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

CHERYL BUTLER,	§	
	§	
Plaintiff,	§	
	§	
	§	
v.	§	**CIVIL ACTION NO. 3:18-cv-00037-E**
	§	
JENNIFER M. COLLINS,	§	
STEVEN C. CURRALL,	§	
JULIE FORRESTER ROGERS,	§	
HAROLD STANLEY, AND	§	
SOUTHERN METHODIST UNIVERSITY,	§	
	§	
Defendants.	§	

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Kim J. Askew
Texas State Bar No. 01391550
kim.askew@us.dlapiper.com
Mallory Biblo
Texas State Bar No. 24087165
mallory.biblo@us.dlapiper.com

DLA PIPER LLP (US)
1900 N. Pearl Street
Suite 2200
Dallas, TX 75201
Tel. 214.743.4506

ATTORNEYS FOR DEFENDANTS SOUTHERN METHODIST UNIVERSITY, JENNIFER M. COLLINS, STEVEN C. CURRALL, JULIE PATTERSON FORRESTER, AND HAROLD STANLEY

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Plaintiff Cheryl Butler ("Plaintiff" or "Butler"), a former professor at the Dedman School of Law ("Law School") at Defendant Southern Methodist University ("SMU"), brought thirty causes of action against SMU and several of its officers and faculty alleging race discrimination, a racially hostile work environment, retaliation, and alleged violations of the Americans with Disabilities Act ("ADA") and Family Medical Leave Act ("FMLA"), all stemming from her failure to achieve tenure. The remaining individual defendants are Dean Jennifer Collins, former Provost Steven Currall, former Interim Provost Harold Stanley, and Professor Julie Forrester. After extensive amendments of her complaint, the dismissal of nine counts for failure to state a claim, and the completion of discovery, summary judgment is proper because there are no genuine issues of material facts on the remaining claims and/or the claims are preempted or require dismissal because they are not recognized causes of action.

I. STATEMENT OF FACTS

A. Plaintiff's Hiring at SMU's Dedman School of Law

1. SMU hired Butler as an Assistant Professor of Law in the Law School on March 3, 2011. (App. 105-06, 118-19.) She signed an employment contract ("Contract") with SMU under which she would be considered for tenure in the 2015-2016 academic year if her Contract was renewed after her initial three-year appointment. (App. 106, 118.) SMU was required to pay her for a terminal year if she was denied tenure. (App. 115, 118-19, 131.) The Contract incorporated SMU's Guidelines for the Award of Tenure, Policy 6.12, ("Guidelines") and the Bylaws of the Dedman School of Law on Tenure and Promotion ("Bylaws"). (App. 106, 118-19.) Over the course of her career at SMU, Defendant Butler taught Torts I and Torts II, Employment Discrimination, and Critical Race Theory. (App. 106.)

B. SMU Tenure Standards

2. SMU and the Law School evaluate three criteria in making the decision to award tenure—teaching, scholarship or research, and service. (App. 106-07, 130, 137.) Under the Bylaws, a law professor has "two preeminent responsibilities"—teaching and scholarship—that are given equal weight in a tenure decision. (App. 106, 130.) The third component of service is important but not weighted as heavily in the tenure decision. (App. 1060.) The Guidelines, on which the Bylaws are based, provide that tenure is awarded to faculty members who are outstanding in either teaching or research and whose performance in the other is high. (App. 106.)

3. The Bylaws provide that a candidate for tenure is considered in the fifth year of teaching [Bylaw IX(b)], as Butler was considered. (App. 106, 130.) The Bylaws and the Guidelines also set forth the requirements for the tenure process: (a) the Dean of the Law School appoints a three-member advisory committee, commonly known as the "Tenure Committee"; and (b) members of the Tenure Committee review the tenure candidates' scholarship and teaching, counsel the candidate on teaching and research, and are generally available to the candidate professor during the tenure process. (App. 106-07, 130-134, 137-28.) The Guidelines allow a candidate to appeal a negative tenure recommendation. (App. 107, 138.)

C. Three Candidates in the 2015-2016 Tenure Class in the Law School

4. Three candidates were in the tenure class in the Law School for the 2015-2016 academic year—Butler, David Taylor ("Taylor"), and Keith Robinson ("Robinson").[1] (App. 111.) Robinson is an African American male. (App. 78, 111.) Butler is an African American female. When Dean Jennifer Collins appointed Butler's tenure committee on September 27, 2015,[2] Butler

[1] As discussed herein, Robinson and Taylor were granted tenure and Butler was denied tenure. (App. 14, 109.)

[2] As discussed herein, this was Butler's second tenure committee.

had insisted to the Dean and her tenure committee that she wanted to be considered for tenure in the 2015-2016 academic year with the rest of her tenure class. (App. 110-11.)

D. Butler's Contract Renewal and the Appointment of her Tenure Committees

5. SMU renewed Butler's Contract in March of 2014. (App. 107.) An Advisory Committee on Contract renewal, which also served as the first tenure committee for Butler, led the evaluation of Butler's Contract renewal. Professors Joe Norton, George Martinez, and Beth Thornberg served on this committee. (App. 107.) The renewal evaluation determined that Butler had met the standards related to scholarship and service but concluded that her teaching needed to improve in order to meet the high-quality standard for teaching. (App. 14-15, 107, 144.) The Law School faculty concluded that Butler could work to meet the high-quality standard for teaching and her Contract was renewed in the Spring 2014 semester and was "optimistic that the problems" [with her teaching] "could be corrected and that she would meet our standards when she came up for tenure." (App. 14-15; *see* 107, 144.)

6. The committee which led Butler's Contract renewal evaluation also served as her first tenure committee ("First Tenure Committee"). (App. 107.) The First Tenure Committee continued to work with Butler over many months but began to raise concerns that Butler was still not meeting the high-quality teaching standard—the very issue that had been raised in her Contract renewal evaluation. (App. 108.) She appeared to be meeting the scholarship and service requirements for tenure. (App. 108.) When the First Tenure Committee apprised Butler of its concerns regarding her failure to meet the high-quality standard for teaching, she accused them of violating her civil rights and of unspecified discrimination in the tenure process. (App. 108.) The members of the First Tenure Committee resigned on September 21, 2015. (App. 108.) Defendant Jennifer Collins ("Collins"), the Dean of the Law School, did not seek the resignations of the committee members and "regretfully" accepted their resignations. (App. 108, 146.)

7. Dean Collins then appointed a new Tenure Committee on September 27, 2015 consisting of Professors Roy Anderson, Anthony Colangelo and Mary Spector ("Tenure Committee"). (App. 7, 108.) Butler approved of this committee, informing Dean Collins that she was "grateful" for the committee and "happy" that Anderson was serving as its chair. (App. 108-109, 147.) Anderson met with Butler before he agreed to serve and Butler "expressed delight" and thanked him for agreeing to serve. (App. 15.) Anderson would not have served on the Committee if Butler had objected in any way. (App. 15.) Of course, Anderson had served on many tenure committees during his 51 years of service as a law professor at SMU, and he had supported candidates of diversity who had achieved tenure in the Law School. (App. 3, 14.) As recent as the Spring 2015 semester, Anderson had served on the tenure committee of and voted in favor of tenure for Professor Jessica Weaver who was the first African American female law professor to be awarded tenure in the Law School. (App. 14.) Butler was considered for tenure under the same policies and procedures as Weaver had been considered and Weaver achieved tenure. (App. 14.)

8. Dean Collins told the Tenure Committee that the prior committee had resigned but did not apprise the Tenure Committee of the reasons for the resignation of the First Tenure Committee. (App. 15, 108.) Dean Collins never made any negative statements regarding Butler or her relationship with the First Tenure Committee. (App. 15.) Dean Collins advised Butler to report any concerns she had regarding possible discrimination or civil rights violations to the Office of Institutional Access and Equity, which is the office at SMU that handles complaints of discrimination or retaliation based on an employee's protected status. (App. 108.)

E. Butler's Request for a Tenure Extension after Continued Concerns on Teaching

9. The Tenure Committee began working with Butler around September 27, 2015, and over the course of the Fall semester also identified concerns regarding whether Butler was meeting the high-quality standard for teaching. (App. 16, 108-09.) Once the Tenure Committee apprised

Butler of its concerns regarding whether she was meeting the teaching standards, she sought an extension of her tenure vote. (App. 109.) Because the Tenure Committee could not address such issues, Dean Collins and the Tenure Committee directed Butler to Interim Provost Harold Stanley for questions on a tenure extension, and she was directed to Human Resources ("HR") and SMU's Office of Institutional Access and Equity ("IAE") for issues related to the FMLA and ADA, respectively. (App. 4, 108-10, 148, 151.) Dean Collins and the Tenure Committee did not have the power or authority to address tenure extensions and were not authorized to do so under SMU policy. (App. 16, 109-10, 115, 148, 170, 212, 252-53; *see* 176-80, 226-28.) Further, as early as June 12, 2015, Dean Collins had notified Butler in writing that any FMLA requests were to be directed to Rhonda Adams, a Benefits Specialist in HR. (App. 115, 162.)

10. In November of 2015, Butler sought an extension of her tenure consideration from the 2015-2016 academic year to the 2016-2017 academic year. (App. 110, 149.) After Provost Stanley asked Butler to provide reasons for a tenure extension, which she did on an untimely basis, he denied her request for a tenure extension finding that she had not "provided reasons that would suggest [her] tenure consideration should be extended for another year," and pointed out the SMU tenure decision was based on her teaching, research [scholarship][3] and service since she had begun teaching at SMU in 2011. (App. 110, 149-51.) Provost Stanley also noted that Butler had "alluded to various health concerns" in her tenure extension request and advised her to address such issues with SMU's Human Resources Office who could answer questions related to the FMLA and ADA. (App. 151.) The Provost could not address any health issues. (App. 151, 252-53; *see* 176-80, 226-28.) Dean Collins and the Tenure Committee did not participate in any of the discussions with Provost Stanley related to the tenure extension request. (App. 110, 115-16.)

[3] The scholarship and research standards are the same standards.

F. Postponement of Law School Faculty Vote Because of Butler's Delay

11. The Law School was originally scheduled to vote on the three candidates for tenure in December of 2015. (App. 17-18.) Candidates are required to submit tenure materials in a form known as the "tenure box" which included detailed resumes, syllabi, teaching evaluations, and candidate personal statements. (App. 110.) Candidates Taylor and Robinson submitted their tenure boxes on time, but Butler did not. (App. 17-18, 110-11.) Because Butler had not submitted her "tenure box" in a timely manner and had insisted that she be voted on at the same time as the other two candidates in her tenure class, Dean Collins and Interim Provost Stanley postponed the faculty tenure vote from December of 2015 to January of 2016 to ensure that Butler was considered with the other two candidates. (App. 17-18, 110-11.)

G. The Tenure Committee Report and Negative Tenure Recommendation

12. The Tenure Committee conducted its evaluation of the tenure criteria related to Butler throughout the Fall 2015 semester. (App. 109.) In evaluating whether Butler had met the tenure criteria, Tenure Committee members, Dean Collins, and tenured Law School faculty also reviewed Butler's scholarship and personally visited her classes. (App. 12-13, 18, 65, 113-14.) The Tenure Committee prepared a detailed confidential tenure report dated January 8, 2016 ("Tenure Report") which was submitted confidentially to the tenured Law School faculty in advance of the meeting. (App. 49-69, 111.) All members of the Tenure Committee—Professors Anderson, Spector and Colangelo—concurred in and signed off on the Tenure Report. (App. 11, 49, 69.) The Tenure Report concluded that while Butler's scholarship and service met SMU's tenure standards, her teaching did not. (App. 69; *see* App. 49-69.) The Dean did not assist the Tenure Committee in drafting, editing or reviewing the Tenure Report and did not direct what the report would contain. (App. 111; *see* App. 49-69.)

