. ROA.3146 (citing *Williams v. Tarrant Cty. Coll. Dist.*, 717 F. App'x 440, 444-45 (5th Cir. 2018) (unpublished)); *see also NME Hosps., Inc. v. Rennels*, 994 S.W.2d 142, 144 (Tex. 1999).

for associational discrimination based on disability). The district court found no language in the ADA, RA, or precedential case law recognizing a cause of action for "segregation in the workplace." ROA.3146. Butler has not pointed this Court to any such language. *See* Appellant.Br.49-50.

To the extent that "segregation" is encompassed within the term "discrimination" in ADA section 12112(b)(1), Butler asserted RA, ADA, and TCHRA claims for alleged disability discrimination in Counts 17 and 29. ROA.3147 n.11; *see also* Appellant.Br.49 (citing 42 U.S.C. §12112(b)(1)). The district court did not question the cognizability of those claims, but rather addressed them separately. ROA.3147 n.11. Moreover, the district court concluded that, even if a "segregation in the workplace" claim were cognizable, the summary-judgment record contained no evidence to support it. ROA.3147. For example, no evidence indicates that, much less creates a triable issue on whether, SMU's decision to perform its contractual obligation to pay Butler for a terminal year was based on—or even connected with—a purported disability. The district court correctly granted summary judgment on Count 18.

b. Count 19: "associational discrimination"

Count 19 alleges RA and ADA violations based on "associational discrimination." ROA.715-16, 3147-48. Butler contends that an "unpublished opinion of this Circuit…recognizes that the ADA prohibits associational

discrimination…." Appellant.Br.49 (citing *Besser v. Tex. Gen'l Land Office*, 834 F. App'x 876, 887 (5th Cir. 2020) (unpublished)). On the contrary, *Besser* states the same thing that *Spencer* and *Grimes* stated earlier: "This court has not 'explicitly recognized a cause of action for discrimination based on association with a handicapped individual.'" 834 F. App'x at 886. In *Besser* (as in *Spencer* and *Grimes*), the Court held that "***Regardless of whether we would recognize such a claim***, we agree with the district court that Besser has not adequately pled facts sufficient to support the fourth requirement" that would apply if such an action were viable. *Id.*

The district court applied *Spencer* and *Grimes* in "declin[ing] to recognize Plaintiff's 'associational discrimination' claim" without support in the RA, ADA, or other precedent. ROA.3147-48. The district court also held that, even if such a claim were cognizable, the summary-judgment record lacked evidence to support the first, third, and fourth elements that would be required to establish such a claim. *Id.* (citing *Spencer*, 725 F. App'x at 267).

The district court correctly granted summary judgment on Count 19.

3. Defendants were not required to present evidence to support Butler's opposition to summary judgment.

Butler contends that the summary judgment on her "tenure denial" claims was improper because "Defendants-Appellees bore the burden of proving that Butler was unqualified for tenure but nonetheless failed to adduce indispensable evidence to

prove that point, Butler's tenure box." Appellant.Br.52. This argument does not support any relief for multiple reasons.

First, Butler's characterization of her claims as requiring proof that she was "unqualified for tenure" is incorrect. Her claims are based on alleged employment discrimination and retaliation, as well as breach of contract. ROA.704-26. Courts do not sit as a "super-tenure committee," but rather serve as arbiters of Butler's legal claims under various statutes designed to address discrimination and retaliation in the workplace, as well as common-law principles applicable to employment contracts. *See, e.g.*, *Megill v. Bd. of Regents of State of Fla.*, 541 F.2d 1073, 1077 (5th Cir. 1976); *E.E.O.C. v. Amego, Inc.*, 110 F.3d 135, 145 (1st Cir. 1997).

In addition, for elements of Butler's statutory/contract claims Defendants challenged for "no evidence," Butler—not Defendants—bore the burden to present evidence creating a genuine dispute of material fact. *See Austin*, 864 F.3d at 335; *see also Catrett*, 477 U.S. at 323.

Moreover, to the extent Defendants submitted evidence in support of their traditional summary-judgment grounds, they bore no burden to include evidence that Butler contends would have supported her opposition. *See* FED. R. CIV. P. 56(c). Defendants were required only to submit evidence sufficient to negate the existence of a single element of each challenged claim. *See Catrett*, 477 U.S. at 323.

