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OPINIONS AND ORDERS

OPINION, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (DECEMBER 15, 2023)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DEANA POLLARD SACKS,

Plaintiff-Appellant,

v.

TEXAS SOUTHERN UNIVERSITY; AHUNANYA ANGA; JAMES DOUGLAS; FERNANDO COLON-NAVARRO; ANA OTERO; APRIL WALKER,

Defendants-Appellees.

No. 22-20474

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CV-3563

Before: DAVIS, ENGELHARDT, and OLDHAM,
Circuit Judges.

PER CURIAM:*

Deana Sacks, a white woman, worked as a law professor at Texas Southern University's ("TSU")

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* This opinion is not designated for publication. *See* 5th Cir. R. 47.5.

Thurgood Marshall School of Law from 2000 to 2020. While there, she alleges that she endured various forms of discrimination, including physical and verbal altercations, *see, e.g.*, ROA.250, retaliation for her EEOC complaints, *see* ROA.284-87; ROA.1566-79, and unequal pay, *see* ROA.262-68.

Sacks sued TSU and five of its faculty members. She raised five federal claims†: (1) Title VII sex discrimination, (2) Title VII race discrimination, (3) Title VII retaliation, (4) Equal Pay Act ("EPA") violations, and (5) violations of the Equal Protection Clause, the Due Process Clause, and the Fourth Amendment. At the Rule 12(b)(6) stage, the district court dismissed claims (1), (3), and (5) in whole or in part. ROA.400-01. The remaining claims proceeded to discovery. During discovery, a magistrate judge granted in part and denied in part Sacks's motion to compel. ROA.769-71. The district court also denied Sacks's motion to amend her complaint (for the third time). ROA.2472 n. 1. Then the district court granted summary judgment on claims (2) and (5). ROA.2500. Finally, Sacks's EPA claim (4) proceeded to trial. There, the jury found for TSU. ROA.3464-77. Sacks moved for a jury investigation and new trial. ROA.3570-92; ROA. 3622-38. The district court denied both motions. ROA.3645-53; ROA.3653-54.

We have fully reviewed the district court's orders dismissing Sacks's Title VII claims (1), (2), and (3); her constitutional claims (5); and its denial of Sacks's

† She also raised a claim under Texas state law for invasion of privacy. The district court dismissed that claim under Rule 12(b)(6). Sacks did not appeal that dismissal, so we do not discuss that claim further.

motions for leave to amend her complaint, jury investigation, and new trial. As to those orders, we affirm for substantially the reasons given by the district court. We have also reviewed the partial denial of Sacks's motion to compel and find no abuse of discretion. *See Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 817 (5th Cir. 2004) (citation omitted); *see also Crosby v. La. Health Servs. & Indem. Co.*, 647 F.3d 258, 261 n. 1 (5th Cir. 2011) (applying abuse of discretion review to a magistrate's discovery decision where the plaintiff timely challenged that decision below).

AFFIRMED.

FINAL JUDGMENT, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS (APRIL 8, 2022)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DEANA POLLARD SACKS,

Plaintiff,

v.

TEXAS SOUTHERN UNIVERSITY, AHUNANYA ANGA, JAMES DOUGLAS, FERNANDO COLON-NAVARRO, ANA OTERO, AND APRIL WALKER,

Defendants.

Civil Action No. H-18-3563

Before: Ewing WERLEIN, JR.
United States District Judge.

FINAL JUDGMENT

This case came on for trial by Jury on April 4, 2022, and, after both parties had rested and closed the evidence, and argued the case, the Jury deliberated and on this 8th day of April, 2022, returned its unanimous Verdict. Now, therefore, for the reasons set forth in the Memorandum and Order entered August 29, 2019, the Memorandum and Order entered January 25, 2021,

and the unanimous Verdict returned by the Jury this day, it is

ORDERED and ADJUDGED that Plaintiff Deana Pollard Sacks shall take nothing on her claims against Defendant Texas Southern University, Ahunanya Anga, James Douglas, Fernando Colon-Navarro, Ana Otero, and April Walker, and Plaintiff's claims against all Defendants are DISMISSED with prejudice on the merits.

This is a FINAL JUDGMENT.

The Clerk will enter this Final Judgment, providing a correct copy to all counsel of record.

SIGNED at Houston, Texas, on this 8th day of April, 2022.

/s/ Ewing Werlein, Jr.
United States District Judge

MEMORANDUM AND ORDER GRANTING DEFENDANTS' AMENDED MOTION FOR SUMMARY JUDGMENT, IN PART, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS (JANUARY 25, 2021)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DEANA POLLARD SACKS,

Plaintiff,

v.

TEXAS SOUTHERN UNIVERSITY, AHUNANYA ANGA, JAMES DOUGLAS, FERNANDO COLON-NAVARRO, ANA OTERO, and APRIL WALKER,

Defendants.

Civil Action No. H-18-3563

Before: Ewing WERLEIN, JR.,
United States District Judge.

MEMORANDUM AND ORDER

Pending is Defendants Texas Southern University and James Douglas's Amended Motion for Summary

Judgment (Document No. 62).[1] After having carefully considered the motion, response, reply, objections, and the applicable law, the Court finds as follows.

I. Background

Plaintiff Deana Pollard Sacks was hired in 2000 as an assistant professor of law at the Thurgood Marshall School of Law ("TMSL") at Texas Southern University ("TSU"), and later became a tenured professor.[2] Sacks testifies that during her career, she has "published in numerous top 20-40 general law reviews through the competitive submission process," has been

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[1] On September 15, 2020, the deadline for filing dispositive motions under the Court's Amended Docket Control Order, Sacks filed a Motion for Leave to Amend, Stay of Proceedings, and Amended Docket Control Order (Document No. 63), accompanied by a proposed Third Amended Complaint. If permitted, this amended pleading would add a new defendant, one or more new claims, rejoin a defendant previously dismissed, and replead claims previously dismissed more than a year before, on August 29, 2019. *See* Memorandum and Order (Document No. 30). Sacks filed her 67-pages-long Second Amended Complaint (Document No. 24) nearly 22 months ago, and the parties have proceeded to litigate her claims for nearly two years, including for more than a year after the Court dismissed some of Sacks's claims and some defendants. Defendants TSU and James Douglas timely filed their Motion for Summary Judgment on Sacks's remaining claims on September 15, 2020. The Court declines to permit Sacks on the dispositive motions deadline to file what would be her fourth complaint, adding new parties and claims, rejoining a dismissed defendant, and repleading long-dismissed claims. Sacks's Motion for Leave to Amend, Stay of Proceedings, and Amended Docket Control Order (Document No. 63) is DENIED.

[2] Document No. 62, ex. 7 at 16:8-22; Document No. 72, ex. A ¶ 6. Sacks resigned from TSU in August 2020. Document No. 62, ex. 7 at 72:20-73:10.

ranked by SSRN "in the top 10% of all scholars in all disciplines internationally based on the high level of usage of [her] scholarship," and has received teaching evaluations that "were extremely positive . . . consistent with [her] work ethic, [her] level of preparation for class, the feedback [she] received from other professors . . . , and students who thanked [her] directly for taking such care with teaching [her] classes."[3] From 2011 to the spring of 2016, Sacks was awarded the "Roberson King Professor of Law" title, which is a five-year title and pays $20,000 on top of the professor's regular salary each year of the titled professorship.[4]

Sacks identifies herself as a Caucasian woman and alleges that she suffered harassment at TSU because of her race and unequal pay because of her gender.[5] Sacks claims that her race-related harassment began early on in her career at TSU, and that "there was a pronounced double standard at TMSL for blacks and whites."[6]

Sacks describes certain specific personal encounters with other TMSL faculty members as evidence of this continuing harassment. The principal incidents were her encounter with Professor Ana Otero at the bathroom door in the faculty lounge restroom area in 2012,[7] a hallway shouting exchange with Professor

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[3] Document No. 72, ex. A ¶¶ 2, 19.

[4] *Id.*, ex. A ¶¶ 21-22.

[5] *Id.*, ex. A ¶ 5.

[6] *Id.*, ex. A ¶ 11.

[7] *Id.*, ex. A ¶ 27.

April Walker a month later,[8] and a parking space dispute between Sacks and Professor Ahunanya Anga in 2017.[9] Sacks complained about each of these events to Dean Holley and/or TSU's Human Resources Department.[10]

Sacks spent the spring semester of 2013 as a visiting professor at the University of Houston.[11] She did not return to TSU in the fall of 2014 as planned because the law school gave her a teaching schedule of Monday, Wednesday, Friday classes instead of a Tuesday, Thursday schedule that she had requested in order to spend her weekends in Malibu, California, to handle family matters.[12]

After Sacks returned to TSU in the spring of 2015, she alleges that the harassment became worse, due in part to the return of faculty member and later interim dean Defendant James Douglas.[13] The new incidents of harassment included alleged "attempts to alter [Sacks's] historically very good teaching evaluations," other cars parked in Sacks's "24/7 reserved

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[8] *Id.*, ex. A ¶ 30.

[9] *Id.*, ex. A ¶ 71.a.

[10] *Id.*, ex. A ¶¶ 27, 30, 71.a.

[11] *Id.*, ex. A ¶ 35.

[12] Document No. 62, ex. 7 at 29:13-19; Document No. 72, ex. A ¶ 38.

[13] Document No. 72, ex. A ¶ 40.

parking space," a malfunctioning computer, and missing emails.[14]

In spring 2016, when Sacks's Roberson King five-years titled professorship ended, the TSU faculty again voted on three titled professorships, and Sacks did not receive one.[15] Sacks testifies that all three titles were given to black faculty members who she states did not follow the application guidelines and did not produce "very high quality scholarship," while Sacks's application "conformed entirely to the application instructions" and listed the rank of each journal in which she was published as well as usage statistics and citations by courts to her work.[16] Sacks contends that Douglas harassed her the day after the titled professorship vote by smiling at her when they passed each other in a hallway and asking, "How are you doing?" and that Professor McKen Carrington, who was walking with Douglas, "rubb[ed] it in" by commenting, "How's it going?"[17] Sacks and her husband complained to Dean Holley that the vote was based on race, not merit, and asked him to disregard the vote and distribute the titled professorships based on merit, but Dean Holley told them he would go along with the faculty vote.[18]

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[14] *Id.*, ex. A ¶¶ 41, 43, 44.

[15] *Id.*, ex. A ¶¶ 46-47.

[16] *Id.*

[17] *Id.*, ex. A ¶ 48.