H. The Reasons for Tenure Committee's Negative Tenure Recommendation

13. The tenure decisions for the three professors were based solely on the criteria applied to all candidates for tenure at SMU—teaching, scholarship, and service. (App. 112.) Butler's Tenure Report discusses the basis for her negative tenure recommendation. (App. 49-69, 112.) Her student teaching evaluations were "problematic" and a "cause for concern" and many of the concerns identified in the evaluations were also confirmed by faculty members who had personally visited Butler's classes to observe her teach. (App. 54-65.) Of course, the Bylaws required that "student evaluations" be considered as part of the tenure process. (App. 44.) Students had complained, and visits by her fellow faculty members confirmed, that Butler was unprepared for class, contradicted previous statements she had made about cases and legal rules, did not have a good command of tort law, and had acted unprofessionally by berating, belittling and expressing anger at some students. (App. 12-13, 54-65, 113-14.) The Tenure Committee concluded that Butler had shown a lack of commitment to teaching and gave numerous examples: (a) her failure to ever submit her grades on time when she knew that students' job interviews hinged on receiving first semester grades in a timely fashion; (b) submitting exams which contained misspellings because they had not been proofread; and (c) using the identical exam two years in a row. (App. 20-21, 65-66.) After visiting her classes, Butler's Tenure Committee chair agreed with the assessments of other faculty members and students that Butler had not demonstrated a mastery of torts. (App. 18, 62-63.)

14. The Tenure Committee also noted that Butler could be "untruthful" by mischaracterizing colleagues' statements and in making statements that she likely knew to be untrue. (App. 68.) Based on Butler's interactions with her Tenure Committee, Butler's Tenure Committee Chair called her an "incessant liar," and other members of the faculty had expressed similar concerns based on their personal interactions with Butler. (App. 10, 22-23, 68.) Butler was

also "largely uncooperative" in working with her Tenure Committee—she failed to provide prior exams so the committee could evaluate them, she did not submit information for her "tenure box" on a timely basis, and she even failed to submit her updated resume. (App. 16-17, 110.)

I. The Tenure Committee Meeting and Tenured Faculty Vote

15. The tenured faculty of the Law School met on January 13, 2016, to consider tenure for candidates Butler, Taylor, and Robinson. (App. 111.) Anderson made the tenure presentation on behalf of Butler and the other two members of her Tenure Committee were present (Colangelo and Spector). (App. 111.) The tenured faculty voted to award tenure to Taylor and Robinson. (App. 14, 111.) The tenured faculty voted to not recommend tenure for Butler. (App. 111.) Dean Collins did not vote during the meeting as she is designated under the Guidelines to handle any appeal of a negative tenure recommendation. (App. 111, 138.) Race was not a consideration in the tenure evaluation except that SMU was committed to diversity in its faculty. (App. 23-24, 112, 114.) At the conclusion of the meeting, Dean Collins notified Butler of the negative tenure recommendation. (App. 112.) In conducting the tenure meeting, Dean Collins had followed the Law School Bylaws; (a) all three candidates were evaluated under the tenure standards of the Guidelines and Bylaws; (b) a special meeting had been called and held for the tenure vote on January 13, 2016; (c) a quorum of tenured Law School faculty members had voted by secret unsigned ballots; and (d) the Dean had notified Butler of the negative tenure recommendation. (App. 107, 112, 130-132, 137-138.)

J. Professor Butler's Appeal of Faculty Recommendation to Dean Collins

16. As permitted under the Guidelines, in January of 2016, Butler appealed the negative tenure recommendation of the faculty to Dean Collins. (App. 112; *see* App. 138.) Consideration of Butler's appeal was delayed until her 12 weeks of FMLA leave was completed on April 11, 2016. (App. 112.) On April 5, 2016, Dean Collins notified Butler that her FMLA leave was ending

on April 11 and that she needed to submit any additional materials for her appeal by April 25. (App. 112, 152-53.) Butler did not submit any additional materials, and on May 4, 2016, Dean Collins notified Butler that she had denied her appeal of the negative faculty recommendation and that she also would submit a negative tenure recommendation to the Provost. (App. 113, 154.)

K. Dean Collins' Negative Recommendation to the Provost and Reasons

17. As required by the Guidelines, Dean Collins presented her negative tenure recommendation to Provost Steven Currall on May 4, 2016. (App. 113, 138, 155-60.) In her letter to the Provost, Dean Collins outlined the reasons for her negative recommendation. (App. 133, 155-60.) While Butler had outstanding scholarship and service, teaching deficiencies existed that caused Butler to fail to meet SMU's high-quality standard, including: (a) problems with her class syllabi, assignments, exams, and teaching; (b) lack of classroom preparation; (c) excessively reviewing materials she had previously taught in her classes; and (d) a lack of knowledge of substantive tort law that manifested itself in misstatements of law and confusing contradictions in class. (App. 113-14, 156-60.) These issues were demonstrated in student evaluations and reinforced by personal observations of faculty members who had observed Butler's classes. (App. 54-65, 157.) Dean Collins had also personally visited Butler's classes and found these same issues. (App. 113-14, 157.) Because Professor Butler refused to accept any negative critique or the negative criticism in student evaluations, Dean Collins conducted a comparative review of the student evaluations of all tenured and non-tenured faculty in the Law School for the Spring 2015 semester and found that Butler had the lowest scores for torts, one of the mandatory and foundational courses for law students. (App. 114, 157.) Butler had consistently had some of the lowest teaching evaluations in the Law School throughout her SMU career. (App. 114, 157.) Dean Collins did not consider Butler's race in her tenure evaluation. (App. 114.)

L. Provost Recommendation on Tenure and Butler Does Not Appeal

18. Provost Currall was the Chief Academic Officer for SMU who oversaw the overall promotion and tenure process for SMU. (App. 75.)[4] The Provost works with a Provost Advisory Panel, composed of professors from various SMU schools, and reviews tenure and promotion recommendations from all of SMU's schools. (App. 74, 138.) He and the panel considered the tenure recommendation of the Law Faculty which was provided to them by the end of January of 2016, and they had full access to her "tenure dossier" [the Tenure Report, candidate personal statement, resume, and student evaluations] over the Spring 2015 Semester. (App. 72, 74, 80.) The tenure dossier allowed him and the Provost Advisory Panel to evaluate and deliberate the three tenure criteria—research, teaching, and service. (App. 74, 80.) Of course, he also had the Deans' Letter of May 4, 2016, which reinforced the recommendations already submitted in the Tenure Report. (App. 80.) At his level, the Provost described the work of considering tenure and promotion as a "merit-based process" that is "standardized" and "very solemn and rigorous." (App. 74.) The Provost and the Provost Advisory Panel reviewed Butler's tenure dossier and the faculty recommendation over the course of the Spring 2016 semester but delayed releasing a tenure recommendation until Butler was no longer on FMLA leave and the Dean had submitted her recommendation to him, which she did on May 4, 2016. (App. 93-94.) The Provost and Provost Advisory Panel applied the same tenure standards to the three candidates for tenure from the Law School—Professors Butler, Taylor, and Robinson. (App. 79.)

[4] Currall had overseen some 100 tenure reviews prior to his service as Provost at SMU and handled about 100 tenure and promotions while at SMU. (App. 75.) Butler did not report to Currall. He did not oversee her day-to-day work and had never spoken to her about any aspect of her tenure. (App. 76.) He was in a different building from Butler and the Law Faculty and had no interactions with Butler. (App. 76.)

19. On May 5, 2016, Provost Currall sent a letter to Butler informing her that he could not make a positive recommendation of tenure. (App. 81, 93-94.) He notified her that she had three weeks from the date of his letter to appeal his tenure recommendation to SMU President Gerald Turner (App. 81, 93.) Butler did not appeal the Provost's tenure recommendation to the President and the recommendation became final. (App. 81-82.)

20. After the tenure denial, and as required by her Contract and the Bylaws, Butler remained as a fully paid professor at the Law School during her terminal academic year in the Fall 2016 and Spring 2017 semesters. (App. 82.) She was free to work on her research and scholarship or to seek new employment during her paid terminal year. (App. 115.)

M. Butler's Request for FMLA Leave and Leave Determinations by SMU

21. SMU's FMLA Policy and the necessary certification forms for employees and health care providers are available on its website on a 24/7 basis. (App. 169-70; *see* 176-84.) The FMLA Policy and forms identify Rhonda Adams ("Adams") as the Benefits Specialist to whom forms are to be returned and provide her telephone number. (App. 170, 181, 253.) All SMU employees were required to follow these specified FMLA procedures. (App. 170.)

22. During the Spring 2015 semester Butler mentioned to Dean Collins that she might want to take FMLA leave, and the Dean sent her an email, on June 12, 2015, informing her that Adams would contact her. (App. 115, 162.) Adams sent Butler the FMLA forms and FMLA Policy on June 12, 2015. (App. 171, 185.) Adams followed up with Butler on June 16, 2015 and November 24, 2015 because Butler had not submitted any FMLA leave requests. (App. 171, 185, 187.) Some almost six months after Adams provided Butler the FMLA forms, Butler finally submitted her first FMLA leave request on December 18, 2015. (App. 172, 203.)

23. Adams approved FMLA leave for Butler for November 18, 2015 through December 21, 2015. (App. 172, 204.) This was the full amount of leave Butler was entitled to in

2015 because SMU operates on a calendar basis for FMLA leave calculations. (App. 172.) Adams also approved FMLA leave for Butler for January 6, 2016 through February 17, 2016 and for February 18, 2016 through April 11, 2016. (App. 173.) During these periods, Butler did not have to teach or be present in the classroom for 12 weeks, the maximum number of weeks she could obtain leave under the FMLA for calendar year 2016. (App. 173.) Adams provided Butler with written notice of the dates of her FMLA leave and a calendar showing the FMLA leave. (App. 173, 207-08.) Following her standard practice, Adams notified Dean Collins of the dates FMLA leave had been granted so that Butler's supervisor would know that she would be out of the workplace; no other personal or medical information was provided. (App. 172, 204-05.) Butler was paid her salary for the entire period she was on FMLA leave in 2015 and 2016. (App. 173.)

24. Adams based all of her FLMA determinations on SMU policy and procedures as required by the FMLA, but Butler complained of discrimination because she believed her FMLA leave had not been properly designated. (App. 174, 253.) Samantha Thomas ("Thomas"), the Executive Director of IAE, asked Sheri Starkey, the Chief Human Resources Officer, to review all FMLA designations for Butler to determine if they had been made in accordance with the FMLA and SMU policy. (App. 253.) The Chief Human Resources Officer found that there had been no discrimination in the FMLA designations, and that SMU had properly designated all FMLA leave for Butler. (App. 253-54, 272.)

25. Adams made all FMLA determinations related to Butler. (App. 170, 172-74, 243.) No persons outside of HR made any FMLA determinations related to Butler. (App. 170, 172-74, 249.) Starkey can review FMLA information, but not the Dean of any schools, Provosts, or any other representatives of SMU. (App. 170-71.) Dean Collins and Provosts Stanley and Currall had no role in making any FMLA determinations related to Butler, never reviewed or considered

information from her health care providers, and never directed Adams or anyone in HR to make FMLA decisions for Butler. (App. 173, 249, 253.) Further, Adams had no knowledge of or involvement in the tenure proceedings which were ongoing in the Law School and Provost's Office. (App. 174.)