Independently, Butler does not identify any portion of the district court's summary judgment—or any ground in Defendants' summary-judgment motion—requiring proof by the materials submitted in Butler's tenure box. Appellant.Br.52-54. One case that Butler cites indicates that tenure materials are discoverable. *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990). But none of the cases supports the proposition that the tenure materials are required, or even essential, to proving or disproving discrimination. *See, e.g., Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 137 (2000) (alleging discrimination by plumbing-products manufacturer); *Laxton v. Gap Inc.*, 333 F.3d 572, 574 (5th Cir. 2003) (alleging discrimination by Gap store). At most, Butler's cited cases examine a plaintiff/professor's qualifications themselves (or lack thereof) and the review procedure, not tenure materials. *See Yul Chu v. Miss. State Univ.*, 592 F. App'x 260, 261-62 (5th Cir. 2014) (unpublished) (discussing tenure review process, but not referencing review of materials or "tenure box"); *Nikolova v. Univ. of Tex.*, No. 1:19-CV-877-RP, 2022 WL 466988, at *3, 11 (W.D. Tex. Feb. 15, 2022) (referencing "tenure dossier" in factual recitation, without relying on it to decide that fact disputes precluded summary judgment).

Finally, Butler does not offer any record support for her contention that Defendants failed to produce the tenure materials submitted in her tenure box. Appellant.Br.54. To the extent this portion of her brief attempts to rehash her Rule

56(d) arguments regarding the "tenure box," she failed to demonstrate any abuse of discretion in that regard. *See* Argument III(A), *supra*.

4. Butler was required to present evidence to create a genuine fact dispute on the elements Defendants challenged for "no evidence."

Butler contends that the district court "simply defaulted to finding that Butler failed to carry her burdens as nonmovant" rather than "ensure that Defendants-Appellees carried their evidentiary burdens." Appellant.Br.55-56. But for elements of Butler's claims Defendants challenged for "no evidence," Butler—not Defendants—bore the burden to present evidence creating a genuine dispute of material fact. *See Austin*, 864 F.3d at 335; *see also Catrett*, 477 U.S. at 323. Because she failed to timely file a summary-judgment response, despite having been granted two extensions of time to do so, Butler did not meet this burden.

In this section of her brief, Butler makes three specific challenges to the district court's summary-judgment. First, she contends that summary judgment on the breach of contract claim is defeated by evidence that "Dean Collins adjudicated Butler's appeal contrary to the rules' requirement that it be brought to the faculty." Appellant.Br.56. However, she does not cite to any evidence in the summary-judgment record creating a genuine issue of material fact as to: (1) what "rules" required that Butler's appeal of the faculty's negative tenure recommendation be "brought to the faculty;" (2) whether those "rules" were incorporated into the

employment contract; and (3) how the appeal was adjudicated contrary to any such rules. *Id.* Similarly, she asserts that Collins's letter to Currall at the appeal's conclusion, with a negative tenure recommendation, was dated "93 days past the February 1 deadline required by the rules." Appellant.Br.57. But she does not cite any summary-judgment evidence regarding the "rules," what deadline they may have set, and whether they were incorporated into the contract. *Id.* Nor does she explain why the decision to decide her appeal after she re32 affording her time to file materials supporting her appeal, should be considered a contractual breach rather than an accommodation. ROA.1894-95.

Butler also contends that her "lengthy e-mail to Collins in Summer 2015" evidences her complaints about racial hostilities and discrimination. Appellant.Br.57. However, this e-mail focuses largely on interactions with a student, Pin Wu, not SMU coworkers. ROA.2215-20 (opening paragraphs and ¶¶1-34). Butler also mentions that she had "shared with [Collins] the war stories about how colleagues are bullying me," but states that Butler "do[es] not wish to discuss the details of the harassment and discrimination from colleagues [here]." ROA.2220 (¶¶35, 38). Butler's conclusory complaints, without more, are not sufficient to raise a genuine issue of material fact, any more than are allegations in her pleadings. *See Anderson*, 477 U.S. at 248-49.

Finally, Butler argues that Stanley's letter denying her request to extend tenure consideration to the following year, along with SMU records approving FMLA leave during the year she was considered for tenure, create a fact issue precluding summary judgment on her "failure to accommodate" claim. Appellant.Br.57-58. The alleged accommodation is the delayed vote on her tenure application. ROA.716, 3154. To establish a claim, Butler was required to establish, among other things, that achieving tenure was an essential function of her job and that delaying the vote by one year would have allowed her to perform that essential function. *See Kapche v. City of San Antonio*, 176 F.3d 840, 843 (5th Cir. 1999); ROA.3153-54. There is no summary-judgment evidence to support either of those required elements. ROA.3154-55. On the contrary, Butler had been unable to improve her skills and performance over all the years she taught at SMU. *See* Statement of the Case §§B, E-G, *supra*.