[18] *Id.*, ex. A ¶ 49.

Also in 2016, a student who received a failing grade and wanted it changed filed a charge of discrimination against Sacks.[19] Sacks states that the faculty committee, which included Otero, Anga, and Walker, harassed her by trying to make a finding of discrimination against her.[20] Dean Holley, however, rejected the student's claim of discrimination and found that the student failed because of TMSL's comprehensive exam, not Sacks's grade.[21]

In September 2016, after the faculty had voted earlier that year to award to another professor the five-years Roberson King titled professorship, and after Sacks concluded that faculty members Otero, Walker, and Anga were complicit in trying to make a finding of discrimination against her when the student charged Sacks with grade discrimination, Sacks filed a complaint with TSU's Human Resources, alleging unequal pay based on race and gender as well as harassment.[22] She introduced her complaint by summarizing it was based on "conduct perpetrated by April Walker, Ahunanya Anga, and Ana Otero," with help from others, "mostly female faculty members . . . [who] have harassed me (and others) for years and have formed a faction and voting block to benefit themselves to the detriment of the law school. This group has been referred to as a 'clique,' and its members are viewed as the least productive, least qualified members of the

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[19] *Id.*, ex. A ¶ 51.

[20] *Id.*, ex. A ¶ 54.

[21] *Id.*, ex. A ¶¶ 54-55; *id.*, ex. A-8.

[22] *Id.*, ex. A-4 at 95 of 581 to 104 of 581.

law faculty. Their conduct has had a devastating effect on the law school's reputation."[23] In the first section of the ten-pages complaint she charged that she received unequal pay and principally focused on what she stated was "the non-meritorious faculty vote" that chose another faculty member for the Roberson King titled professorship.[24] The second section of Sacks's Human Resources complaint alleged harassment, three pages of which detailed all her criticisms of TMSL's handling of the student complaint against her for grade discrimination and the faculty committee's recommendation against her, which, she acknowledged, "Thankfully, Dean Holley . . . decided not to follow."[25] The last section of her 2016 complaint was entitled "Prior Complaints," in which she recited her prior conflicts with Otero, Walker, Anga, and one or two others who were allegedly in what she termed the "harassing faction."[26]

In early 2017, Sacks filed a formal charge of discrimination with the EEOC, complaining of harassment and violation of the Equal Pay Act.[27] Following the complaint, Sacks testifies that "many incidents of virtually nonstop harassment" occurred, which included students complaining to the assistant dean about the date of an exam, false accusations of Sacks calling other TMSL professors "incompetent," a "strange ant

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[23] *Id.*, ex. A-4 at 95 of 581.

[24] *Id.*, ex. A-4 at 97 of 581.

[25] *Id.*, ex. A-4 at 101 of 581.

[26] *Id.*, ex. A-4 at 103 of 581.

[27] *Id.*, ex. A ¶¶ 62, 70

infestation" in Sacks's law school office, important emails not coming to her account, Sacks not being paid in accordance with her official salary, and a significant increase in Sacks's workload.[28] Sacks alleges other hostile acts such as Defendant Fernando Colon-Navarro "badmouthing" her, faculty member Ana James yelling at her during faculty meetings, "hostile and menacing" looks from Douglas, her car being vandalized, "a black man" following her to her car, and continuing problems with teaching evaluations.[29]

After filing an Amended Charge of Discrimination on May 11, 2018, Sacks filed this suit alleging against TSU claims of Title VII hostile work environment and retaliation, and for violations of the Equal Pay Act and § 1983, and alleging § 1983 claims and invasion of privacy against Colon-Navarro, Anga, Douglas, Otero, and Walker in their personal capacities.[30] By Order entered August 29, 2019, all retaliation and § 1983 claims against TSU, and all claims against Anga, Colon-Navarro, Otero, and Walker were dismissed, leaving for adjudication Sacks's claims against TSU for violation of the Equal Pay Act and for hostile work environment based on race under Title VII, and the claim against Douglas for (Second Am. Compl.). deliberate indifference under § 1983.[31] Defendants now move for summary judgment on these claims.

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[28] *Id.* ex. A ¶¶ 71-72.

[29] *Id.* ex. A ¶ 73.

[30] Document No. 24 (Second Am. Compl.).

[31] Document No. 30.

II. Evidentiary Objections

Sacks objects to and moves to strike numerous summary judgment exhibits produced by Defendants.[32] Many of the exhibits to which Sacks objects are either immaterial to the Court's analysis or are separately produced by Sacks. Because these objections, even if granted, would have no effect on the viability of Sacks's claims, rulings will be made on only those objections to evidence relevant to the summary judgment decision.

Sacks's hearsay objection to Defendants' Exhibit 2,[33] anonymous student evaluations made by Sacks's students in 2017, is SUSTAINED to the extent the evaluations are offered to prove the truth of what the students said about her.

Sacks's Rule 803(6) objection to Appx. pages 50-56 of Defendants' Exhibit 4,[34] is SUSTAINED because that document was created in anticipation of litigation and is not admissible as a business record. *See Brauninger v. Motes*, 260 F. App'x 634, 637 (5th Cir. 2007) (The Fifth Circuit "has deemed reports inadmissible where their 'primary utility' is for litigation.") (quoting *Broadcast Music, Inc. v. Xanthas, Inc.*, 885 F.2d 233, 238 (5th Cir. 1988)). Sacks's objections to other portions of Exhibit 4, some of which she includes in her own summary judgment evidence,[35] and others,

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[32] Document No. 71; Document No. 75.

[33] Document No. 62, ex. 2

[34] *Id.*, ex. 4.

[35] Document No. 72, ex. A-4 at 137 of 581 to 141 of 581, 238 of 581, 245 of 581, 264 of 581; *id.*, ex. A-8.

which were created in the ordinary course of business during an internal human resources investigation, are OVERRULED. *See id*. at 637-38 ("The district court correctly found that the primary purpose of Williamson's and Ellison's reports had little to do with any anticipated litigation by Brauninger. The harassment investigation was triggered by employees' sexual harassment complaints and not by Brauninger's subsequent threat to sue. . . . [I]t was an ordinary practice for human resources managers to investigate those complaints and to document the findings of that investigation.").

Sacks's objection to paragraph 3 of Defendants' Exhibit 9,[36] TMSL Professor Fernando Colon-Navarro's Declaration, in which the witness reports what students complained to him about Sacks and what the students reported to him that Sacks had said to them, is SUSTAINED as hearsay.

Sacks's objection to the entirety of Defendants' Exhibit 13,[37] TMSL Administrator Derrick Wilson's Declaration, is OVERRULED. Sacks argues that Derrick Wilson's spreadsheet was prepared in anticipation of litigation, but as with the Human Resources investigations into harassment complaints, Wilson's testimony establishes that his spreadsheet was made as part of the normal course of business. Acting Dean Douglas asked Wilson for faculty salary data after Sacks filed her 2016 internal complaint, in response to which Wilson prepared this spreadsheet of such data.[38] *See Brauninger*, 260 F. App'x 637-38. Sacks

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[36] Document No. 62, ex. 9.

[37] *Id.*, ex. 13.

[38] *Id.*, ex. 14 ¶ 3.

argues that W-2 forms are the best evidence of faculty salary data, and the W-2 evidence is also before the Court. Sacks's contention that Wilson's Declaration and spreadsheet are non-credible and false is not a valid legal objection but rather an indication of a conflict in the evidence and disputed fact issues.

Finally, Sacks's objection to Administrator Wilson's Supplemental Declaration and comparative salary chart,[39] which Wilson declares under penalty of perjury is true and correct, is OVERRULED. Wilson may be in error on his facts, as Sacks stridently argues, and these issues of controverted material fact will need to await trial.

III. Legal Standard

Rule 56(a) provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials in a pleading, and unsubstantiated assertions that a fact issue exists will not suffice. *Id.* "[T]he nonmoving party must set forth specific facts showing the existence of a 'genuine' issue concerning every essential component of its case." *Id.* "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A)

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[39] Document No. 74, ex. A.

citing to particular parts of materials in the record . . . or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). "The court need consider only the cited materials, but it may consider other materials in the record." *Id.* 56(c)(3).

In considering a motion for summary judgment, the district court must view the evidence "through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2513 (1986). All justifiable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986). "If the record, viewed in this light, could not lead a rational trier of fact to find" for the nonmovant, then summary judgment is proper. *Kelley v. Price-Macemon, Inc.*, 992 F.2d 1408, 1413 (5th Cir. 1993). On the other hand, if "the factfinder could reasonably find in [the nonmovant's] favor, then summary judgment is improper." *Id.*

IV. Discussion

A. Equal Pay Act Against TSU

Sacks alleges that TSU violated the Equal Pay Act by paying male professors more than she was paid for equal work, and she identifies as comparators Lupe Salinas, Manuel Leal, Okezie Chukwumerije, Gabriel Aitsebaomo, Darnell "Larry" Wheeden, Emeka Duruigbo, and Colon-Navarro, and produces Form W-2 tax statements and other evidence that they were paid

more than she from 2017 through 2019. TSU produces evidence that some but not all of these individuals held additional positions or had longer tenure than Sacks. Also, Salinas and Leal are both male professors who were formerly judges and who received tenure after Sacks and were paid more than she. As to them, TSU argues that certain factors "other than sex" justify the differences in pay for the ex-judges. This "any other factor than sex" defense, unlike the other three of four affirmative defenses set forth in the Equal Pay Act, *see Siler-Khodr v. Univ. of Tex. Health Sci. Ctr. San Antonio*, 261 F.3d 542, 546 (5th Cir. 2001), invites highly subjective considerations. Viewing the summary judgment evidence in the light most favorable to Sacks, Sacks has raised genuine issues of material fact as to whether TSU violated the Equal Pay Act with regard to Sacks's compensation. Accordingly, TSU's motion for summary judgment on Sacks's Equal Pay Act claim is denied.

B. Title VII Hostile Work Environment Based on Race Against TSU

To establish a hostile work environment claim under Title VII, the plaintiff must show that: (1) she belongs to a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment was based on a protected characteristic; (4) the harassment affected a term, condition, or privilege of employment; and (5) her employer knew or should have known of the harassment and failed to take prompt remedial action. *EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 399 (5th Cir. 2007). For race-based harassment to affect a term, condition, or privilege of employment, as required to support a claim for hostile work environment under Title VII, it must be "sufficiently severe

or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 370 (1993). Courts look to the totality of the circumstances including "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." *Id.* at 371. "Actionable harassment must involve 'racially discriminatory intimidation, ridicule and insults.'" *Felton v. Polles*, 315 F.3d 470, 485 (5th Cir. 2002), *abrogated on other grounds by Burlington N. & Sante Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006) (citation omitted).