26. Although the FLMA Policy, online certification forms, and emails from Adams and Collins had informed Butler that she was to submit FMLA requests to HR and Adams, Butler still attempted to provide FMLA information to Dean Collins. (App. 174) As late as February 23, 2016, after Butler knew that Adams was handling her FMLA leave requests and had actually received approved FMLA leave notifications from Adams, Butler still attempted to send FMLA material to Dean Collins. (App. 174, 209.) Adams admonished Butler that Dean Collins was not an "FMLA decisionmaker" who could approve or certify FMLA leave and that sending her FMLA information to the Dean was not notice to HR and not in compliance with SMU policy. (App. 174, 209.)

N. SMU Granted Butler's Requests for ADA Reasonable Accommodations

27. SMU maintained its "Needs of Persons with Disabilities" policy ("ADA Policy), Employee Documentation of Disability, and Employee Reasonable Accommodation Request forms ("ADA Forms") on its public website on a 24/7 basis, which informed all employees of how to request an ADA accommodation. (App. 211; *see* 221-28.) ADA information was also available to Butler through the SMU policy manual and in the IAE office, where Carolyn Hernandez ("Hernandez") served as SMU's Director and ADA/504 Coordinator. (App. 210-11.) Hernandez first provided Butler with the ADA Policy and ADA Forms on December 14, 2015 and observed Butler picking the forms up from the IAE office on the same day. (App. 212, 221.) Hernandez received, evaluated, and determined reasonable accommodations on all ADA requests for accommodations submitted by Butler. (App. 213.)

28. Butler did not submit her first request for an ADA accommodation and forms from health care providers until April 6, 2016. (App. 213.) Hernandez approved ADA reasonable accommodations for the classroom, such as Butler using her medications and sitting while teaching and granted Butler reasonable accommodations which allowed her to be out of the classroom, not teaching, and fully paid from April 21, 2016 through April 27, 2016 and from April 27, 2016 through May 20, 2016. (App. 213-14.) The ADA reasonable accommodation allowing Butler to be absent from the classroom began immediately after Butler's full 12-week entitlement of FMLA leave for calendar year 2016 ended on April 11, 2016. (App. 214.)

29. Hernandez was the sole person authorized under SMU policy and procedures to approve ADA accommodation requests, and she was the only SMU representative to determine ADA accommodations for Butler. (App. 212, 215, 252.) SMU Deans, including Dean Collins, the Interim Provost, and the Provost had no authority to review or determine ADA accommodations on behalf of SMU, and did not discuss, make, or participate in any ADA determinations made on behalf of Butler. (App. 212, 252.) Despite SMU's ADA Policy and emails from Dean Collins and Hernandez explicitly informing Butler that IAE made accommodation determinations, whenever Butler disagreed with an IAE accommodation determination, she then sent ADA requests to persons other than the designated SMU representative. (App. 116, 167-68, 214-15, 235.) SMU Policy, Dean Collins, and Hernandez had provided explicit written notice to Butler that only IAE approved accommodation request, and Butler had knowledge of this because she had received accommodation approvals from Hernandez. (App. 214-15.) Butler has even claimed that Interim Provost Stanley had denied her tenure extension as an ADA accommodation when he had directed her to HR to address any ADA or FMLA issues. (App. 215, 251-52.) The Interim Provost never made any determination on an ADA accommodation for Butler. (App. 252.)

O. SMU Did Not Discriminate Against Butler in the Tenure Decision or with FMLA and ADA Determinations

30. After Butler learned that her First Tenure Committee had concerns regarding whether she met the teaching standards, she accused the committee of violating her civil rights and made non-specific allegations that there was discrimination in the tenure process to Dean Collins and the committee. (App. 108.) Dean Collins directed her to IAE, the SMU office that handles complaints of discrimination or retaliation based on protected status. (App. 108.) Butler met with Thomas and Hernandez, the ADA/504 Coordinator and Investigator, on September 10, 2015. (App. 210-11, 216, 243.) Butler had never filed a complaint before the September meeting and wished only to discuss "concerns" about being treated fairly in the tenure process. (App. 216.) Butler informed Thomas and Hernandez that she did not wish to file a complaint, but they provided her information on all of SMU's policies against discrimination and retaliation and invited her to meet again. She did not. (App. 216, 243.) SMU also maintains its policies against discrimination and retaliation on the SMU website where they are available on a 24/7 basis ("EEO Policy"). (App. 248-50; *see* 268-69.) The EEO Policy designates IAE as the office that handles such complaints and concerns. (App. 248, 268.) Butler had also received training on SMU's discrimination and harassment policies in August of 2015. (App. 239.)

31. Butler did not file a complaint, but her later emails suggested to Hernandez that Butler was alleging discrimination and retaliation and Hernandez commenced an investigation. (App. 216.) Hernandez interviewed key witnesses such as Dean Collins, Provost Stanley, and professors on Butler's tenure committees (Professors Anderson, Colangelo, Spector, Martinez, Thornberg, and Norton). (App. 216, *see* 283-314.) The investigation began in February of 2016 but was delayed because Butler had requested that IAE not investigate her allegations while she was on FMLA leave or out of the classroom as an ADA accommodation during the Spring 2016

semester. (App. 217.) Even after Butler was no longer on leave or out of the classroom as an ADA accommodation, she still refused to participate in the investigation and refused to be interviewed or to return Hernandez's telephone calls. (App. 217.)

32. Hernandez completed the investigation into the allegations of discrimination and retaliation in the tenure decision and concluded that SMU had not discriminated or retaliated against Butler; she released the findings in a letter dated December 22, 2016. (App. 218, *see* 236-37.) SMU had denied tenure to Butler because she did not meet SMU's standards for teaching and promotion; race was not a factor in the decision. (App. 218; *see* 236-37.) The investigation also found no basis for comments attributed by Butler to faculty and staff regarding discrimination. (App. 237.)

33. Butler also accused SMU of failing to properly designate FMLA leave and denying her the right to apply for ADA accommodations in the Fall 2015 and Spring 2016 semesters. (App. 218, 239-40.) Hernandez investigated those allegations and concluded that there had been no policy violation or discrimination because SMU had provided Butler with the maximum allowable benefits under the FMLA during the Fall 2015 semester and in the Spring 2016 semester, in which she was granted 12 weeks of paid FMLA leave. (App. 219, *see* 237.)

34. The investigation showed that SMU had not discriminated against Butler regarding ADA accommodations. (App. 219, *see* 237.) SMU had granted Butler reasonable accommodations which allowed her to be out of the classroom and not teaching from the date her FMLA leave ended on April 11, 2016. (App. 219, *see* 237.) The investigation also showed that Dean Collins and the Provost had never made any ADA determinations related to Butler and that Butler had never requested an ADA accommodation until April of 2016. (App. 214, 219.) Butler's November of 2015 request to Provost Stanley for a tenure extension was not an ADA determination because

the Provost had directed her to HR regarding any and all health concerns; the Provost could not grant or deny ADA accommodations under SMU Policy and did not do so. (App. 219, 237.)

35. Butler refused to participate in the investigations related to her tenure denial or FMLA or ADA complaints. (App. 219, 316, 319.) She did not return the investigator's telephone calls, did not appear by SKYPE, and refused to be interviewed even after Hernandez offered to have other IAE representatives sit in on the interviews to allay any concerns of Butler. (App. 219, 237.) After the investigator found no discrimination, Butler refused to participate in follow-up interviews. (App. 237.)

36. After SMU released the findings of the investigation to her, Butler disagreed with them and again complained of discrimination, which caused Thomas, the IAE Executive Director, to "fully investigate" these complaints. (App. 322, 328.) Butler refused to participate in this follow-up investigation even though she refused to accept the findings of the prior investigations. (App. 264, 322.) She did not answer follow-up questions and did not answer any questions of the investigator (Thomas). (App. 264.) Despite Butler's refusal to participate,[5] Thomas investigated her allegations and interviewed Hernandez (ADA allegations), Anderson (tenure allegations) and Adams (FMLA allegations). (App. 328, *see* 322-26.) In a letter dated, January 26, 2017, IAE released its final conclusions to Butler informing her that no evidence supported her allegations of discrimination and that she had refused to participate in the investigation. (App. 264, 329.)

[5] Butler had informed IAE that she had tape recordings supporting her discrimination allegations but failed to turn them over to IAE during the investigation even though IAE repeatedly requested them. (App. 329.) Surreptitiously recorded tapes were produced in the litigation, but they were incomprehensible, most did not identify, misidentified, or confused the purported identity of the speakers, and are likely inadmissible in any court proceeding. The ones that could be deciphered failed to support the allegations made in this lawsuit.

II. LEGAL STANDARD

Summary judgment is appropriate when the evidence on file shows that "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party bears the initial burden of showing the court there is no genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A party with the burden of proof on an issue "must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in his favor." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). Once the movant has made this showing, the burden shifts to the nonmovant to establish there is a genuine issue of material fact so that a reasonable jury might return a verdict in its favor. *Id* at 324. "[C]onclusory allegations, speculation, and unsubstantiated assertions are inadequate to satisfy the nonmovant's burden in a motion for summary judgment." *Hamilton v. Waters Landing Apartment*, 3:13-CV-0038-D, 2014 WL 1255839, at *6 (N.D. Tex. Mar. 27, 2014), *aff'd in part sub nom. Hamilton v. AVPM Corp.*, 593 F. App'x 314 (5th Cir. 2014) (citing *Ramsey v. Henderson*, 286 F.3d 264, 269 (5th Cir. 2002)); *see Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996) ("[P]leadings are not summary judgment evidence."); *Johnston v. City of Houston, Tex.*, 14 F.3d 1056, 1060 (5th Cir. 1994) (for the party opposing the motion for summary judgment, "only evidence—not argument, not facts in the complaint—will satisfy the burden."). The nonmovant must "go beyond the pleadings and by [his] own affidavits, or by depositions, answers to interrogatories and admissions on file, designate specific facts showing that there is a genuine issue of material fact for trial." *Giles v. General Elec. Co.*, 245 F.3d 474, 493 (5th Cir. 2001) (citing *Celotex Corp.*, 477 U.S. at 324). A court "resolve[s] factual controversies in favor of a nonmoving party . . . only when an actual controversy exists, that is, when both parties have submitted

evidence of contradictory facts." *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 525 (5th Cir. 1999).

III. ARGUMENTS AND AUTHORITIES

A. SMU IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S TITLE IX CLAIM BECAUSE IT IS PREEMPTED BY TITLE VII (COUNT 30).

Plaintiff's Title IX claim is preempted given that Title VII is the exclusive remedial scheme for employment claims, which include the claims in count 30. "Title VII provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions." *Lakoski v. James*, 66 F.3d 751, 753 (5th Cir. 1995). Such preemption is justified by the fact that "the prohibition against employment discrimination in [T]itle VII is identical to the proscription of sex discrimination in [T]itle IX, thereby guaranteeing that the [T]itle VII enforcement procedures will fully vindicate the rights created under [T]itle IX." *Lowery v. Tex. A&M Univ. Sys.*, 117 F.3d 242, 248-49 (5th Cir. 1997) (citing *Lakoski*, 66 F.3d at 756-57).

Here, the basis for Plaintiff's Title IX claim—hostile work environment and deliberate indifference—revolves around the allegations that Plaintiff was subjected to a hostile work environment that SMU allegedly failed to address and correct. Dkt. No. 12 at ¶¶ 868-73. This claim falls within the exclusivity of Title VII employment discrimination based on sex in federally funded educational institutions. *See Lakoski*, 66 F.3d at 754 (Title VII is the exclusive remedial scheme for employment discrimination claims, including hostile work environment claims); *Slabisak v. Univ. of Tex. Health Sci. Ctr. at Tyler*, 4:17-CV-597, 2018 WL 1072511, at *2-3 (E.D. Tex. Feb. 27, 2018) (plaintiff's Title IX claims for deliberate indifference and retaliation are preempted by Title VII). Because Title VII provides the exclusive remedy for the Title IX claim alleged by Plaintiff, summary judgment is warranted on this claim.