Contrary to Butler's assertion, the district court did not make credibility determinations in reviewing the summary-judgment record. *Compare* Appellant.Br.55, 58 *with* ROA.3121-71. Nor did the district court exhibit bias in assessing—at a hearing on the same day the summary-judgment order and opinion issued (January 19, 2023)—that Butler's claims lack a meritorious factual basis. *Compare* Appellant.Br.58-59 *with* ROA.3171 (summary-judgment order/opinion signed January 19, 2023), ROA.3666 (at show-cause hearing, stating that court had

"uploaded to ECF its merits decision" on the summary-judgment motion). The district court provided great detail in its 50-page memorandum opinion and order to support this assessment. ROA.3121-71.

Summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" *Catrett*, 477 U.S. at 327. Persons asserting claims founded in fact have a right to try such claims to a jury, but equally, persons against whom baseless claims are asserted have a right to summary disposition. *See id.* Courts must respect both sides of this equation in determining summary judgments. *Id.* By granting summary judgment, the district court applied well-established legal principles to reach the decision compelled by Rule 56 and applicable case law. Butler has not provided this Court with any basis to decide differently.

IV. Butler has not established the extraordinary circumstances required for reassignment, even if she had shown any basis to remand.

1. The standards for reassigning a case on remand are extraordinarily high.

This Court rarely invokes its extraordinary power to reassign a case to another judge on remand. *In re DaimlerChrysler Corp.*, 294 F.3d 697, 700 (5th Cir. 2002). The Court has discussed and applied two different tests in exercising this power,

both examining the appearance of fairness or impartiality. *Id.* at 700-01. Butler has not met either test. *See id.*

2. Butler has not met either test for reassignment.

In *DaimlerChrysler*, the district court demonstrated inappropriate hostility toward the defendants. *Id.* In ruling against the defendants, the district court ignored binding precedent. *Id.* at 701 n.1. Then, in the resulting mandamus, the district court filed a vigorous opposition based, in part, on personal attacks. *Id.* These attacks went beyond statements that the defendants' position was not credible or lacked merit. For example, the district court asserted that, whereas a plaintiff's lawyer would be taken to task for the same behavior, "the well-heeled minions of the massive automobile manufacturers [*i.e.*, defendants] are certain they can act with such utter hubris, certain of impunity." *Id.*

The district court has diligently applied this Court's precedent. *See, e.g.*, ROA.2451, 2881, 2951-53, 3121-71. And none of the statements Butler references constitutes a personal attack on Butler or her attorneys. *See* Appellant.Br.29-30, 32; ROA.3456. Conclusions that Butler engaged in dilatory tactics are supported by the record. *See, e.g.*, Statement of the Case §§III-VI, *supra*; Argument §§II-III, *supra*. The decision that Butler's claims lack merit is supported by the summary-judgment record and a well-reasoned opinion. ROA.3121-71. And observations that Butler's counsel (Young) constantly interrupted the court, treated the court with scant

respect, and impugned the integrity of other lawyers on both sides are supported by the hearing transcripts. *See, e.g.*, ROA.2963-64, 3468-71, 3472, 3479-81, 3503-05, 3527-28. Even so, the district court decided the issues in this case based on the applicable legal standards, not emotion or bias. *See, e.g.*, ROA.2879-82, 2948-67, 3121-71.

Butler's argument that "each and every litigant is entitled to fair and equitable treatment in our nation's federal courts" concludes a brief in which she argues repeatedly that she should be exempted from the deadlines and procedural requirements that ensure fair and equitable treatment to each and every litigant in federal court. The district court was lenient with Butler over the years, allowing multiple counsel withdrawals and substitutions and myriad deadline extensions, even over Defendants' opposition. Even if Butler had demonstrated any reversible error in the course of the litigation, she has not demonstrated a basis to take the extraordinary action of reassignment on remand. *Compare DaimlerChrysler*, 294 F.3d at 700-01 *with* ROA.3452-3536, 3537-3667.

CONCLUSION

The Court should overrule Butler's issues and affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June 8, 2023, this document was served in compliance with the Federal Rules of Appellate Procedure and the local rules of this Court, by filing this document with the Court's CM/ECF system which served the document on all parties electronically to all counsel of record.

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CERTIFICATE OF COMPLIANCE

On this 8th day of June, 2023, I hereby certify that:

(1) this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 12,988 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f) and 5TH CIR. R. 32.2;

(2) this brief complies with the typeface and type style requirements of FED. R. APP. P. 32(a)(5) and 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font (with 12-point Times New Roman font in any footnotes per 5TH CIR. R. 32.1);

(3) this brief complies with the redaction requirements of 5TH CIR. R. 25.2.13; and

(4) the electronic form of this brief has been scanned for viruses with a commercial virus-scanning program (Sophos Endpoint Security and Control AntiVirus) and is free of viruses.

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