Sacks is a member of a protected class and testifies that beginning early and continuing throughout her 20 years career at TMSL, she experienced unwanted harassment. Sacks asserts that the alleged harassment was because of her race, white, and that such harassment created a hostile work environment. Although Sacks complains of a variety of incidents over the years that she describes as race harassment, she focuses in her summary judgment submissions on three altercations between her and other TMSL faculty members as specific proof of continuing racial harassment: (1) the bathroom door incident with Otero; (2) the hallway incident with Walker; and (3) the parking space incident with Anga.

The bathroom door incident between Sacks and Professor Ana Otero occurred in March 2012. Sacks testified that she walked into the lunchroom and "was making a bee-line for the bathroom door" when Otero, who was standing near the door talking with

Professor Dominguez, put her hand out to block her.[40] After Sacks entered the bathroom, Otero "pushed [the door] open suddenly—it was a great deal of force," which hit her body and "would have hit me in the face. . . . "[41] When she exited the bathroom Sacks went directly to Dean Holley's office and lodged a complaint against Otero for threatening or violent behavior. Otero responded that she was not aware that Sacks was right behind her when she went "to grab the door."[42] Dean Holley interviewed Sacks, Otero, and the eyewitness Professor Dominguez, and found that "[w]hile some verbal slings and arrows were exchanged, and some touching and door slamming took place, no one was injured, nor was there an attempt to injure. . . . "[43]

The hallway incident between Sacks and Professor April Walker occurred in April 2012, the month after Sacks's encounter with Otero. Sacks complains that Walker yelled at her in the TMSL hallway in front of her students and falsely accused her of trying to "beat up" Ana Otero.[44] Sacks testifies that "I was upset by that. . . . She's very loud. So I had to raise my voice to defend myself against this ridiculous allegation. . . . "[45] Sacks further complains that when they were both

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[40] Document No. 62, ex. 7 at 56:11-17.

[41] *Id.*, ex. 7 at 56:25-57:9.

[42] *Id.*, ex. 10-A.

[43] *Id.*, ex. 15 at Appx. 197; Document No. 72, ex. A-4 at 258 of 581.

[44] Document No. 72, ex. A ¶ 30.

[45] Document No. 62, ex. 7 at 190:9-13.

in Dean Holley's office during his inquiry into the boisterous hallway encounter, Walker, who is black, said that Sacks "got away with things at TMSL because I'm white."[46] Walker made a Human Resources complaint and filed a police complaint about Sacks, and Sacks made a Human Resources complaint about Walker.[47] Human Resources, after reviewing Sacks's complaint and the witness statements, found there was "no evidence of harassment or slander by Professor Walker, . . . and also insufficient evidence to support your allegation that Professor Walker has an inability to control her anger."[48] Sacks also testifies to a second brush with Walker four months later when Walker walked behind Sacks, who at the moment was in the hallway knocking on Edith Dean's door, and "either punched or pushed hard my shoulder bag so that it, you know, came off my shoulder and hit me below."[49]

The third of Sacks's claimed principal racial harassment incidents—the parking space encounter with Professor Ahunanya Anga—occurred five years later, in April 2017. Sacks testifies that Anga positioned her own "car sideways, blocking me from getting into my parking spot."[50] Sacks and Anga thereupon engaged in a verbal dispute. Sacks testifies that Anga:

"started yelling at me, calling me crazy,

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[46] Document No. 72, ex. A ¶ 30.

[47] Document No. 62, ex. 12 ¶ 2; *id.*, ex. 12-A; Document No. 72, ex. A-4 at 223 of 581 to 237 of 581.

[48] Document No. 72, ex. A-4 at 238 of 581.

[49] *Id.*, ex. A ¶ 33; Document No. 62, ex. 7 at 58:12-18.

[50] Document No. 62, ex. 7 at 198:5-6.

> saying things like, 'You need to go see a doctor,' which made no sense. . . . So when she starts saying things to me like 'You don't deserve a spot. You don't—you shouldn't have a spot. What's your title,' she was making reference to the fact that my title had been taken away by the faculty, and she was taunting me and being mean."[51]

Anga states she moved her car to a different parking spot and left.[52] Sacks went to Human Resources the same day, showed the cell phone video she had made of Anga's behavior in the parking lot, and declares that she wrote a formal HR complaint, to which she never received a response.[53] The summary judgment evidence does not include a copy of Sacks's alleged "formal complaint" about this incident.

Except for attributing to Walker a reference to Sacks's being white when Dean Holley interviewed them after their hallway shouting match in 2012, Sacks produces no evidence apart from her own uncorroborated and speculative testimony, that the alleged slights and altercations happened because of her race. Indeed, the various incidents that Sacks regards as racial harassment of her over the years have in common the fact that there is no summary judgment evidence that they were accompanied by racial slurs, epithets or even references to race or other indicia that they were racially motivated. *Cf. Cavalier v. Clearlake Rehab. Hosp., Inc.*, 306 F. App'x

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[51] *Id.*, ex. 7 at 198:24-199:15.

[52] *Id.*, ex. 11 ¶ 2.

[53] Document No. 72, ex. A ¶ 71.a.

104, 107 (5th Cir. 2009) ("Though Cavalier may believe that all twelve incidents were motivated by racial animus, subjective belief of racial motivation, without more, is not sufficient to show a hostile work environment."). In some instances, the inference that the incidents were racially motivated is not even plausible. For example, Sacks points to a certain teaching grant that she did not receive as evidence of her poor treatment at TMSL, but the grant was awarded to another white faculty member, Rebecca Stewart.[54] Sacks also complains that a false charge of discrimination made against her by a student contributed to a race-based hostile work environment. The student who made the accusation wanted his failing grade changed, and to get the grade changed he brought a charge of grade discrimination against Sacks.[55] Dean Holley investigated the charge, found no evidence of discrimination by Sacks in her grading, and dismissed the charge.[56]

As to the altercations with the other faculty members, apart from the one reference Sacks attributed to Walker when they met with Dean Holley in 2012, the confrontations themselves did not include racial statements, language, or other indications that they were based on anything other than volatile personality conflicts.[57] Sacks refers to the three altercations in

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[54] Document No. 72, ex. A ¶ 19, *id.*, ex. A-3.

[55] *Id.*, ex. A-4 at 182 of 581.

[56] *Id.*, ex. A-4 at 181 of 581; *id.*, ex. A-8.

[57] Sacks produces a student witness's authenticated statement as evidence of what occurred during the hallway shout-down incident with Walker. The student testified that "[t]he mood

her summary judgment response as "verbal and physical intimidation and racial harassment that TSU failed to reasonably investigate or correct."[58] The summary judgment evidence, however, is insufficient to raise a genuine issue of material fact that these encounters were racially motivated. *See Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 652 (5th Cir. 2012) (district court properly rejected as evidence of race-based hostility plaintiff being threatened by another employee where "there was no evidence that the event had anything to do with race. . . . At most, the incident revealed that Green and Hernandez had a long-running dispute that would eventually lead to both men being disciplined."). As in *Hernandez*, courts "do not consider the various incidents of harassment not based on race . . . . when determining whether the harassment experienced under a hostile work environment claim was sufficiently severe or pervasive." *Id.* at 654.

Sacks's summary judgment evidence of the three principal clashes that Sacks had with Otero and Walker in 2012 and with Anga in 2017, and the several assorted additional incidents that affronted her over the years, as a matter of law do not raise a genuine issue of material fact that she suffered

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between the professors was tense, . . . [t]he discussion was heated, . . . [that Walker accused Sacks] of trying to 'beat-up' . . . [Otero] approximately two weeks ago. . . . " The exchange was "especially loud and chaotic." The student, however, makes no mention of any racial comment made by Walker, including when the student, Sacks, and Walker were in Dean Holley's office describing the incident to him. *Id.*, ex. K at 10 of 12 to 11 of 12.

[58] Document No. 72 at 17.

pervasive harassment due to a racially hostile work environment during her employment at TMSL. *See Peterson v. Linear Controls, Inc.*, 757 F. App'x 370, 374 (5th Cir. 2019) (allegations concerning harsh treatment over ten days during six years of employment do not show "pervasive harassment"); *Watkins v. Recreation & Park Comm'n for Baton Rouge*, 594 F. App'x 838, 841 (5th Cir. 2014) (three incidents of offensive harassment over the course of eight years of employment were not severe, pervasive, frequent, or physically threatening enough to support plaintiff's claim of a hostile work environment); *Hernandez*, 670 F.3d at 652 (two episodes of race-based harassment over a ten-year period did not create a fact issue that the harassment was sufficiently severe or pervasive to support a hostile work environment claim); *cf. Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435, 442-43 (5th Cir. 2011) ("repeated profane references" to plaintiff along with "strident age-related comments" used by supervisor "on almost a daily basis within the work setting" created genuine issue of material fact as to ADEA-based claim for hostile work environment discrimination).

To bolster her hostile work environment claim, Sacks argues that the testimony of two other former TMSL employees, who are white, Patricia Garrison and Rebecca Stewart, show that TMSL continually harasses white faculty members.[59] Sacks relies on

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[59] Sacks also produces the declaration of Jason Casey, a white student who received his J.D. from TMSL in 2018. Casey testified to what he witnessed during one of Sacks's classes when a student had a seizure and also that Sacks had trouble with her parking spot at TSU. Casey does not report any racial harassment of Sacks or even mention race other than to state that he is

cases discussing sexual harassment directed at others as evidence of a hostile workplace. *See, e.g.*, *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 477-78 (5th Cir. 1989) ("Even a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive.") (citing *Vinson v. Taylor*, 753 F.2d 141, 146 (D.D.C. 1995), *aff'd* 106 S. Ct. 2399 (1986)). Sacks, however, does not cite to any caselaw that applies the same standard outside of the context of sexual harassment. Nonetheless, of the two former TMSL employees upon whose deposition and declaration evidence Sacks relies, only one supports Sacks's contention. Patricia Garrison, a white TMSL alumna who was hired by TMSL in 2007 to oversee operations of the Academic Support Program Department, which assists students to prepare for the bar examination and provides other tutoring, testified that after six years she was forced out of her job because of her race, and that "[t]he atmosphere at TMSL is very hostile toward Caucasians, and Caucasians are harassed as I was on a regular basis."[60] Garrison sued TSU for race discrimination and agreed to leave her job as part of her settlement with the university.[61] The other white employee on whose testimony Sacks relies was a faculty member, Professor Rebecca Stewart, a tenured professor, who departed TSU in 2020. She made no claim of race-based harassment. She left, according to her testimony, because of an "underlying

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Caucasian and Caucasians are in the minority on campus at TSU. *Id.*, ex. I.