B. SUMMARY JUDGMENT IS APPROPRIATE ON THE BREACH OF CONTRACT CLAIM (COUNT 9) BECAUSE THERE IS NO EVIDENCE OF A BREACH.

Summary judgment is appropriate on the breach of contract claim because Plaintiff cannot establish her prima facie case of a breach of her employment contract—the appointment letter—with SMU. Indeed, SMU fully performed under the contract in making decisions related to Plaintiff's tenure. "The elements of a breach of contract claim are: (1) a valid contract; (2) performance or tendered performance; (3) breach of the contract; and (4) damages resulting from the breach." *Myan Mgmt. Grp. v. Adam Sparks Family Revocable Tr.*, 292 S.W.3d 750, 754 (Tex. App.—Dallas 2009, no pet.).

As an initial matter, judicial review of tenure decisions is limited. *Halper v. Univ. of the Incarnate Word*, 90 S.W.3d 842, 845 (Tex. App.—San Antonio 2002, no pet.); *Spuler v. Pickar*, 958 F.2d 103, 107 (5th Cir. 1992). In other words, "[c]ourts are not qualified to review and substitute their judgment for these subjective, discretionary judgments of professional experts independently in an intelligent informal comparison of the scholarly contributions or teaching talents of one faculty member denied promotion with those of another faculty member granted a promotion; in short, courts may not engage in 'second-guessing' the University authorities in connection with faculty promotions." *Clark v. Whiting*, 607 F.2d 634, 639 (4th Cir. 1979).

Here, Plaintiff contends that SMU's decision not to award tenure violated the Bylaws and the Guidelines, which are incorporated by reference into her employment agreement.[6] *See* Dkt.

[6] To the extent that Plaintiff alleges breaches of unsigned documents—the "Code of Ethics," "the ethical rules set forth by the States Bars," the "AALS Bylaws and Core Values," and the "AAUP guidelines and Best Practices"—those cannot survive a motion for summary judgment given that the signed employment contract—the appointment letter—does not expressly or plainly refer to them. *See Cullipher v. Weatherby-Godbe Const. Co., Inc.*, 570 S.W.2d 161, 164 (Tex. App.—Texarkana 1978, writ ref'd n.r.e.) ("The rule accepted in Texas is that in order to be construed as a part of a signed contract, the extrinsic document must either be signed or must be referred to in the signed contract."); *see also Keith A. Nelson Co. v. R. L. Jones, Inc.*, 604 S.W.2d 351, 354 (Tex. App.—San Antonio 1980, writ ref'd n.r.e.) ("Ordinarily, the absence of any specific reference to

No. 12 at ¶¶ 701-18. Because Plaintiff's employment agreement incorporated the terms of the Bylaws and the Guidelines by reference, those terms became a part of the employment agreement, and SMU was contractually obligated to comply with them (which SMU did). *See Owen v. Hendricks*, 433 S.W.2d 164, 166 (Tex. 1968) (providing that an unsigned paper is incorporated by reference in a signed agreement when the signed agreement plainly refers to the unsigned paper); *Castroville Airport, Inc. v. City of Castroville*, 974 S.W.2d 207, 211 (Tex. App.—San Antonio 1998, no pet.). "[S]o long as [SMU] properly followed its procedures in making its decision not to grant tenure, [SMU]'s professional decision that [Butler] did not qualify for tenure is not subject to judicial review." *Halper*, 90 S.W.3d at 845; *see Spuler*, 958 F.2d at 107 ("The tenure process—from the initial recommendation of the candidates by the professoriate to the ultimate review by university administrators and members of the Board of Regents—is intrinsically subjective. Such a determination is not readily scrutinized in the adversarial judicial forum. The judicial inquiry is properly only whether the decision was made, wisely or not, by a specific exercise of professional judgment and based on factors clearly bearing on the appropriateness of conferring academic tenure.").

Here, SMU fully performed under the Contract—there is absolutely no breach. It reviewed Butler for Contract renewal after the initial appointment period. (App. 107, 118.) After Contract renewal, SMU considered Butler for tenure in the 2015-2016 academic year—her fifth year of teaching. (App. 106-07, 118, 130.) SMU followed the Bylaws and the Guidelines that were incorporated into the Contract with the appointment of three-member tenure committees, and the members of those committees reviewing Butler's scholarship and teaching, visiting her classroom,

---

another instrument indicates that the parties did not intend to contract with reference to the other instrument.").

counseling her on these criteria, and being generally available to her during the tenure process. (App. 107, 130.) As required by the Bylaws, Dean Collins called a special meeting of the Law School for the tenure vote and a quorum of tenured Law School faculty voted on the tenure candidates by unsigned secret ballots. (App. 112, 131.) After Butler's negative tenure vote, Dean Collins informed Butler of the vote, Butler appealed the faculty negative tenure recommendation, and Dean Collins later notified her of the result of the appeal. (App. 112-13, 131.) In sum, the evidence conclusively establishes that SMU did not breach the employment agreement, the Bylaws, or the Guidelines related to the tenure decision, and summary judgment is proper on the breach of contract claim.

C. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON ALL CLAIMS UNDER THE FAMILY MEDICAL LEAVE ACT (COUNTS 23-26).

Summary judgment is required on all claims under the FMLA, for FMLA interference and interference with job restoration (counts 23 and 26), retaliation and harassment (count 24), and invasion of privacy (count 25) against SMU and the Individual Defendants.

1. Summary judgment is proper on the FMLA harassment claim (Count 24) and the FMLA invasion of privacy claim (Count 25) because these are not recognized causes of action under the FMLA.

a. There is no separate cause of action for harassment under the FMLA (Count 24).

To the extent Plaintiff has alleged a FMLA cause of action based on hostile work environment harassment, such a cause of action does not exist. *Smith-Schrenk v. Genon Energy Servs., L.L.C.*, No. H-13-2902, 2015 WL 150727, at *4 n.60 (S.D. Tex. Jan. 12, 2015) ("Plaintiff has not cited to and the court has not found any case wherein a federal court has recognized a FMLA cause of action based on hostile work environment harassment."); *see Ragsdale v. Beacon Health Sys., Inc.*, 3:18-CV-183-PPS, 2020 WL 1849403, at *6 (N.D. Ind. Apr. 13, 2020) ("It is unclear whether the FMLA even allows for a cause of action for harassment or hostile work

environment—the FMLA and the implementing statutes don't mention the availability of such a cause of action, and I can find no Seventh Circuit case wherein the adverse employment action in an FMLA retaliation claim was in the form of severe or pervasive harassment."). At best, the plaintiff can use "the harassment she experienced" to establish "a materially adverse action for purposes of proving her FMLA retaliation claim." *Morris v. Tex. Health & Human Servs. Comm'n*, No. H-16-3116, 2019 WL 3752762, at *14 (S.D. Tex. Aug. 8, 2019) (analyzing alleged harassment in context of FMLA retaliation claim). Accordingly, the Court should enter summary judgment on the cause of action for harassment under the FMLA. The claim does not exist.

b. The Fifth Circuit has not recognized a cause of action for invasion of privacy under the FMLA (Count 25).

The Fifth Circuit has found "that the FMLA does not create an actionable right to privacy." *Wilson v. Nat'l Ass'n of Letter Carriers, Branch No. 2730*, No. 01-2736, 2006 WL 8455827, at *4 (E.D. La. May 4, 2006). Other courts—within this Circuit and outside of it—have noted that, although the FMLA regulations adopt the ADA's privacy provisions, it is, at the very least, doubtful that a private cause of action exists. *See Ekugwum v. City of Jackson, Miss.*, No. 3:09CV48DPJ-JCS, 2010 WL 1490247, at *2 (S.D. Miss. Apr. 13, 2010) ("It is not settled whether this provision . . . gives rise to a private right of action for disclosure."); *see also Jones v. Velocity Tech. Sols. LLC*, No. 2:19-cv-1274-KJM-EFB PS, 2020 WL 4430636, at *4 (E.D. Cal. July 31, 2020); *Walker v. Gambrell*, 647 F. Supp. 2d 529, 539 n.5 (D. Md. 2009). In any event, assuming such right did exist, "the ADA confidentiality requirements expressly referred to in 29 C.F.R. § 825.500(g) apply to information obtained as a result of an employer-requested medical examination or other employer inquiries." *Walker v. Gambrell*, 647 F. Supp. 2d 529, 539 n.5 (D. Md. 2009) (emphasis added). Thus, the claim must fail where "[n]o employer-initiated examination or inquiry took place," or where the information at issue "was not created for the

purpose of documenting or maintaining a file on Plaintiff's FMLA leave." *Id.*; *accord Cash v. Smith*, 231 F.3d 1301, 1307-08 (11th Cir. 2000) (declining to decide whether private cause of action exists because the facts demonstrated the provisions did not apply: "the disclosure that Cash complains of was not the result of an examination ordered by APCA, but of a voluntary disclosure that Cash made to Smith. The statute and regulation cited by Cash do not govern voluntary disclosures initiated by the employee, and therefore the district court correctly granted APCO's motion for summary judgment on this count."). Here, it is undisputed that there was "[n]o employer-initiated examination or inquiry took place" but a voluntary disclosure that Plaintiff made to SMU to obtain ADA and FMLA benefits. (App. 23, 50, 112, 116, 167-68, 170.) Thus, Plaintiff's claim for invasion of privacy fails as a matter of law.

2. Individual Defendants Currall (Counts 24-25) and Collins (Counts 23-26) are not an "employer" under the FMLA, and there can be no individual liability against these Individual Defendants who made no FMLA decisions.

Before determining whether Plaintiff's (cognizable) FMLA claims have merit, the Court must first determine against whom she can assert the claims. *See Harville v. Tex. A & M Univ.*, 833 F. Supp. 2d 645, 654 (S.D. Tex. 2011). Summary judgment is required on the FMLA claims against Individual Defendants Currall and Collins because they are not Plaintiff's "employers" as defined by the FMLA.

"The FMLA does not contemplate holding individuals liable for corporate violations." *Burris v. Brazell*, 306-CV-0814-K, 2008 WL 5220578, at *1 (N.D. Tex. Dec. 15, 2008), *aff'd*, 351 F. App'x 961 (5th Cir. 2009) (citing *Lubke v. City of Arlington*, 455 F.3d 489, 494 (5th Cir. 2006) (noting "the FMLA offers no relief" against "individual defendants")); *Seaman v. C.S.P.H., Inc.*, No. Civ. A. 3:96-CV-2165P, 1997 WL 361652, at *2 (N.D. Tex. June 23, 1997) (Solis, J.) (granting motion to dismiss FMLA claims against individual defendants). Courts have determined that an individual may be liable only where such individual meets the definition of "employer."

Coleman v. FFE Transp. Servs., Inc., No. 3:12-cv-1697-B, 2013 WL 1914932, at *4 (N.D. Tex. May 9, 2013) (Boyle, J.). For these Individual Defendants to be held liable as Butler's employer under the FMLA, the question becomes whether they "exercised sufficient control over Plaintiff's ability to take protected leave to qualify as [an] employer[] under the FMLA." *Trevino v. United Parcel Serv.*, No. 3:08-CV-0889-B, 2009 WL 3199185, at *5 (N.D. Tex. Oct. 5, 2009) (Boyle, J.) (citing *Evans v. Henderson*, No. 99–C–8332, 2000 WL 1161075 (N.D. Ill. Aug.16, 2000)). Butler must be able to show that the individual "plays a[] significant role in receiving, processing, or approving leave under the FMLA," or that the "requests for FMLA leave went through [the individual] or that [the individual] was ever consulted regarding any of her FMLA requests." *Trevino*, 2009 WL 3199185, at *6; *see also Law v. Hunt Cty., Tex.*, 830 F. Supp. 2d 211, 216 (N.D. Tex. 2011) (Fish, J.) ("[T]here is no evidence before the court concerning Berger's ability to grant Law protected leave."). Therefore, "[t]he ultimate question is whether the individual had 'supervisory authority over the complaining employee' and is 'responsible in whole or part for the alleged violation.' " *Rudy v. Consolidated Rest. Co., Inc.*, No. 3:08–CV–0904–L, 2010 WL 3565418, at *6 (N.D. Tex. Aug. 18, 2010), *report & recommendation adopted*, 3:08-CV-0904-L, 2010 WL 3565422 (N.D. Tex. Sept. 3, 2010).

Here, the Contract itself shows that SMU is Butler's employer—not Provost Currall or Dean Collins. (App. 105-06, 118-19.) Significantly, only the SMU Benefits Specialist Adams made determinations and reviewed information from healthcare providers on Butler's FMLA leave. (App. 115, 173.) Currall and Collins had absolutely no role in making any FMLA determinations related to Butler and they were not authorized to receive FMLA leave requests or the health provider certifications. (App. 82, 115, 170, 173.) No persons outside of HR at SMU could make FMLA leave determinations (App. 170) and Adams followed SMU policy and

procedures in making her FMLA determinations (App. 174). There are no genuine issues of material fact on this claim and the Court should dismiss all FMLA causes of action against Individual Defendants Currall and Collins.

3. Plaintiff cannot establish a prima facie case for interference under the FMLA (Counts 23 and 26).

Even if Plaintiff could sue Defendant Collins for interference (counts 23 and 26), Plaintiff's prima facie case against Collins and SMU (count 26) fails because Plaintiff was not denied FMLA benefits by SMU, her actual employer. Rather, SMU awarded Plaintiff the maximum leave allowable in the calendar years in which she sought FMLA leave.

"It [is] unlawful for any **employer** to interfere with, restrain, or deny the exercise of or attempt to exercise, any right" provided under the FMLA. *Hester v. Bell-Textron, Inc.*, 11 F.4th 301, 306 (5th Cir. 2021) (emphasis added). "To state a prima facie FMLA interference claim, a plaintiff must allege that "(1) [s]he was an eligible employee; (2) [her] employer was subject to FMLA requirements; (3) [s]he was entitled to leave; (4) [s]he gave proper notice of [her] intention to take FMLA leave; and (5) [her] **employer** denied [her] the benefits to which [s]he was entitled under the FMLA." *Hester*, 11 F.4th 306 (emphasis added); *see Jiles v. Wright Med. Tech., Inc.*, 313 F. Supp. 3d 822, 844 (S.D. Tex. 2018); *see also Caldwell v. KHOU-TV*, 850 F.3d 237, 245 (5th Cir. 2017); *Lanier v. Univ. of Texas Sw. Med. Ctr.*, 527 F. App'x 312, 316 (5th Cir. 2013); *Cuellar v. Keppel Amfels, L.L.C.*, 731 F.3d 342, 347 (5th Cir. 2013). "The employee also must show that the violation prejudiced [her]." *Campos v. Steves & Sons, Inc.*, 10 F.4th 515, 526 (5th Cir. 2021) (citing *Acker v. Gen. Motors, L.L.C.*, 853 F.3d 784, 788 (5th Cir. 2017)).

Plaintiff's interference claim fails because it is undisputed that SMU, Butler's employer[7] did not deny Plaintiff any FMLA benefits. Butler received the maximum FMLA leave benefits in 2015 and 2016. (App. 172-73, 204, 207-08.) In 2016, Butler received 12 weeks of leave, the maximum allowable leave in a calendar year under the FMLA. (App. 173, 207-08.) In fact, SMU went beyond the FMLA's requirements and paid her salary while she was on FMLA leave. (App. 173.) Summary judgment is required on this baseless claim.

4. Defendants are entitled to summary judgment on Plaintiff's FMLA retaliation claim (Count 24).

a. Plaintiff's prima facie FMLA retaliation claim fails.

Like her other FMLA claims, Plaintiff cannot demonstrate a genuine issue of material fact with respect to the FMLA retaliation claim given that Plaintiff was not treated less favorably than those who had not requested FMLA leave or because she sought FMLA protection. "A *prima facie* showing of FMLA retaliation requires that a plaintiff show: (1) '[s]he was protected under the FMLA;' (2) '[s]he suffered an adverse employment action;" and (3) '[s]he was treated less favorably than an employee who had not requested leave under the FMLA or the adverse decision was made because [s]he sought protection under the FMLA." *Campos*, 10 F.4th at 527; *see Acker*, 853 F.3d at 790 (citing *Mauder v. Metro. Transit Auth. of Harris Cty., Tex.*, 446 F.3d 574, 583 (5th Cir. 2006)). "The third element requires the employee to show 'there is a causal link' between the FMLA-protected activity and the adverse action." *Richardson v. Monitronics Int'l Inc.*, 434

[7] As the undisputed facts make clear, Dean Collins did not employ Butler; SMU employed Butler. (App. 105-06, 118.) And despite Butler's unsupported allegations to the contrary, the Dean had no power or authority under SMU policy and procedures to make any FMLA determinations, and Adams in HR and the Dean herself frequently apprised Butler of this important fact. (App. 115, 173.) Adams, the designated Benefits Specialist who handled FMLA requests, unequivocally told Butler that Dean Collins was not a "designated FMLA decisionmaker," that she could not certify leave, and that emails to Dean Collins were not notice to HR, which is the SMU entity that made FMLA decisions. (App. 174-75, 209.)

F.3d 327, 332 (5th Cir. 2005)). If the plaintiff establishes a prima facie case, then the burden shifts to the defendant to "articulate a legitimate, non-discriminatory reason for the adverse employment action." *Houston v. Tex. Dep't of Agric.*, 20-20591, 2021 WL 5147939, at *3 (5th Cir. Nov. 5, 2021) (citing *Richardson*, 434 F.3d at 333 (5th Cir. 2005)). In the third step of the *McDonnell Douglas* framework, the burden shifts back to the plaintiff to "show by a preponderance of the evidence" that the defendant's reason is a pretext for retaliation. *Tex. Dep't of Agric.*, 20-20591, 2021 WL 5147939, at *3 (citing *Richardson*, 434 F.3d at 333 (5th Cir. 2005).

Here, Plaintiff argues that the retaliation took the form of: (1) "a conspiracy to defame her character by spreading false rumors that both her request for FMLA leave as well as the Complaint lacked credibility"; (2) "a scheme to secretly defame her character and to commit fraud by hiding defamatory statements that her FMLA leave requests were fraudulent;" and (3) the acts of interference described above" and "by intimidating and coercing . . . witnesses to stop protesting or testifying about the discrimination." Dkt. No. 12 at ¶¶ 839-41. Assuming for purposes of this motion the veracity of these allegations, Plaintiff's prima facie case nevertheless fails because Plaintiff cannot demonstrate that she was treated less favorably than an employee who had not requested leave under the FMLA or the adverse decision was made because she sought protection under the FMLA. Butler's Tenure Committee Chair and the Dean make clear that the FMLA was not a consideration in the tenure evaluation and that only information they had regarding Butler and the FMLA was the confirmation date that HR had sent out once leave was approved. (App. 23, 67, 112.) Indeed, the Tenure Committee had informed Butler that they would not consider her health as part of their evaluation. (App. 67.)

Here, there is no evidence of causal connection because neither Butler's FMLA leave nor her medical issues were considered at any stage of the denial of her tenure. The Tenure Committee

did not consider such issues. (App. 67.) No details on Professor Butler's FMLA leave or her medical issues were discussed at the tenure meeting except the dates on which she had been granted FMLA leave as stated in her Tenure Report. (App. 67, 112.) Rather, tenure decisions for the three candidates were based on the criteria set forth in the Bylaws and Guidelines—teaching, scholarship, and service. (App. 112.) The same standards and procedures were applied to the three candidates in evaluating whether they had met the requirements for tenure. (App. 112.) And, neither Dean Collins nor Provost Currall considered Butler's FMLA leave. (App. 73, 113-14, 133, 154-60.) Accordingly, Plaintiff has no evidence of causal connection and thus cannot establish a prima facie case of FMLA retaliation.

b. Defendants have legitimate, nonretaliatory reasons for the denial of tenure of Plaintiff.

Summary judgment should be granted on Plaintiff's retaliation claims for her failure to establish a prima facie case. Nevertheless, Defendants have proffered legitimate reasons for Plaintiff's denial of tenure—namely, Plaintiff was unqualified. The Tenure Report and Dean's Letter sets forth the basis of her lack of qualifications in detail. (App. 49-69, 113-14, 157-58.) Her Tenure Committee Chair made clear that Butler did not meet the "high quality" standard for teaching as required by SMU Guidelines and the Law School Bylaws. (App. 20-21.) The Dean, fellow faculty, and students personally observed her repeated problems with syllabi, assignments, exams, and grading. (App. 113-14, 157-58.) Butler was not prepared in the classroom, repeatedly reviewed materials previously covered in class covered, and showed a lack of knowledge of tort law that confused students and resulted in her misstating the law. (App. 113-14, 157-58.) Butler had some of the lowest student evaluations in the Law School in torts, a mandatory and foundational course for law students. (App. 114, 157.) She was unequivocally not qualified for tenure. Consequently, Defendants' burden at this step is met.

c. Plaintiff cannot demonstrate Defendants' legitimate, nonretaliatory reasons are pretext for retaliation.

Further, Plaintiff cannot demonstrate Defendants' legitimate, nonretaliatory reasons are pretext for retaliation. Plaintiff's retaliation claims further fail because she cannot demonstrate Defendants' proffered reasons are false and pretext for retaliation. Plaintiff has no evidence that would call any of the other proffered reasons into question or that would otherwise support a finding that they are pretext for retaliation.

In short, Plaintiff cannot meet her burden on her retaliation claim at any stage. Plaintiff cannot make a prima facie case and, even assuming she could, she has no evidence to prove that Defendants' proffered reasons for her denial of tenure was pretext for retaliation. Consequently, the Court should enter summary judgment on Plaintiff's FMLA retaliation claim.

D. PLAINTIFF'S CLAIMS UNDER THE ADA/REHABILITATION ACT CANNOT SURVIVE SUMMARY JUDGMENT (COUNTS 16-22).

Summary judgment is proper on all claims against SMU under the ADA for a hostile work environment (count 16), denial of tenure (count 17), discrimination based on segregation from the workplace (count 18), associational discrimination (count 19), invasion of medical privacy (count 20), failure to accommodate (count 21), and retaliation (count 22).

1. The Fifth Circuit does not recognize causes of action for discrimination based on segregation in the workplace (Count 18), associational discrimination (Count 19), and invasion of medical privacy (Count 20), and those claims must be dismissed.

a. There is no separate cause of action based on segregation in the workplace under the ADA (Count 18).

Segregation in the workplace is not an independent cause of action, but merely a theory of "discrimination." "[T]he term 'discrimination' includes limiting, segregating or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee." *Cannizzaro v. Neiman*

Marcus, Inc., 979 F. Supp. 465, 474 (N.D. Tex. 1997) (Solis, J.). Summary judgment is proper on Plaintiff's attempt to create a cause of action that the ADA does not allow.

b. There is no separate cause of action for associational discrimination under the ADA (Count 19).