[60] Document No. 72, ex. B ¶ 18.

[61] *Id.*, ex. B ¶ 19.

current of sexism."[62] When directly asked if there is "an underlying current of racism against whites at TSU," she replied, "Not that I could tell."[63]

"'[S]econd-hand' harassment carries less evidentiary weight in a hostile work environment case." *Johnson v. Saks Fifth Ave. Tex., LP*, H-05-1237, 2007 WL 781946, at *25 (S.D. Tex. Mar. 9, 2007) (Rosenthal, J.) (collecting cases showing that second-hand harassment, "although relevant, carries less weight than remarks or actions directed at the plaintiff"). Garrison's conclusory testimony is insufficient on this summary judgment record to raise a fact issue that Sacks was harassed because of her race.

Viewing the summary judgment evidence in the light most favorable to Sacks over the span of her two decades career at TMSL that began in 2000, the most serious events were a couple of verbally volatile but non-violent random encounters Sacks had with other faculty members in 2012 (Otero at the bathroom door and Walker in the hallway a few weeks later), and one in 2017 (Anga at the disputed parking space), several other incidents or affronts from time to time where the races of the participants and Sacks are not shown in the evidence to have been a factor, the faculty's vote to confer upon another faculty member the remunerative Roberson King Honorary titled professorship when Sacks's five-year term expired, and Sacks's own perception that because she is white others on the faculty treated her with less respect

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[62] *Id.*, ex. G at 82:6-8.

[63] *Id.*, ex. G at 82:11-15.

than that to which she believed she was entitled based on her scholarship and academic reputation.

For a hostile work environment claim to survive summary judgment, courts require plaintiffs to point to evidence of abuse that is severe, frequent, and directly related to the plaintiff's race. "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.'" *Sarwal v. Shulkin*, No. H-16-00247, 2017 WL 3008582, at *8 (S.D. Tex. July 14, 2017) (Rosenthal, C.J.) (quoting *Hernandez*, 670 F.3d at 651); *see also Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 347-48 (5th Cir. 2007) (racially inappropriate comments and other isolated comments were not enough to overcome summary judgment in hostile work environment claim); *Lister v. Nat'l Oilwell Varco, L.P.*, No. H-11-0108, 2013 WL 5515196, at *27-28 (S.D. Tex. Sept. 30, 2013) (plaintiffs' allegations of a racial marking on a toolbox, a racial comment, and scratches on their cars fell short of showing that they were subjected to a racially hostile work environment); *Dogan-Carr v. Saks Fifth Ave. Tex., LP*, No. H-05-1236, 2007 WL 646375, at *31-33 (S.D. Tex. Feb. 26, 2007) (a string of offensive encounters that were not necessarily race related that occurred over a four to five month period and then a year later along with plaintiff's supervisor directing racially offensive comments toward other employees did not rise to the level of objectively severe or pervasive); *cf. Walker v. Thompson*, 214 F.3d 615, 626 (5th Cir. 2000) (many offensive, inflammatory racial comments made to plaintiffs over years created fact issue for hostile work environment claim to survive summary judgment),

abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405 (2006). TSU is entitled to summary judgment on Sacks's hostile work environment claim.

C. Section 1983 Deliberate Indifference Against Douglas

Under 42 U.S.C. § 1983, Sacks replicates her Title VII hostile work environment claim against Douglas in his personal capacity, alleging violations of 42 U.S.C. § 1981 and the Fourteenth Amendment's Equal Protection Clause. Section 1983 is not itself a source of substantive rights but merely provides a method for vindicating federal rights conferred elsewhere. *Albright v. Oliver*, 114 S. Ct. 807, 811 (1994).

Sacks argues that Douglas, as interim dean of TMSL, did not investigate Sacks's race discrimination complaints, which contributed to the hostile work environment at TMSL. "A supervisor can be liable for the hostile work environment created by his subordinates 'if that official, by action or inaction, demonstrates a deliberate indifference to a plaintiff's constitutional rights.'" *Johnson v. Halstead*, 916 F.3d 410, 416-17 (5th Cir. 2019) (quoting *Southard v. Tex. Bd. of Criminal Justice*, 114 F.3d 539, 551 (5th Cir. 1997)). Douglas argues that he is entitled to qualified immunity on this claim. "The doctrine of qualified immunity protects government officials from civil damages liability when their actions could reasonably have been believed to be legal." *Whitley v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013) (quoting *Morgan v. Swanson*, 659 F.3d 359, 370 (5th Cir. 2011) (en banc). To overcome qualified immunity, a plaintiff must show: "(1) that the official violated a statutory or constitutional

right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Id.* (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011)).

Because Sacks has failed to produce evidence that she was subjected to a hostile work environment due to her race, there is no hostile work environment claim for which Douglas could be liable as her supervisor. But if there were such evidence, Sacks would also need to show that Douglas's alleged deliberate indifference to her rights was objectively unreasonable. *See Zarnow v. City of Wichita Falls, Tex.*, 500 F.3d 401, 407 (5th Cir. 2007) ("[O]n motion for summary judgment, a plaintiff must produce evidence showing two things: (1) that the defendant[] violated the plaintiff's constitutional rights and (2) that the violation was objectively unreasonable."). The summary judgment evidence shows that Douglas investigated Sacks's claims to some extent, even if he did not investigate them to her satisfaction. Sacks admits that she has no personal knowledge as to what actions Douglas took in regard to the 2016 internal complaint she submitted to TSU, which was the only one submitted while Douglas was Dean of TMSL and her supervisor.[64] Instead, she argues that Douglas is liable because he testified in his deposition that he did not recall Sacks's allegations of harassment from her internal complaint. Douglas testified, however, that he read Sacks's 2016 internal complaint and then passed it on to TSU's Office of General Counsel.[65] Sacks does not cite any authority to support her contention that Dean Douglas had a constitutional duty to read

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[64] Document No. 62, ex. 7 at 223:3-5.

[65] *Id.*, ex. 14 ¶¶ 4-5; Document No. 72, ex. F at 223:10-19.

through her complaint more carefully than he did or that his actions regarding her 2016 internal TSU complaint, including passing the complaint on to TSU's General Counsel, were "objectively unreasonable." *Id.* Moreover, the bulk of Sacks's 2016 internal TSU complaint's harassment allegations deals with the 2012 altercations between Sacks and Otero and Sacks and Walker, and the charge of grade discrimination, all of which occurred and were investigated by TSU before Douglas became interim dean. Douglas is entitled to summary judgment based on qualified immunity.

V. Order

For the foregoing reasons, it is

ORDERED that Defendants' Amended Motion for Summary Judgment (Document No. 62) is GRANTED IN PART. Plaintiff's claim against TSU under Title VII for a hostile work environment based on race is DISMISSED on the merits with prejudice, and Plaintiff's claim against Defendant James Douglas in his personal capacity for race discrimination under 42 U.S.C. § 1983 is DISMISSED based on qualified immunity. The motion is otherwise DENIED. Plaintiff's Equal Pay Act pay discrimination claim alleged against Defendant TSU remains for trial.

The Clerk will enter this Order, providing a correct copy to all parties of record.

SIGNED at Houston, Texas, on this 25th day of January, 2021.

/s/ Ewing Werlein, Jr.
United States District Judge

ORDER DENYING PLAINTIFF'S MOTION TO RECONSIDER HER MOTION TO COMPEL THE PRODUCTION OF WOMEN'S W-2S, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS (JUNE 10, 2020)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DEANA POLLARD SACKS,

Plaintiff,

v.

TEXAS SOUTHERN UNIVERSITY,
and JAMES DOUGLAS,

Defendants.

Civil Action No. H-18-3563

Before: Frances H. STACY
United States Magistrate Judge

ORDER

Pending and referred is Plaintiff's Motion for Reconsideration in Regard to Plaintiff's Motion to Compel Defendants' Production of Documents (Document No. 52). In that motion, Plaintiff seeks reconsideration of the Order which denied Plaintiff's motion

to compel documents responsive to Request for Production Nos. 1-4, 17, 20 and 41. Having considered that motion, the response in opposition, and the Order entered on April 29, 2020, which granted in part and denied in part Plaintiff's Motion to Compel, the undersigned concludes that no reconsideration is warranted. As regards to Plaintiff's argument that she needs salary and workload information for both male and female law professors to support her Equal Pay Act claim (Request for Production Nos. 1-4), male comparator information is enough for Plaintiff at this stage, as it is Plaintiff's burden to show that she is, or has been, paid less than her male comparators. Whether Plaintiff believes that female law professors are generally paid less than male law professors at Texas Southern University, that alone, even if supported by some evidence, is not enough to meet Plaintiff's burden of showing that she is paid less than identifiable male comparators. *See Sims v. Wells Fargo Bank, N.A.*, 298 F. Supp. 3d 987, 993 (S.D. Tex. 2018)("To establish her *prima facie* case, Sims must show: "(1) that her employer is subject to the Act; (2) that she performed work in a position requiring equal skill, effort[,] and responsibility under similar working conditions; and (3) that she was paid less than members of the opposite sex.") (quoting *Jones v. Flagship Int'l*, 793 F.2d 714, 722-23 (5th Cir. 1986)). As for the remaining Requests for Production, they (Request for Production Nos. 17, 20, and 41) are, as set forth in the Order entered on April 29, 2020, overbroad and/or not proportional to the needs of the case. Plaintiff's Motion for Reconsideration (Document No. 52) is DENIED.

Signed at Houston, Texas, this 10th day of June, 2020.

/s/ Frances H. Stacy
United States Magistrate Judge

ORDER DENYING PLAINTIFF'S MOTION TO COMPEL THE PRODUCTION OF WOMEN'S W-2S, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS (APRIL 29, 2020)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DEANA POLLARD SACKS,

Plaintiff,

v.

TEXAS SOUTHERN UNIVERSITY,
and JAMES DOUGLAS,

Defendants.

Civil Action No. H-18-3563

Before: Frances H. STACY
United States Magistrate Judge

ORDER

Before the Magistrate Judge upon referral from the District Judge is Plaintiff's Motion to Compel the Production of Documents and to Continue the Discovery Cut Off Date (Document No. 45). In that motion, Plaintiff complains about Defendants refusal to provide documents responsive to Request for Production Nos.