Associational discrimination, based on an ADA disability of a family member, has not been recognized by the Fifth Circuit. *See, e.g., Grimes v. Wal-Mart Stores Texas, LLC.*, 505 F. App'x 376, 380 n.1 (5th Cir. 2013) (per curiam) ("[T]his opinion should not be construed as recognizing a cause of action for associational discrimination based on disability . . . ."); *Roth v. Canon Sols. Am., Inc.*, No. 3:18-CV-02196-BT, 2019 WL 4597583, at *5 (N.D. Tex. Sept. 23, 2019) (Rutherford, Mag.) ("[T]he Fifth Circuit has never recognized a cause of action for 'associational discrimination' based on a disability."). The ADA does not require employers to accommodate a non-disabled worker who chooses to take leave from work in order to care for a disabled relative. *See Besser v. Texas General Land Office*, 834 F. App'x 876, 887 (5th Cir. 2020) (citing 29 C.F.R. § 1630.8 (2019)). Therefore, the Court should determine that Plaintiff's associational discrimination claim based "on her association with an immediate family member" is not a valid ADA claim, and summary judgment on that claim is warranted. *See Besser*, 834 F. App'x at 886-87; *see also Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 348 (5th Cir. 2007); *Balachandran v. Valvtechnologies, Inc.*, 4:20-CV-1078, 2021 WL 3639806, at *2 (S.D. Tex. July 30, 2021). Summary judgment must be granted on the associational discrimination claim.

c. There is no separate cause of action for invasion of medical privacy under the ADA (count 20).

There is simply no legal support in the Fifth Circuit for a cause of action based on invasion of privacy under the ADA. The citation in the Second Amended Complaint is to the ADA generally, and those provisions do not speak to "privacy" at all. Dkt. No. 12 at XX. The ADA requires "confidentiality" of the results of a medical examination, or a disability-related inquiry

made by an employer. *See* 42 U.S.C. § 12112(d). However, these provisions do not discuss confidentiality of medical disclosures voluntarily made by the employee pursuant to an ADA reasonable accommodation requests or FMLA applications. *See id.* Therefore, they do not support a private cause of action under these facts (if at all).

2. Plaintiff cannot establish her prima facie case of failure to accommodate (Count 21) because she fails the qualified and failure to accommodate elements of the claim. And the delay of a tenure vote is not a reasonable accommodation under the ADA as a matter of law.

The ADA prohibits covered employers from "discriminat[ing] against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). Discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." *Id.* § 12112(b)(5)(A). "To prevail on her failure-to-accommodate claim, [the plaintiff] must show that '(1) [she] is a "qualified individual with a disability;" (2) the disability and its consequential limitations were "known" by the covered employer; and (3) the employer failed to make "reasonable accommodations" for such known limitations.' " *Jennings v. Towers Watson*, 11 F.4th 335, 343 (5th Cir. 2021); *Amedee v. Shell Chem., L.P.*, 953 F.3d 831, 837 (5th Cir. 2020).

Here, plaintiff is not "qualified" under the ADA. "To avoid summary judgment on whether he is a qualified individual, [Plaintiff] needs to show 1) that he could perform the essential functions of the job in spite of his disability or 2) that a reasonable accommodation of his disability would have enabled him to perform the essential functions of the job." *Turco v. Hoechst Celanese Chem. Grp., Inc.*, 101 F.3d 1090, 1093 (5th Cir. 1996) (alterations added); *see Thompson v. Microsoft Corp.*, 2 F.4th 460, 467 (5th Cir. 2021). " 'Essential functions' are those duties that are fundamental to the job at issue"; the term does not include the marginal functions of the position.

Kapche v. City of San Antonio, 176 F.3d 840, 843 (5th Cir. 1999); 29 C.F.R. § 1630.2(n)(1). The EEOC implementing regulations provide that "[a] job function may be considered essential if, for example, "the reason the position exists is to perform that function." 29 C.F.R. § 1630.2(n)(2)(i). "To aid in the determination of whether a function is essential, a court may consider evidence a variety of factors including, but not limited to, (1) the employer's judgment as to which functions are essential, (2) written job descriptions prepared before advertising or interviewing applicants for the job, (3) the amount of time spent on the job performing the function, and (4) the work experience of both past and current employees in the job." *Kapche*, 176 F.3d at 843.

Here, Plaintiff's claim fails because she does not argue (nor can she) that she required an accommodation to "perform the essential functions of" her job—law professor. Rather, her argument is that she required an accommodation—a delay of the tenure vote—in order to be promoted to a tenured professor. *See, e.g.*, Dkt. No. 12 at ¶¶ 809-18. Significantly, "tenure" is not an essential function of her job. (*See* App. 118-19.)

Further, a delay or extension of a tenure vote is not a reasonable accommodation. "The ADA provides a right to a reasonable accommodation, not to the employee's preferred accommodation." *Jennings*, 11 F.4th at 344. "The appropriate accommodation need not be 'the employee's preferred accommodation,' and the employer is free to 'choose the less expensive accommodation or the accommodation that is easier for it to provide.' " *Thompson*, 2 F.4th at 469. "[T]he EEOC regulations define the term 'reasonable accommodation' as '[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position.' " *Wilkerson v. Boomerang Tube, LLC*, No. 1:12-CV-198, 2014 WL 5282242, at *7 (E.D. Tex. Oct. 15, 2014); *accord Barber v. Nabors*

Drilling U.S.A., Inc., 130 F.3d 702, 709 (5th Cir. 1997). "Time off, whether paid or unpaid, can be a reasonable accommodation." *Jennings*, 11 F.4th at 344.

Plaintiff's requested accommodation—a delayed or extension on a tenure vote—is not a "reasonable accommodation" because it is not a "modification or adjustment to the work environment" or to the circumstances under which Butler's position "is customarily performed." In other words, it has nothing to do with how or when she carries out her duties. Rather, it is a request that her promotion be kept on the table and given to her at a later time. This is not required by the ADA.

Further, SMU fully accommodated Plaintiff by allowing her to not teach and to be out of the classroom from the date her FMLA leave ended on April 11, 2016 until the very end of the Spring 2016 semester in May. (App. 213.) Butler was granted an ADA reasonable accommodation to not teach from April 14 through May 20, 2016. (App. 213-14.) When her FMLA leave ended, the ADA accommodations SMU granted to Butler allowed her to be out of the classroom for the entire Spring 2016 semester—and fully paid for the entire semester (even though she never set foot in a classroom or taught a student). (App. 214.)

3. Plaintiff's prima facie case of a hostile environment based on an alleged disability (Count 16) fails because she cannot establish the harassment element.

A cause of action for disability-based harassment is "modeled after the similar claim under Title VII." *Flowers v. S. Reg'l Physician Services Inc.*, 247 F.3d 229, 235 (5th Cir. 2001) (citing *McConathy v. Dr. Pepper/Seven Up Corp.*, 131 F.3d 558, 563 (5th Cir. 1998)). "To establish a hostile work environment claim under the ADA, a plaintiff must show: (1) that she belongs to a protected group; (2) that she was subjected to unwelcome harassment; (3) that the harassment complained of was based on her disability or disabilities; (4) that the harassment complained of affected a term, condition, or privilege of employment; and (5) that the employer knew or should

have known of the harassment and failed to take prompt, remedial action." *Patton v. Jacobs Eng'g Grp., Inc.*, 874 F.3d 437, 445 (5th Cir. 2017). Moreover, the disability-based harassment must "be sufficiently pervasive or severe to alter the conditions of employment and create an abusive working environment." *McConathy*, 131 F.3d at 563 (internal quotations omitted) (quoting *Farpella–Crosby v. Horizon Health Care*, 97 F.3d 803, 806 (5th Cir. 1996)). In determining whether harassment is sufficiently pervasive or severe, we consider "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Thompson*, 2 F.4th at 471 (quoting *Patton*, 874 F.3d at 445 (internal quotation marks and citation omitted). " '[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious)' do not suffice to alter the terms and conditions of employment." *Patton*, 874 F.3d at 445 (5th Cir. 2017).

Plaintiff has no evidence of harassment; nevertheless, evidence of harassment pervasive or severe enough to alter the conditions of her employment. Further, even the allegations provided in the live complaint (which are not evidence) are not "sufficiently pervasive or severe" to establish Plaintiff's prima facie case. Plaintiff points to (1) statements of Defendants (without specifying which one) that she was a "liar," "lying," or "lied"[8] about her disabilities or need for "FLMA or ADA leave," Dkt. No. 12 at ¶ 779, and (2) emails questioning whether she was "really sick" and spreading rumors that she faked illness, Dkt. No. 12 at ¶ 787. These statements do not give rise to a hostile work environment complaint; they were no more than "a few harsh words." *See Thompson*, 2 F.4th at 471; *McConathy*, 131 F.3d at 564 (providing that supervisor's "insensitive

[8] The Tenure Report discussed that Butler was "untruthful" in her dealings with her Tenure Committee, fellow Law School faculty, and Law School administration, but these allegations had nothing to do with ADA or FMLA or that she was allegedly sick. (App. 22, 68.)

and rude" comments regarding the slow pace of plaintiff's recovery from surgery were insufficient as a matter of law to state a hostile environment claim); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 595-96 (5th Cir. 1995) (noting that "mere utterance of an . . . epithet which engenders offensive feelings in an employee" is not enough to constitute hostile environment harassment)); *see Pickens v. Shell Tech. Ventures Inc.*, 118 F. App'x 842, 850 (5th Cir. 2004) (stating that "racially insensitive" comments made by employees at a Christmas party were not severe or pervasive enough to create a hostile work environment); *Nadeau v. Echostar*, No. EP-12-CV-433-KC, 2013 WL 5874279, at *32 (W.D. Tex. Oct. 30, 2013) (concluding that manager's alleged taunt that Plaintiff is "looking sick" and remark that "this job is not for you if you have a health problem," constituted "occasional teasing, offhand comments, and non-serious isolated incidents that are not actionable."). Accordingly, SMU is entitled to summary judgment on the cause of action for hostile work environment under the ADA.

4. The denial of tenure claim (Count 17) fails because Plaintiff cannot establish that she was qualified for tenure.

"To establish a prima facie discrimination claim under the ADA, a plaintiff must prove: (1) that [s]he has a disability; (2) that [s]he was qualified for the job; and (3) that [s]he was subject to an adverse employment decision on account of [her] disability." *Thompson*, 2 F.4th at 470. As discussed above, there is no issue of material fact that Plaintiff was not "qualified for the job." *See supra* § III.C.4.b.

E. SUMMARY JUDGMENT IS PROPER ON ALL CLAIMS UNDER 42 U.S.C § 1981 (COUNTS 10-12).

1. The claims under § 1981 against the Individual Defendants cannot survive summary judgment.

The claims against Individual Defendants Collins, Currall, Forrester, and Stanley are properly dismissed because these individuals are not the employer of Plaintiff given that they are

not parties to Plaintiff's underlying employment contract with SMU and did not exercise sufficient control over employment decisions related to Plaintiff.

Generally, § 1981 creates "a cause of action against the contracting parties only." *McLennan v. Oncor Elec. Delivery Co.*, No. 3:12-CV-00531-G (BF), 2012 WL 3072340, at *4 (N.D. Tex. July 6, 2016), *report & recommendation adopted*, 2012 WL 3079063 (Jul. 30, 2012). "Fifth Circuit precedent indicates that a third-party may be liable under § 1981 only in certain circumstances." *Howard v. Miss. State Univ.*, No. 1:1-CV-00154-MPM-DAS, 2015 WL 1862923, at *4 (N.D. Miss. Apr. 23, 2015). "The Fifth Circuit has held that an individual may be liable under § 1981 if the individual is **'essentially the same' as the employer** in exercising authority over the plaintiff." *Thomas v. Grundfos, CBS*, No. 4:18-CV-0557, 2019 WL 7838172, at *1 (S.D. Tex. Sept. 20, 2019) (emphasis added) (citing *Foley v. Univ. of Hous. Sys.*, 355 F.3d 333, 337 (5th Cir. 2003)), *report & recommendation adopted*, 2020 WL 553665 (Feb. 4, 2020). "District courts within the Fifth Circuit have interpreted *Foley* as recognizing individual liability for **supervisors who exercise control over employment decisions** and were personally involved in the complained-of conduct, **but disallowing § 1981 claims against a mere co-worker**." *Thomas, CBS*, No. 4:18-CV-0557, 2019 WL 7838172, at *1 (collecting cases) (emphasis added). "A supervisor or coworker is 'essentially the same' as an employer if he or she exercises **control or 'managerial authority'** over the plaintiff." *Williams v. City of Richardson*, No. 3:16-CV-2944-L-BK, 2018 WL 5885540, at *3 (N.D. Tex. Aug. 15, 2018) (emphasis added), *report & recommendation adopted*, 2018 WL 4269088 (Sept. 7, 2018); *accord Howard*, 2015 WL 1862923, at *4. In order to be held individually liable, the employee must have "**substantial control** over a plaintiff with respect to employment decisions." *McLennan*, 2012 WL 3072340, at *4 (emphasis

added). That is, any "employment decision" taken by that employee must be conducted "in a supervisory capacity." *McLennan*, 2012 WL 3072340, at *4.

Under this rule, it is clear that there is no cause of action against a mere co-worker. *McLennan*, 2012 WL 3072340, at *5. Where the individual defendant is a supervising employee, the court "must assess how much control the defendant had over employment decisions relating to the plaintiff." *Id.* This requires that the alleged supervisor have "the ability to fire [her], give [her] raises, or affect [her] employment contract." *Id.* Individuals may be held liable under § 1981 only "when they have the capacity to make and enforce the contract between the employer and the employee." *Miller v. Wachovia Bank, N.A.*, 541 F. Supp. 2d 858, 863 (N.D. Tex. 2008) (Fitzwater, J.) (quoting *Hicks v. IBM*, 44 F. Supp. 2d 593, 594 (S.D.N.Y. 1999)). Where, "[a]t most, Plaintiff alleges that [the individual] is a co-worker who provided information to a decision-making body, [the allegation] is insufficient to state a claim against [the individual] under section 1981." *Mbadiwe v. Union Mem'l Reg'l Med. Ctr., Inc.*, No. 3:05CV49-MU, 2005 WL 3186494, at *2 (W.D.N.C. Nov. 28, 2005); *see also Miller*, 541 F. Supp. 2d at 867 (relying on *Mbadiwe* to find plaintiff failed to state a claim against individual who might have "furnished those with the authority to terminate Miller's employment the information on which the termination decision was based"). For example, in *Delouise v. Iberville Parish School Board*, the Middle District of Louisiana explained: "The evidence reveals that, at the times Plaintiff's position came before the [Iberville Parish School Board ('IPSB')], Cancienne [(the individual defendant)] could only make recommendations to the IPSB, and could not effectively remove anyone on his own. In fact, he was not authorized or empowered to do so. In his testimony, Cancienne firmly stated that he had no authority to terminate or employ any person. . . . Thus, even as Plaintiff's 'immediate supervisor,' he is not the type of supervisor contemplated by Section 1981 under the 'essentially

the same' principle, because Cancienne exercised little control over Plaintiff's employment beyond recommendation. . . . Even if it could be shown that the IPSB members typically voted according to Cancienne's recommendations, the members themselves exercised the final judgment over Plaintiff's employment." 8 F. Supp. 3d 789, 804 (M.D. La. 2014) (granting summary judgment).

Here, the Individuals Defendants did not exercise managerial authority over Plaintiff and any involvement was merely to provide information to the decision-making authority. In more detail, the Individual Defendants did not have oversight of the "day-to-day work of Professor Butler as a law professor at the Dedman School of Law," (App. 76), and did not vote at faculty meetings where hiring decisions were made or involved in termination decisions, (App. 115). And, neither had the ability to make a final decision regarding the tenure of Butler (or a role in considering or approving decisions related to Butler's tenure extension, leave under the FMLA, or ADA accommodations). (App. 79, 115-116, 172, 212 (Currall), App. 109-10, 115, 166, 172 (Collins)). It is also undisputed that the Individual Defendants are not parties or signatories to Plaintiff's employment contract with SMU. (App. 86-87.)

In short, none of the Individual Defendants had the ability to exercise the "control" or "managerial authority" over Plaintiff to qualify as the "employer" or had the "capacity to make and enforce the contract between employer and the [Plaintiff]."

2. Summary judgment is proper on all claims for hostile work environment and race discrimination under 42 U.S.C § 1981.

a. Plaintiff cannot establish a racially hostile work environment (Count 10) because she was not subjected to unwelcome harassment based on race.

"To establish a claim of hostile work environment, a plaintiff must show that [s]he: (1) belongs to a protected group; (2) was subjected to unwelcome harassment; (3) the harassment

complained of was based on race; (4) the harassment complained of affected a term, condition, or privilege of employment; (5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action." *Hudson v. Cleco Corp.*, 539 F. App'x 615, 619-20 (5th Cir. 2013). Courts "analyze the hostility of a work environment in the totality of the circumstances, including examining 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' " *Brooks v. Firestone Polymers, L.L.C.*, 640 F. App'x 393, 399 (5th Cir. 2016). "Further, [t]o be actionable, the challenged conduct must be both objectively offensive, meaning that a reasonable person would find it hostile [or] abusive, and subjectively offensive, meaning that the victim perceived it to be so." *Brimmer v. Shinseki*, No. 3:11-CV-1956-L, 2013 WL 4763947, at *6 (N.D. Tex. Sept. 5, 2013) (Lindsay, J.).

Here, Plaintiff has not created a fact issue that she was subject to unwelcome harassment based on race (because there is no evidence of harassment based on race or otherwise). Rather, Plaintiff provides non-specific allegations that the "conduct was frequent, severe, humiliating and undermined Plaintiff's work performance, physical and mental health." Dkt. No. 12 at ¶ 725; *see* Dkt. No. 12 at ¶¶ 719-733. As such, Plaintiff has not offered evidence of an incident or incidents that rise to the level of "severe or pervasive harassment" for which § 1981 provides relief. Accordingly, Plaintiff has failed to establish a *prima facie* case of race discrimination under a hostile work environment theory, and this claim does not survive summary judgment.

b. Plaintiff was not qualified for the position she sought and cannot establish race discrimination based on her denial of tenure (Count 11).

"University tenure decisions represent a distinct kind of employment action, involving special considerations." *Yul Chu v. Miss. State Univ.*, 592 F. App'x 260, 265 (5th Cir. 2014). "In order to set forth a prima facie case of discrimination under . . . § 1981, a plaintiff must set forth

sufficient evidence that establish that (1) she belongs to a protected class; (2) she applied for and was qualified for the position she sought; (3) she was not promoted to the position sought, *i.e.*, she suffered an adverse employment action; and (4) her employer promoted someone to the position who was not a member of the protected class." *Ruth v. Owens-Ill. Glass Container, Inc.*, 260 F. App'x 703, 705 (5th Cir. 2007); *accord Udoewa v. Plus4 Credit Union*, 754 F. Supp. 2d 850, 867 (S.D. Tex. 2010).

Here, there is no issue of material fact that Plaintiff was not "qualified for the position" of Associate Professor. *See supra* § III.C.4.b.

F. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON THE DISCRIMINATION CLAIMS UNDER TITLE VII (COUNTS 13-15) AND TCHRA (COUNTS 27-29).

1. Plaintiff cannot establish a racially hostile work environment (Count 13) because she was not subjected to unwelcome harassment based on race.

"To establish a claim of hostile work environment under Title VII, a plaintiff must prove [s]he (1) belongs to a protected group; (2) was subjected to unwelcome harassment; (3) the harassment complained of was based on race; (4) the harassment complained of affected a term, condition, or privilege of employment; (5) the employer knew or should have known the harassment in question and failed to take prompt remedial action." *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 651 (5th Cir. 2012). "Harassment affects a 'term, condition, or privilege of employment' if it is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.' Workplace conduct 'is not measured in isolation.' In order to deem a work environment sufficiently hostile, 'all of the circumstances must be taken into consideration.' This includes 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' To be actionable, the

work environment must be 'both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' " *Hernandez*, 670 F.3d at 651.

Plaintiff must personally experience the "hostile" conduct but relies heavily on hostility toward other staff members. *See* Dkt. No. 12 at ¶¶ 751, 754. This is insufficient to support her claim. "To establish a hostile work environment, however, a plaintiff must personally experience racial harassment. The court will therefore consider the harassment that a reasonable jury could find that plaintiffs experienced." *Arrieta v. Yellow Transp., Inc.*, No. 3:05-CV-2271-D, 2008 WL 5220569, at *26 (N.D. Tex. Dec. 12, 2008) (Fitzwater, J.). Evidence that related to "other women," not Plaintiff, "is not relevant." *Septimus v. Univ. of Hous.*, 399 F.3d 601, 612 (5th Cir. 2005) (affirming summary judgment); *see also Hernandez*, 670 F.3d at 652 (affirming summary judgment and district court's disregard of evidence of harassment that plaintiffs did not personally experience). Because there is no evidence in this case that Plaintiff personally experienced a racially hostile work environment, summary judgment is warranted.

2. Plaintiff was not qualified for the position she sought and cannot establish race discrimination based on her denial of tenure (Counts 14 and 27).

Again, "[u]niversity tenure decisions represent a distinct kind of employment action, involving special considerations." *Chu*, 592 F. App'x at 265. "To establish a prima facie case in the context of a denial of tenure under Title VII, the plaintiff must show that: (1) he belongs to a protected group, (2) he was qualified for tenure, and (3) he was denied tenure in circumstances permitting an [inference] of discrimination." *Id.* (alternations in original).[9] "Evidence that supports

[9] Under TCHRA, the elements for a claim for racial discrimination are nearly identical—namely, the plaintiff must establish that she (1) is a member of a protected class, (2) was qualified for her position, (3) was subject to adverse employment decisions, and (4) was treated less favorably than

a *prima facie* case includes departures from university procedures, conventional evidence of bias against the plaintiff, and evidence that 'the plaintiff is found to be qualified for tenure by some significant portion of the departmental faculty, referrants or other scholars in the particular field." *Id.* (alterations in original). Other circuits have recognized that tenure decisions in colleges and universities involve considerations that set them apart from other kinds of employment decisions. *Tanik v. S. Methodist Univ.*, 116 F.3d 775, 776 (5th Cir. 1997) (citing *Zahorik v. Cornell University*, 729 F.2d 85, 92 (2nd Cir. 1984); *Kumar v. University of Massachusetts*, 774 F.2d 1, 11 (1st Cir. 1985)). Those factors are: (1) tenure contracts require unusual commitments as to time and collegial relationships, (2) academic tenure decisions are often non-competitive, (3) tenure decisions are usually highly decentralized, (4) the number of factors considered in tenure decisions is quite extensive, and (5) tenure decisions are a source of unusually great disagreement. *Tanik*, 116 F.3d at 776 (citing *Zahorik*, 729 F.2d at 92-93).

Here, there is no issue of material fact that Plaintiff was not qualified for tenure. *See supra* § III.C.4.b.

Thus, the consideration is whether Plaintiff met the necessary prerequisites for tenure. The record conclusively supports that she did not.

3. Plaintiff was not qualified for the tenured position she sought and cannot establish a case of disability discrimination under TCHRA (count 29).