1-3, 4 and 56, which seek "Gender and Race Compensation and Workload Evidence;" Request for Production Nos. 9, 26, 32, 34-36, 40-42, 48, 49-53 and 54, which seek "Racial Harassment and Hostile Environment Evidence;" Request for Production Nos. 17, 23, which seek "Law Professors' Personnel Files and Evidence of Competency and Merit;" and Request for Production Nos. 20-22, which seek "Evidence Concerning Student Records." In response to that motion, Defendants coalesce the parties' dispute into 6 issues: (1) "Every law professor's W-2 and personnel files"; (2) "Documents going back to 2010;" (3) "Paper course schedules and syllabi;" (4) "Reimbursement documents;" (5) "Complaints and charges from other professors;" and (6) "Student A.L.'s academic records." Because Defendants' classification of the disputed discovery issues into six categories does not fully encompass all of the documents sought by Plaintiff with her Motion to Compel, the undersigned will consider the Requests for Production one-by-one, within the groupings made by Plaintiff.

Having considered those requests and Defendants' responses thereto, the claims and allegations in this case, the Memorandum and Order of August 29, 2019 (Document No. 30), and each sides' briefing, it is ORDERED, for the reasons set forth below, that Plaintiff's Motion to Compel and to Continue the Discovery Cut-Off Date (Document No. 45) is GRANTED in PART.

This is an employment dispute, with Plaintiff Deana Pollard Sacks alleging claims for race discrimination under Title VII/§ 1983,[1] and violations of the

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[1] Sacks' Title VII race discrimination claim is against Defendant

Equal Pay Act. Those claims are what remain following the District Court's Memorandum and Order of August 29, 2019, which granted in part and denied in part Defendants' Amended Motion to Dismiss. As is set forth in that Memorandum and Order, Sacks is a tenured professor at the Thurgood Marshall School of Law (TMSL) and has been such since 2008. She alleges in this case that she is, and has been, paid less than her male comparators, and that she has faced harassment from other faculty members and the administration of TMSL based on her race (Caucasian). Those claims survived Defendants' Motion to Dismiss. Following the Court's ruling on the Motion to Dismiss, Sacks commenced written discovery. It is Defendants' responses to the Request for Production she served in December 2019, that underlie Sacks' Motion to Compel. Recognizing the burden Sacks faces in proving her two remaining claims, but also recognizing that there are only two claims that remain, it appears that Sacks is, on the one hand, seeking too much, and Defendants, on the other hand, are offering too little.

With Request for Production Nos. 1, 2, 3, 4 and 56, Sacks claims that she is seeking "Gender and Race Compensation and Workload Evidence." Both salary and workload information is relevant to Sacks' Equal Pay Act claim insofar as Sacks is seeking to show that she was paid less than male comparators. Such information is directly sought in two of these requests for production: "all IRS form W2 documents for all TMSL professors from 2010 to present" (Request for Production No. 4); and "all final course offerings at

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Texas Southern University, and Sacks' § 1983 race discrimination claim is against Defendant James Douglas in his individual capacity.

TMSL from 2010 to the present" (Request for Production No. 56). But, as Defendants maintain, the time period, from 2010 to present, is too long, Sacks has only identified four male comparators for her Equal Pay Act so her request for the W2s for all TMSL professors is overly broad, and course schedules can be found on either TMSL's website, or in the library. Taking into consideration these valid objections and related arguments in response to the Motion to Compel, the undersigned concludes that Defendants should produce W2s for all male TMSL professors from 2015 to the present, and should make available to Plaintiff any and all course schedules from 2015 to the present. Whether the course schedule information is in the library or not, Defendants shall obtain such information from whatever source, including the library, and make such available to Sacks for inspection and copying. Defendants shall do this within twenty-one (21) days after the entry of this Order, and Plaintiff's Motion to Compel is GRANTED as to Request for Production Nos. 4 and 56 in this limited regard only. Plaintiffs' Motion to Compel documents responsive to Request for Production Nos. 1-3 (Request for Production No. 1: "all documents showing base salary information for all TMSL professors from 2010 to the present;" Request for Production No. 2: "all documents showing any bonus payments or any other form of additional compensation paid to any TMSL professors from 2010 to the present, including, but not limited to, monies for titles, directorships, deanships, summer teaching assignments, research stipends, bonuses, compensation for bar review classes or sessions, and any other compensation for any reason, from any fund;" Request for Production No. 3: "all documents showing payments made to any TMSL professors that are not classified

as either base salary or bonus payments from 2010 to present, including, but not limited to, reimbursement for travel, food, parking, copying, entertaining candidates for hire, or any other monies paid to any TMSL professor for any reason") is DENIED, as those requests for production are decidedly overbroad, and not proportional to the needs of the case.

With Request for Production Nos. 9, 26, 32, 34-36, 40-42, 48, 49-53 and 54, Sacks seeks "Racial Harassment and Hostile Environment Evidence." Three of these requests, Request for Production Nos. 40, 42, and 54, seek information about other race discrimination complaints made by or against TMSL faculty or staff (Request for Production No. 40: "all documents that contain a complaint or grievance filed by any TMSL professor for race discrimination;" Request for Production No. 42: "all documents that contain a complaint or grievance filed against TMSL or any TMSL professor, dean, administrator, staff, or any other TMSL employee for race discrimination;" Request for Production No. 54: "all Human Resources documents that discuss, concern, or relate to all complaints or grievances of harassment, discrimination, or intimidation by any TMSL professor since 2010"). While those requests are not limited by time, they do seek information relevant to Sacks' hostile work environment claim, particularly insofar as Sacks claims that the racially hostile work environment she faces is endemic at TMSL. In addition, Request for Production No. 32, in which Sacks seeks information and documents about a faculty vote for three professorships in 2016, is relatively discrete, and sufficiently tied to her allegations of racial bias and related racial harassment, to warrant production. Plaintiff's Motion to

Compel documents responsive to Request for Production Nos. 32, 40, 42, and 54 is therefore GRANTED and Defendants shall, within twenty-one (21) days after the entry of this Order, provide Sacks with all non-privileged information and documents responsive to Request for Production No. 32, and all non-privileged information and documents responsive to Request for Production Nos. 40, 42, and 54, for the time frame of 2010 to the present. Plaintiffs' Motion to Compel documents responsive to the other Requests for Production, Request for Production No. 9 ("all written communications to or from any TMSL professors regarding the title of Robertson King Professor of Law since 2010"); No. 26 ("all counseling statements, incident reports, or disciplinary documents for all TMSL professors, deans, administrative staff, or any other agents or employees of TMSL from 2010 to present"); No. 34 ("all demands or requests for unpaid wages, bonuses, or other compensation made by professors of TMSL since 2010"); No. 35 ("all documents that concern, relate to, or discuss any university-wide freezes on sabbaticals from 2005 to the present"); No. 36 ("all EEOC charges of discrimination filed by any TSU professor since 2010"); No. 41 ("all documents that contain the word "bitch," including all emails, complaints, or other correspondence to or from any TMSL professor, administrator, staff member, agent, employee, or student"); and Nos. 49-53 ("all documents that discuss, concern, or relate to all complaints or grievances concerning April Walker's conduct since 2010," "Ahunanya['s] conduct since 2010," "Fernando Colon's conduct since 2010," "James Douglas's conduct since 2010," and "Ana Otero's conduct since 2010") is DENIED given that those requests are overbroad and/or not proportional to the needs of the case. Additionally,

Plaintiff's Motion to Compel documents responsive to Request for Production No. 48, in which Sacks seeks evidence of a parking spot dispute between her and Ahunanya Anga on April 17, 2017, is, because Defendants have responded, subject their objections, that no responsive documents have been identified, also DENIED.

With Request for Production Nos. 17 and 23, Sacks seeks "Law Professors' Personnel Files and Evidence of Competency and Merit." Request for Production No. 17 asks for "teaching evaluations for all TMSL professors from 2010 to present," and Request for Production No. 23 asks for "all syllabi for all TMSL professors, adjuncts, or instructors for all courses taught from 2010 to the present." Given that Sacks' Equal Pay Act claim is limited to claims of disparate pay based on her gender, those two requests are, as objected to, overbroad and not proportional to the needs of the case, and Plaintiff's Motion to Compel documents responsive to Request for Production Nos. 17 and 23 is DENIED.

Finally, Sacks seeks "Evidence Concerning Student Records" in Request for Production Nos. 20-22. Those requests for production seek documents related to the student who made a complaint against Sacks in late 2016. Request for Production 20 seeks "all documents that discuss, relate to, or concern [A.L.'s] application" to TMSL; Request for Production No. 21 seeks "all documents that discuss, relate to, or concern [A.L.'s] complaint concerning Plaintiff, including, but not limited to, all correspondence between TSU/TMSL and [A.L.] and all documents that relate to the Academic Standards Committee that reviewed the complaint;" and Request for Production No. 22 seeks "all TSU/

TMSL documents that relate to [A.L.], including, but limited to all correspondence between [A.L.] and any professor or dean at TMSL, all documents that discuss, relate to, or concern [A.L.'s] termination from the law school." To the extent Sacks alleges or suggests that the student complaint was somehow related to the racially hostile work environment she faced, Defendants should be required to produce all documents responsive to Request for Production No. 22. The other two requests related to that student are not sufficiently related to any claim remaining in this case, and are therefore both overbroad and not proportional to the needs of the case. Accordingly, Plaintiff's Motion to Compel documents responsive to Request for Production No. 21 is GRANTED and Defendants shall, within twenty-one (21) days after the entry of this Order, provide Plaintiff with all documents responsive to Request for Production No. 21. Plaintiff's Motion to Compel documents responsive to Request for Production Nos. 20 and 22 is DENIED.

Given the rulings herein, as well as the difficulties the parties may have over the next few months both scheduling and completing discovery, Plaintiff's Motion to Continue the Discovery Cut Off (Document No. 45) is GRANTED and the discovery deadline is extended to August 31, 2020. In addition, the twenty-one day deadline provided herein for the discovery made the basis of this Order may, upon reasonable request, be extended.

Signed at Houston, Texas, this 29th day of April, 2020.

/s/ Frances H. Stacy
United States Magistrate Judge

MEMORANDUM AND ORDER GRANTING DEFENDANTS' AMENDED MOTION TO DISMISS, IN PART, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS (AUGUST 29, 2019)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DEANA POLLARD SACKS,

Plaintiff,

v.