"To establish a prima facie case of disability discrimination, a plaintiff must show that (1) [s]he has a 'disability;' (2) [s]he is 'qualified' for the job; and (3) [s]he suffered an adverse employment decision because of [her] disability." *Donaldson v. Tex. Dep't of Aging & Disability Services*, 495 S.W.3d 421, 426 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). "The plaintiff

---

similarly situated persons not in the protected class. *Alief Indep. Sch. Dist. v. Brantley*, 558 S.W.3d 747, 759 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).

can show the 'qualification' element in one of two ways: (1) by proving that he can perform all essential job functions with or without modifications or accommodations; or (2) by showing that some reasonable accommodation by the employer would enable him to perform the job." *Donaldson*, 495 S.W.3d at 437. As discussed above, Plaintiff was not qualified for the job. *See supra* § III.C.4.b. And, as discussed above, delay of a tenure vote is not a "reasonable accommodation."

G. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S RETALIATION CLAIMS UNDER § 1981 (COUNT 12), TITLE VII (COUNT 15), THE ADA (COUNT 22), AND TCHRA (COUNT 28).

To begin, to establish a prima facie case of retaliation under § 1981, Title VII, and the ADA, a plaintiff must establish: (1) that she engaged in activities protected by the particular statute; (2) an adverse employment action occurred; and (3) a causal link connects the protected activity to the adverse employment action. *See Williams*, 3:16-CV-2944-L-BK, 2017 WL 4404461, at *8 (citing *Reilly v. Capgemini Am., Inc.*, No. 05-CV-1162-K, 2007 WL 945685, at *4 (N.D. Tex. Mar. 28, 2007) (Kinkeade, J.) (collecting cases)).

"If the employee establishes a prima facie case, the burden shifts to the employer to state a legitimate, non-retaliatory reason for its decision.[10] After the employer states its reason, the burden shifts back to the employee to demonstrate that the employer's reason is actually a pretext for retaliation," *LeMaire v.* Louisiana, *480* F.3d 383, 388-89 (5th Cir. 2007) (internal citation omitted), which the employee accomplishes by showing that the adverse action would not have occurred "but for" the employer's retaliatory motive, *Mayberry v. Mundy Contract Maint. Inc.*,

[10] The employer's burden is only one of production, not persuasion, and involves no credibility assessment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993)); *Alvarado v. Shipley Donut Flour & Supply Co., Inc.*, 526 F. Supp. 2d 746, 763 (S.D. Tex. 2007).

197 F. App'x. 314, 317 (5th Cir. 2006) (Title VII and § 1981); *Seaman, 179* F.3d at 301 (ADA). In order to avoid summary judgment, the plaintiff must show "a conflict in substantial evidence" on the question of whether the employer would not have taken the action "but for" the protected activity. *Long v. Eastfield College*, 88 F.3d 300, 308 (5th Cir. 1996) (internal quotation marks omitted). The plaintiff's "subjective belief [that there is a causal connection] is insufficient to demonstrate a causal link between [her] protected activity and the adverse employment action." *Weems v. Dall. Indep. Sch. Dist.*, 260 F. Supp. 3d 719, 736 (N.D. Tex. 2017) (Lindsay, J.).

Further, § 21.055 of the TCHRA is modeled after Title VII's anti-retaliation provision; the elements of a retaliation claim under § 21.055 are the same as under Title VII. *Prewitt v. Cont'l Auto.*, 927 F. Supp. 2d 435, 455 (W.D. Tex. 2013) (citing *Matthews v. High Island Indep. Sch. Dist.*, 991 F. Supp. 840 (S.D. Tex. 1998) (retaliation provisions of Texas Commission on Human Rights Act are interpreted in accordance with parallel provisions of Title VII)); *see also Spencer v. Wolff Shoe Co.*, 1:16-CV-036-RP, 2017 WL 9325616, at *3 (W.D. Tex. Apr. 17, 2017) ("Title VII case law guides a reading of the TCHRA, and the *McDonnell Douglas* burden-shifting framework, used to assess Title VII retaliation claims, is also used to assess TCHRA retaliation claims.").

1. SMU is entitled to summary judgment on the causes of action for retaliation under § 1981 (Count 12), Title VII (Count 15), and TCHRA (Count 28) because Plaintiff cannot satisfy her burden at any stage.

a. Plaintiff cannot establish a prima facie case of retaliation under Title VII (Count 15), TCHRA (Count 28), or § 1981 (Count 12).

Plaintiff cannot meet the causation element of her retaliation claims and cannot demonstrate that SMU's legitimate, nonretaliatory reasons for denying her tenure are a pretext for retaliation.

Plaintiff claims that she "complained of racial discrimination in hiring, application of tenure standards, the tenure process and other terms and conditions of employment at SMU." Dkt. No. 12 at ¶ 769. And, without any supporting evidence, Plaintiff claims her tenure denial was discriminatory.

While "temporal proximity alone, when very close, can in some instances establish a prima facie case of retaliation, . . . the plaintiff must show that her participation in a protected activity was a but-for cause of the adverse action." *Hendrix v. iQor Inc.*, 3:20-CV-0437-N-BT, 2021 WL 3040776, at *7 (N.D. Tex. June 7, 2021), *report & recommendation adopted*, 3:20-CV-00437-N-BT, 2021 WL 3036949 (N.D. Tex. July 19, 2021) (citing *Ganheart v. Brown*, 740 F. App'x 386, 389 (5th Cir. 2018) (per curiam) (internal quotation marks and citation omitted)). Even under the most generous interpretation of the span of time between Plaintiff's protected conduct and denial of tenue, it is insufficient to establish a causal connection as a matter of law. The Fifth Circuit has found temporal proximity of up to four months sufficient to show a causal link. *See, e.g., Bell v. Bank of Am.*, 171 F. App'x 442, 444 (5th Cir.2006) (holding that a seven-month period does not support establish a causal link); *Myers v. Crestone Int'l, LLC*, 121 F. App'x 25, 28 (5th Cir. 2005) (holding that evidence that employee's termination followed approximately three months after her complaints of discrimination was insufficient to establish a causal connection between her termination and the protected conduct); *Raggs v. Miss. Power & Light Co.*, 278 F.3d 463, 471-72 (5th Cir. 2002) (holding that a five-month period does not support an inference of a causal link); *Evans v. City of Houston*, 246 F.3d 344, 355 (5th Cir. 2001) (finding that "a time lapse of up to four months has been found sufficient to satisfy the causal connection for summary judgment purposes" (internal citations omitted)). "[T]he mere fact that some adverse action is taken after an employee engages in some protected activity will not always be enough for a prima facie case."

Swanson v. Gen. Services Admin., 110 F.3d 1180, 1188 n.3 (5th Cir. 1997) ("If timing *alone* were enough, any action taken against Swanson after June 1990, no matter how justified, could be sustained as discriminatory. Title VII's protection against retaliation does not permit EEO complainants to disregard work rules or job requirements.").

Without the temporal proximity inference, Plaintiff must put on evidence demonstrating that SMU relied on Plaintiff's alleged complaints when deciding to deny her tenure, SMU failed to follow its usual policy and procedures in carrying out the challenged employment actions, discriminatory treatment in comparison to similarly situated employees, or evidence that the stated reason for the adverse employment decision were false. Plaintiff has none. First, the evidence shows that the faculty did not discuss (or rely on) Plaintiff's alleged complaints regarding discrimination at any point. (App. 4-5, 49-69.) Second, SMU followed the Bylaws and the Guidelines as discussed above. (App. 107, 112, 130-132, 137-138.) Third, there is no evidence of discriminatory treatment in comparison to similarly situated employees. (*See* App. 14.) Fourth, Plaintiff has no other evidence to suggest that SMU's decision to deny tenure to Plaintiff was motivated by her protected conduct. (App. 73, 216-18, 236-37, 259, 264.) Thus, Plaintiff's prima facie case based on denial of tenure fails.

b. SMU had legitimate, nonretaliatory reasons for demoting and terminating Plaintiff.

Summary judgment should be granted on Plaintiff's retaliation claims for her failure to establish a prima facie case. Nevertheless, as already established above, SMU has proffered legitimate reasons for Plaintiff's denial of tenure, namely, Plaintiff was unqualified. *See supra* § III.C.4.b. Consequently, SMU's burden at this step is met.

c. Plaintiff cannot demonstrate SMU'S legitimate, nonretaliatory reasons are pretext for retaliation.

Like her other claims, Plaintiff's retaliation claims further fail because she cannot demonstrate SMU's proffered reasons are false and pretext for retaliation. The Tenure Report and Dean's Letter of May 4, 2016 clearly show why SMU did not grant tenure to Butler. (App. 46-69, 155-60). And, Plaintiff has no evidence that would call any of the other proffered reasons into question or that would otherwise support a finding that they are pretext for retaliation. Plaintiff has presented no competent summary judgment evidence, besides her own conjectures, beliefs and speculation that would establish that SMU's reason for denial of tenure was pretextual.

In sum, at all times, the ultimate issue in a retaliation case remains whether the protected conduct was a "but for" cause of the adverse employment decision. *Long*, 88 F.3d at 305 n.4. As such, Plaintiff cannot meet her burden on her retaliation claim at any stage. Plaintiff cannot make a prima facie case and, even assuming she could, she has no evidence to prove that SMU's proffered reasons for her denial of tenure were pretext for retaliation. Consequently, the Court should enter summary judgment on Plaintiff's retaliation claims under Title VII, TCHRA, and § 1981.

2. The retaliation claim under the ADA (Count 22) fails because Plaintiff cannot meet the causation element.

There is no causal connection between Plaintiff's alleged protected activity under the ADA and her denial of tenure. Indeed, Plaintiff's retaliation claim fails for a fundamental reason: the initial negative tenure recommendations were made in January of 2016, which is three months before Plaintiff first applied for an ADA reasonable accommodation in April of 2016. (App. 213, 215.) The negative Tenure Report is dated January 8, 2016, and the faculty voted a negative tenure recommendation on January 13, 2016. (App. 111.) In addition, there is no evidence that the Law School faulty, Dean or the Provost considered Butler's non-existent ADA request for

accommodations as they made their tenure recommendations. (App. 78-79, 111-12.) Because the decision to deny tenure could not have been motivated by retaliation given that the negative recommendation occurred prior to any ADA request by Butler, Plaintiff cannot establish a prima facie case of ADA retaliation.[11]

IV. CONCLUSION

As demonstrated above, there are no genuine disputes of material fact on any element of Plaintiff's claims against SMU and the Individual Defendants. Consequently, Defendants respectfully request the Court grant summary judgment in favor of Defendants on all of Plaintiff's claims asserted against it, dismiss this suit with prejudice, and grant any further relief to which Defendants may be justly entitled.

[11] Likewise, Plaintiff cannot satisfy her burden for the other steps of the *McDonnell Douglas* framework for the same reasons as those for the other retaliation claims.

Dated: November 29, 2021

Respectfully submitted,

By: */s/ Kim J. Askew*
Kim J. Askew
Texas State Bar No. 01391550
kim.askew@us.dlapiper.com
Mallory Biblo
Texas State Bar No. 24087165
mallory.biblo@us.dlapiper.com

DLA PIPER LLP (US)
1900 N. Pearl Street
Suite 2200
Dallas, TX 75201
Tel. 214.743.4506

ATTORNEYS FOR DEFENDANTS SOUTHERN METHODIST UNIVERSITY, JENNIFER M. COLLINS, STEVEN C. CURRALL, JULIE PATTERSON FORRESTER, AND HAROLD STANLEY

CERTIFICATE OF SERVICE

Pursuant to the Federal Rules of Civil Procedure and the Local Rules of the Northern District of Texas, I hereby certify that this document filed November 29, 2021 through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Mallory Biblo
Mallory Biblo