TEXAS SOUTHERN UNIVERSITY, AHUNANYA ANGA, JAMES DOUGLAS, FERNANDO COLON-NAVARRO, ANA OTERO, and APRIL WALKER,

Defendants.

Civil Action No. H-18-3563

Before: Ewing WERLEIN, JR.,
United States District Judge.

MEMORANDUM AND ORDER

Pending is Defendants' Amended Motion to Dismiss (Document No. 25). After carefully considering the motion, response, reply, and applicable law, the Court concludes as follows.

I. Background

Plaintiff Deana Pollard Sacks is a tenured professor at the Thurgood Marshall School of Law ("TMSL") at Texas Southern University ("TSU").[1] Plaintiff identifies herself as a Caucasian woman and brings claims of race and sex discrimination, retaliation, pay disparity under the Equal Pay Act, and for invasion of privacy against TSU and five members of the faculty ("Individual Defendants"), one of whom served for a portion of the relevant time as Interim Dean of the law school.[2]

Plaintiff was hired by the TSU's Thurgood Marshall School of Law in 2000 as an assistant professor of law, specializing in the subject of torts.[3] Plaintiff received tenure in 2006 and was promoted to full professor in 2008.[4] Throughout her employment, she has "consistently published academic articles in very prestigious law journals, received good teaching evaluations, and served the public in numerous ways, including providing pro Bono legal services."[5]

In 2011, Plaintiff was awarded the "Roberson King Professor of Law" title, "effective from 2011-2015."[6] Although Plaintiff does not specify when she first experienced harassment based on her race and

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[1] Document No. 24 ¶ 14 (Pl.'s 2d Am. Compl.).

[2] *Id.* ¶¶ 69-102.

[3] *Id.* ¶¶ 39-40.

[4] *Id.* ¶ 40.

[5] *Id.* ¶ 40.

[6] *Id.* ¶ 54.

sex, she alleges that soon after receiving the Roberson King title, the harassment "intensified." Plaintiff alleges that Defendants April Walker and Ana Otero screamed at Plaintiff and were physically aggressive toward her.[7] This aggression included "slamming a door into Plaintiff's body, punching a handbag off of Plaintiff's shoulder, and grabbing Plaintiff's arm" as well as making public statements about Plaintiff such as, "Who does [Plaintiff] think she is?"[8] Plaintiff alleges that Walker has used the phrase "white bitch" to refer to white women and has screamed racial comments in the school, including, "What's so special about [Plaintiff], because she's white?" At an unspecified date, Plaintiff formally complained about Walker and Otero to Human Resources but Human Resources "did not conduct a reasonable investigation or contact critical witnesses, and instead denied Plaintiff's allegations."[9]

Plaintiff alleges that Defendants Ahunanya Anga and Fernando Colon-Navarro "repeatedly screamed at Plaintiff in faculty meetings."[10] She alleges that Colon-Navarro "made numerous false and derogatory statements about Plaintiff," had a sign on his door that said "Parking for Puerto Ricans Only," referred to Caucasians as "fucking whites" in front of students, presented a photograph of an attractive pole dancer to persons in the law school, discussed students' and

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[7] *Id.*

[8] *Id.* ¶ 48.

[9] *Id.* ¶ 55.

[10] *Id.* ¶ 48.

other women's bodies, and told other people how he was "good looking" as a younger man.[11]

Plaintiff took time away from the law school "between 2013 and 2014," citing the continuous harassment and concern for her physical safety as grounds for her leave of absence.[12] TSU did not pay her salary or the Roberson King title funds during Plaintiff's leave of absence, even after she wrote a letter claiming entitlement to the unpaid funds.[13]

Plaintiff alleges that in 2015 her Roberson King Professor of Law title was "revoked because she is Caucasian.[14] The faculty voted to select another recipient for the title.[15] Plaintiff contends that the vote was a "sham" and held near the holidays on a date on which many professors were absent but professors "with TMSL law degrees were present."[16] Three titles were available, including the Roberson King title.[17]' Of the six applicants for the titles, four were black and two were white.[18] According to Plaintiff, the faculty present at the vote decided to award "all three titles to black professors with inferior scholarship

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[11] *Id.*

[12] *Id.* ¶ 56.

[13] *Id.*

[14] *Id.* ¶ 58.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

and incomplete/insufficient application materials" in a "racially motivated" design "to give titles to less deserving black professors and deny the same to deserving white professors."[19]

Plaintiff alleges that "[w]ithin a day or two of the vote," Professors McKen Carrington and James Douglas saw Plaintiff in the law school and "laughed as they passed her, looking right at her . . . "[20] Plaintiff, joined by another law professor, wrote to the dean, requesting that he disregard the vote because it was "racially-motivated."[21] She requested an "outside review" of the decision, arguing that "the applicants who were awarded titles objectively did not deserve them."[22] The dean replied in a letter dated May 19, 2016 that he would approve the faculty recommendation and award the titles to the three law professors selected.[23] In September 2016, Plaintiff delivered a detailed complaint of unequal pay, discrimination, and harassment to then-Interim Dean James Douglas, TSU Human Resources, and TSU President Austin Lane.[24] Plaintiff never received a response to this

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[19] *Id.*

[20] *Id.*

[21] *Id.* ¶ 59.

[22] *Id.*

[23] *Id.*

[24] *Id.* ¶ 62.

complaint and alleges that TSU took no corrective action.[25]

Near the end of 2016, Plaintiff received a call from Professor Otero, informing Plaintiff that Otero was the chair of the Academic Standards Committee and that a student had lodged a charge of discrimination against Plaintiff.[26] Plaintiff claims that the student was "known to the administration to have numerous problems, including psychological, medical, academic and very serious credibility problems," and alleges that "[o]n information" it was Professor Colon-Navarro who instructed the student to lodge a complaint against Plaintiff.[27] Plaintiff alleges that Otero declined to disclose information concerning the student for Plaintiff to use in her defense against the charge.[28] Plaintiff appeared before the Academic Standards Committee, a majority of which consisted of Defendants Otero, Walker, and Anga, and Otero's student assistant Andrea Curtiss.[29] According to Plaintiff, during the meeting, Anga and Curtiss were "openly hostile" to Plaintiff and Curtiss shouted at her.[30] The committee recommended a finding of discrimination against

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[25] *Id.*

[26] *Id.* ¶ 63.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

Plaintiff. The dean, however, refused the Committee's recommendation based on his finding of "no evidence."[31]

In 2017, Plaintiff alleges that she was "again denied a title" when a title position was awarded to a black male professor despite what Plaintiff describes as her "far superior scholarship record, superior scholarly recognition in the legal academy and worldwide, and superior title application materials."[32] Between 2015 and 2018, Plaintiff also "repeatedly asked to be considered for an administrative position, to help with bar preparation, and to direct a program" but was "denied every time."[33] Other professors, either black or male, were given these positions and received additional income for what Plaintiff describes as their "incompetent attempts to prepare students for the bar exams" and "attempt[s] to teach subjects that they do not understand."[34]

In February 2017, Plaintiff filed her first charge of discrimination with the EEOC, claiming race and sex discrimination, retaliation, and that she was paid less than males performing similar work.[35] Plaintiff claims that she was retaliated against for filing the charge.[36] She alleges that Douglas, Colon-Novarro, and Anga became verbally aggressive and loud toward

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[31] *Id.*

[32] *Id.* ¶ 60.

[33] *Id.* ¶ 61.

[34] *Id.*

[35] *Id.* ¶ 65.

[36] *Id.*

her.[37] Plaintiff describes a hostile parking lot encounter with Anga, where Anga sat in her car near Plaintiff's reserved parking space, then pulled into Plaintiff's parking space just as Plaintiff approached, got out of her car and told Plaintiff that she is undeserving of a parking space, and charged at Plaintiff, coming within ten inches of Plaintiff's face and screaming, "What are you going to do about it?"[38] Plaintiff went to TSU Human Resources that day to report the incident and then submitted a written complaint, but TSU "did not conduct a reasonable investigation or take corrective action."[39]

In October 2017, Plaintiff alleges that her students told her they were concerned a conspiracy was afoot among certain students to give Plaintiff unfair and derogatory teaching evaluations to "put [Plaintiff] in her place." Plaintiff's assistant Misty Bishop made statements derogatory of Plaintiff at the time the evaluations were made, which "[u]pon information," she did at the direction of Individual Defendants.[40] Plaintiff believes that other incidents such as missing IT equipment in a room where she was about to conduct a review session, dings and scratches on her car, and unknown individuals sitting or standing in front of Plaintiff's parking space are part of the conspiracy to harass her.[41]

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[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

Plaintiff filed an Amended Charge of Discrimination on May 11, 2018 and timely filed this suit. Plaintiff brings claims against TSU for hostile work environment and retaliation in violation of Title VII, violation of the Equal Pay Act, and civil rights violations under 42 U.S.C. § 1983 and claims against Defendants Anga, Colon-Navarro, Douglas, Otero, and Walker for civil rights violations under 42 U.S.C. § 1983 and for invasion of privacy.[42] Defendants move to dismiss all of Plaintiff's claims except for her claim of pay disparity under the Equal Pay Act.[43]

II. Legal Standard

Rule 12(b)(6) provides for dismissal of an action for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When a district court reviews the sufficiency of a complaint before it receives any evidence either by affidavit or admission, its task is inevitably a limited one. *See Scheuer v. Rhodes*, 94 S. Ct. 1683, 1686 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 102 S. Ct. 2727 (1982). The issue is not whether the plaintiff ultimately will prevail, but whether the plaintiff is entitled to offer evidence to support the claims. *Id.*

In considering a motion to dismiss under Rule 12 (b) (6), the district court must construe the allegations in the complaint favorably to the pleader and must accept as true all well-pleaded facts in the complaint. *See Lowrey v. Tex. A&M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997). To survive dismissal, a complaint

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[42] *Id.* ¶¶ 69-102.

[43] Document No. 25.

must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). While a complaint "does not need detailed factual allegations . . . [the] allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 127 S. Ct. at 1964-65. A motion to dismiss under Rule 12(b)(6) "is viewed with disfavor and is rarely granted." *Harrington v. State Farm Fire & Cas. Co.*, 563 F.3d 141, 147 (5th Cir. 2009) (quotation marks and citation omitted).

III. Analysis

A. Title VII Hostile Work Environment

Plaintiff alleges that TSU created a hostile work environment based on her sex and race. Title VII plaintiffs "must exhaust administrative remedies before pursuing claims in federal court." *Taylor v. Books-A-Million, Inc.*, 296 F.3d 376, 378-79 (5th Cir. 2002). "Exhaustion occurs when the plaintiff files a timely charge with the EEOC and receives a statutory notice of right to sue." *Id.* at 379 (citing *Dao v. Auchan Hypermarket*, 96 F.3d 787, 788-89 (5th Cir. 1996)). In a deferral state such as Texas, an EEOC charge must be filed within 300 days of the alleged discrimination. *Nat'l R.R. Passenger Corp. v. Morgan*, 122 S. Ct. 2061, 2071 (2002). Defendants argue that portions of Plaintiff's allegations are outside the 300-day limitations

period under Title VII and therefore not actionable under Title VII.

Plaintiff filed her first charge of discrimination on February 1, 2017 but alleges discriminatory harassment dating as far back as 2013, which is about when she alleges she took a leave of absence due in part to harassment. When a plaintiff alleges a hostile work environment claim, "as long as an employee files her complaint while at least one act which comprises the hostile work environment claim is still timely, 'the entire time period of the hostile work environment may be considered by a court for the purposes of determining liability.'" *Heath v. Bd. of Supervisors for S. Univ. & Agric. & Mech. Coll.*, 850 F.3d 731, 736 (5th Cir. 2017) (quoting *Morgan*, 122 S. Ct. at 2074)). This so-called "continuing violation" doctrine reflects the reality of a hostile work environment claim, which is "based on the cumulative effect of a thousand cuts, rather than on any particular action taken by the defendant so the filing clock cannot begin running with the first act, because at that point the plaintiff has no claim; nor can a claim expire as to that first act, because the full course of conduct is the actionable infringement." *Id.* (quotation marks and citation omitted). Because Plaintiff has alleged a series of related, continuing acts, including some that occurred within 300 days of her first EEOC complaint, all of the hostile actions Plaintiff alleges may be considered in evaluating whether she states a claim for hostile work environment under Title VII.

Even considering Plaintiff's allegations under the continuing violation doctrine, Defendant argues that Plaintiff has not stated a claim for hostile work environment. To establish a hostile work environment

claim under Title VII, the plaintiff must show that (1) she belongs to a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment complained of was based on her membership in the protected group; (4) the harassment complained of affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action. *English v. Perdue*, No. 18-50530, 2019 WL 2537414, at *3 (5th Cir. June 19, 2019). "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.'" *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 651 (5th Cir. 2012) (citation omitted). "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances." *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 371 (1993). Some factors to consider are: "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." *Id.* "[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2283 (1998) (internal citation and quotation marks omitted). For harassment to be actionable, "the conduct complained of must be both objectively and subjectively offensive. Thus, not only must the victim perceive the environment as hostile, the conduct must also be such that a reasonable person would find it to be hostile or

abusive." *E.E.O.C. v. WC&M Enterprises, Inc.*, 496 F.3d 393, 399 (5th Cir. 2007) (citation omitted).

Plaintiff alleges that she was subjected to a hostile work place environment based both on her race and her sex. The bulk of Plaintiff's complaint focuses on allegations that she was discriminated against on the basis of her race.[44] The only allegations Plaintiff specifically ties to sex are those regarding Defendants Colon-Navarro and Walker. She claims that Colon-Navarro "has presented a photograph of an attractive pole dancer (stripper) to persons in the law school, makes people feel very uncomfortable by constantly discussing students' and other women's bodies and telling everyone how 'good looking' he was as a younger man.[45] Plaintiff claims this conduct was "unwelcomed" and made her "feel very uncomfortable."[46] Plaintiff alleges Walker is known to use the term "white bitch" to refer to white women. However, Plaintiff does not adequately allege when this conduct and these comments were made during her 18 years and counting at TSU, or if or when or how often she herself either was present or was the person to whom the remarks were

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[44] For instance, in her pleading describing the defendants, she claims that Anga "has demonstrated open and obvious anger toward [Plaintiff] and other white professors in the law school," Otero has "demonstrated visible and vocal animosity toward whites," Walker "has demonstrated open and obvious hostility toward [Plaintiff] and other white professors," and Douglas "has a long history of discriminatory behavior toward whites." Document No. 24 ¶¶ 16, 19, 20, 22. She does not specifically claim that any of these defendants exhibited animosity on the basis of sex.

[45] Document No. 24 ¶ 48b.

[46] *Id.*

addressed, such as to allege that the offensive44 conduct was sufficiently pervasive to create a hostile work environment. *See Royal v. CCC & R Tres Arboles, L.L.C.*, 736 F.3d 396, 403 (5th Cir. 2013) (noting that when instances of objectionable conduct are spread out over a period lasting more than a year, this time frame "dilut[es] their pervasive characteristic"). In fact, Plaintiff does not allege that she personally heard Colon-Navarro or Walker make their objectionable comments and, apart from claiming the remarks "caused Plaintiff to feel very uncomfortable," she makes no claim that such comments adversely affected her job performance as a legal scholar and professor. *See Johnson v. TCB Constr. Co. Inc.*, 334 F. App'x 666, 671 (5th Cir. 2009) (rejecting claim for hostile work environment based on race when supervisor frequently used n-word outside plaintiff's presence but there was no evidence it affected plaintiff's job). None of Plaintiff's allegations state facts sufficiently severe to create a hostile work environment for Plaintiff based on her sex. *See Hockman v. Westward Commc'ns, LLC*, 407 F.3d 317, 328 (5th Cir. 2004) (holding that sexually suggestive comments, slapping plaintiff on the behind with a newspaper, grabbing or brushing up against plaintiff's breasts and behind, and attempting to kiss plaintiff did not qualify as severe); *Paul v. Northrop Grumman Ship Sys.*, 309 F. App'x 825, 826 (5th Cir. 2009) (holding that a single incident in which a male employee rubbed his pelvic region across the plaintiff's hips and buttocks for approximately a minute and a half, in the presence of another supervisor who did not intervene was insufficiently severe to constitute an actionable Title VII claim for hostile work environment). Plaintiff has not alleged conduct by Defendants based on Plaintiff's sex

that rises to a level plausibly and objectively considered "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Hernandez*, 670 F.3d at 651. Accordingly, Plaintiff's claim for hostile work environment based on sex discrimination is dismissed.

As Defendant concedes, Plaintiff's claim for hostile work environment based on race is a "closer call" and, indeed, Plaintiff pleads far more detailed facts. Among a stream of allegations in her prolix Second Amended Complaint, Plaintiff alleges that it was because of her race that she experienced incidents involving aggressive physical contact, that she was screamed at on numerous occasions over a period of time, sometimes with overt references being made to her race, that she was harassed even in the parking lot and otherwise subjected to various indignities because of her race, that TSU failed to pay Plaintiff funds attributable to her title although "black professors consistently receive their title funds despite producing far less scholarship," and that TSU, because Plaintiff was white, denied Plaintiff a title for which she was qualified. Construing Plaintiff's well-pleaded facts favorably to Plaintiff, Plaintiff's allegations are sufficient to state a claim that TSU subjected Plaintiff to a hostile work environment on the basis of her race.

B. Title VII Retaliation

A plaintiff establishes a *prima facie* case of unlawful retaliation by demonstrating that (1) she engaged in activity protected under Title VII, (2) an adverse employment action occurred, and (3) there was a causal connection between her protected activity and the adverse employment decision. *Gardner v. CLC*

of Pascagoula, L.L.C., 915 F.3d 320, 327-28 (5th Cir. 2019). In the retaliation context, an adverse employment action is an action that "a reasonable employee would have found . . . [to be] materially adverse, which . . . means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415 (2006) (internal quotation marks omitted). "[N]ormally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence." *Id.* Moreover, "the 'causal link' required in prong three of the prima facie case for retaliation is not as stringent as the 'but for' standard." *Raggs v. Mississippi Power & Light Co.*, 278 F.3d 463, 471 (5th Cir. 2002) (citation omitted). "Close timing between an employee's protected activity and an adverse action against him may provide the 'causal connection' required to make out a prima facie case of retaliation." *Swanson v. Gen. Servs. Admin.*, 110 F.3d 1180, 1188 (5th Cir. 1997).

Plaintiff alleges that she has complained about discriminatory treatment on a number of occasions throughout her career as a professor at TSU. Her complaints of race discrimination to the dean and to the EEOC are protected conduct, satisfying the first element of her claim.

Turning to the second prong, the 300-day limitations period for Title VII applies to any adverse employment actions giving rise to a retaliation claim. *See Morgan*, 122 S. Ct. at 2070-71 (holding that unlike a hostile work environment claim, a Title VII claim arising from a discrete act is time-barred if the plaintiff does not file an EEOC charge within 300 days of the act). Thus, any retaliatory acts occurring more

than 300 days before Plaintiff filed her first charge of discrimination on February 1, 2017 are time-barred. Put differently, only those actions on or after April 7, 2016 can be considered for the purposes of Plaintiff's retaliation claim.

The actions that Plaintiff alleges occurred after this date are documented in Plaintiff's Second Amended Complaint at ¶¶ 62-68. These actions include (1) Plaintiff's colleagues recommending a finding of discrimination against her based on a student's charge,[47] (2) Professor McKen Carrington "yelling" at Plaintiff because Plaintiff suggested that a white professor teach a first-year class, (3) Professors Otero and Walker lodging a complaint against her, (4) Professors Douglas, Colon-Navarro, and Anga becoming "verbally aggressive" and "reprimanding her or yelling at her," (5) being denied increased responsibilities such as preparing students for the bar exam, which responsibilities carried with them increased pay, (6) Professor Anga aggressively interfering with Plaintiff's ability to park in her reserved spot, (7) unknown individuals standing near Plaintiff's parking spot and glaring at her, (8) a male professor's statement in front of Plaintiff's colleagues that Plaintiff's motive in attending a Gender Equity Meeting was to further her EEOC case and to create evidence for a lawsuit, (9) a "conspiracy" among students and Individual Defendants to give Plaintiff unfair teaching evaluations,[48] (10) Professors

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[47] The dean rejected the charge when he found no evidence to support it. Plaintiff does not allege what, if any, consequences would have resulted had the dean agreed to the charge.

[48] The basis of this alleged conspiracy is Plaintiff's beliefs that the Individual Defendants directed one of Plaintiff's teaching assistants to make negative statements about Plaintiff and the

Colon-Navarro and Anga raising their voices at Plaintiff at a faculty meeting, (11) a faculty member raising his voice at a meeting concerning Plaintiff's application for sabbatical,[49] (12) IT equipment being removed by unknown persons from a room before Plaintiff hosted a review session, and (13) being told by a faculty member to "sit down" at a hooding ceremony where professors were told to stand up.

With one possible exception, none of these amounts to "adverse employment actions" for purposes of a Title VII retaliation claim. *Burlington*, 126 S. Ct. at 2415 (2006); *see also King v. Louisiana*, 294 F. App'x 77, 84 (5th Cir. 2008) ("[A]llegations of unpleasant work meetings, verbal reprimands, improper work requests, and unfair treatment do not constitute actionable adverse employment actions as discrimination or retaliation").

The only action alleged that arguably may qualify as something that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination," *Burlington*, 126 S. Ct. at 2415, is Plaintiff's charge that she "was denied increased responsibilities with increased pay, such as bar preparation and directing a civil rights program, despite other professors receiving extra pay for similar activities."[50] But Plaintiff pleads no contextual facts

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fact that a "free pizza" text was sent to many of Plaintiff's students at the time they were filling out her evaluations such that many left for the free pizza.

[49] Plaintiff does not allege that his comments actually resulted in her sabbatical application being denied.

[50] Document No. 24 ¶ 65b.

to show such retaliation against her or its causal connection to her protected activity. Plaintiff alleges no facts as to when she sought "increased responsibilities with increased pay," what the specific additional responsibilities were (the allegation being made only in the hypothetical, "such as bar preparation and directing a civil rights program"), and most importantly, when she was denied any increased responsibility with increased pay with respect to the date she had engaged in protected activity. A plaintiff must plead sufficient facts to allege a "causal connection" between any date(s) on which she engaged in protected activity and the alleged retaliatory act. "[A] time lapse of up to four months may be sufficiently close [to infer retaliation], while a five month lapse is not close enough without other evidence of retaliation." *Feist v. Louisiana, Dep't of Justice, Office of the Atty. Gen.*, 730 F.3d 450, 454 (5th Cir. 2013) (internal quotations omitted). Plaintiff pleads that she was denied increased responsibilities and pay "between 2015 and 2018."[51] This date range makes it possible that Plaintiff was denied increased responsibilities and pay before her 2016 complaint to the dean, or the filing of her EEOC complaints, obviating any inference that being denied those positions was retaliation. In sum, Plaintiff has not satisfied the "causal connection" prong of her *prima facie* case. *See Chhim v. Univ. of Hous. Clear Lake*, 129 F. Supp. 3d 507, 515 (S.D. Tex. 2015) (dismissing plaintiff's retaliation claim because his "vague assertions fail to allege facts supporting any causal connection between his engaging in 'protected activity' and his suffering an 'adverse employment action'").

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[51] Document No. 24 ¶ 61.

Accordingly, Plaintiff's Title VII retaliation claim against TSU is dismissed.

C. 42 U.S.C. § 1983 Civil Rights Violations

Under 42 U.S.C. § 1983, Plaintiff alleges against TSU and the Individual Defendants violations of 42 U.S.C. § 1981, the Fourteenth Amendment's Equal Protection and Due Process Clauses, and the Fourth Amendment. Section 1983 is not itself a source of substantive rights but merely provides a method for vindicating federal rights conferred elsewhere. *Albright v. Oliver*, 114 S. Ct. 807, 811 (1994). To state a viable claim under § 1983, "a plaintiff must (1) allege a violation of rights secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law." *Leffall v. Dall. Indep. Sch. Dist.*, 28 F.3d 521, 525 (5th Cir. 1994).

Plaintiff does not plead facts sufficient to allege violations of the Due Process Clause or the Fourth Amendment. Although Plaintiff makes several vague, conclusory references to unspecified violations of "faculty manuals" that establish the process "for awarding benefits of employment,"[52] she fails to identify any specific life, liberty, or property interest of Constitutional proportions of which she has been deprived, nor does she identify any specific state action that deprived her of such interest. *See Machete Prods., L.L.C. v. Page*, 809 F.3d 281, 290 (5th Cir. 2015) ("In a section 1983 cause of action asserting a due process violation, a plaintiff must first identify a life, liberty, or property interest protected by the Fourteenth

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[52] Document No. 24 ¶ 94.

Amendment and then identify a state action that resulted in a deprivation of that interest.") (quoting *Blackburn v. City of Marshall*, 42 F.3d 925, 935 (5th Cir. 1995)). Nor does Plaintiff—who pleads no search or seizure—identify any legal or factual basis for a Fourth Amendment claim.

As found above, however, Plaintiff states a claim for hostile work environment based on race under Title VII. Plaintiff replicates these allegations to state a claim for hostile work environment based on race under Section 1981 and the Equal Protection Clause. "[D]iscrimination claims, including hostile work environment claims, brought under the Equal Protection Clause, 42 U.S.C. § 1981, or Title VII [1, are subject to the same standards of proof and employ the same analytical framework." *Bryant v. Jones*, 575 F.3d 1281, 1296 (11th Cir. 2009).[53] *See also Wilson-Robinson v. Our Lady of the Lake Reg'l Med. Ctr., Inc.*, No. CIV.A. 10-584, 2011 WL 6046984, at *3 (M.D. La. Dec. 6, 2011) ("Courts analyze employment discrimination claims brought under § 1981, including hostile work environment and retaliation claims, under the same standards applicable to Title VII claims.") (citing *Raggs v. Mississippi Power & Light Co.*, 278 F.3d 463, 468 (5th Cir. 2002)). Therefore, the Court proceeds to Defendants' arguments that they are entitled to immunity on these claims.

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[53] Plaintiff's claim for hostile work environment based on sex is dismissed for the same reasons as her like claim under Title VII, above, for failure to state a claim upon which relief can be granted.

1. Defendant TSU

TSU correctly argues that Plaintiff's claims against it under Section 1983 are barred by sovereign immunity. "Federal courts are without jurisdiction over suits against a state, a state agency, or a state official in his official capacity unless that state has waived its sovereign immunity or Congress has clearly abrogated it." *NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 393-94 (5th Cir. 2015); *see P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684, 688 (1993) ("[S]uits against the States and their agencies . . . are barred regardless of the relief sought."). "Under Texas law, state universities, including Texas Southern University, are agencies of the State and enjoy sovereign immunity." *Jackson v. Texas S. Univ.*, 997 F. Supp. 2d 613, 623 (S.D. Tex. 2014) (quotations omitted). Texas has not consented to suit by statute, and § 1983 does not abrogate state sovereign immunity. *NiGen Biotech, L.L.C.*, 804 F.3d at 394. Accordingly, regardless of the relief sought, Plaintiff's claims against TSU under Section 1983 are foreclosed by state sovereign immunity, and are therefore dismissed.

2. Claims Against Individual Defendants

Plaintiff sues Defendants Anga, Douglas, Colon-Navarro, Otero, and Walker in their personal capacities.[54] "Personal-capacity suits seek to impose indidual liability upon a government officer for actions

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[54] Although Plaintiff's Second Amended Complaint is not entirely clear whether Plaintiff sues the Defendants in their official or individual capacities, Plaintiff's response clarifies that she sues the Defendants only in their "personal" capacities. *See*

taken under color of state law." *Hafer v. Melo*, 112 S. Ct. 358, 362 (1991). "[O]fficials sued in their personal capacities, unlike those sued in their official capacities, may assert personal immunity defenses." *Id.* "Qualified immunity is 'an immunity from suit rather than a mere defense to liability.'" *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009) (citation omitted). "When a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense." *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002) (en banc). "A plaintiff seeking to overcome qualified immunity must show: (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Cass v. City of Abilene*, 814 F.3d 721, 728 (5th Cir. 2016) (citing *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 at 2080 (2011)).

a. Defendants Anga, Colon-Navarro, Otero, and Walker

Defendants Anga, Colon-Navarro, Otero, and Walker argue that Plaintiff has not alleged facts showing that they were acting "under color of state law," as required for liability under 42 U.S.C. § 1983. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of state law." *Townsend v. Moya*, 291 F.3d 859, 861 (5th Cir. 2002). "Not all actions by state employees are acts under color of law." *Edwards v. Wallace Cmty. Coll.*, 49 F.3d 1517, 1523 (11th Cir. 1995) (holding that co-employees of the plaintiff who lacked any supervisory authority over him were not liable pursuant

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Document No. 27 at 12-13.

to § 1983). "The mere fact that [the defendants] were state employees or that the offending acts occurred during working hours is not enough." *Woodward v. City of Worland*, 977 F.2d 1392, 1401 (10th Cir. 1992). *See also Bryant v. Military Dept of Miss.*, 597 F.3d 678, 686 (5th Cir. 2010) (granting summary judgment on a § 1983 claim where the actions of members of a state militia were personally motivated and did not invoke or use any official authority). In the context of harassment of an employee in the workplace, "several cases have declined to find liability under § 1983 against a co-employee for harassment when the harassment did not involve use of state authority or position." *Woodward*, 977 F.2d at 1400 (collecting cases); *Hughes v. Halifax County Sch. Bd.*, 855 F.2d 183 (4th Cir. 1988) (co-workers were not acting with state authority when they taunted plaintiff and performed a mock hanging of plaintiff).

Plaintiff does not adequately allege that Defendants' alleged harassing acts were actions taken in the defendants' performance of official duties. Plaintiff does not allege that her fellow faculty members Anga, Colon-Navarro, Otero, or Walker had any supervisory authority over Plaintiff, and while their alleged harassing actions took place at work during work hours, such actions did not involve the use of their state authority or position. Accordingly, Defendants Anga, Colon-Navarro, Otero, and Walker are not liable under § 1983.[55]

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[55] To the extent that Plaintiff's § 1983 claim is predicated on § 1981, the Fifth Circuit has not decided "whether a § 1981 claim lies against an individual defendant not a party to the contract giving rise to a claim." *Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 337 (5th Cir. 2003) (citing *Felton v. Polles*, 315 F.3d 470 (5th

Plaintiff's personal capacity claims against Anga, Colon-Navarro, Otero, and Walker also fail on the second prong of qualified immunity. Although Plaintiff alleges hostile work environment against her employer TSU on the basis of race under Section 1981 and Equal Protection, this claim by its nature involves cumulative alleged hostile incidents involving multiple persons as well as some incidents not attributed to any specific individuals. In order to overcome each individual's qualified immunity, Plaintiff must point to law that clearly establishes that each individual's conduct was unlawful. *See Iqbal*, 129 S. Ct. 1937, 1948 ("Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."); *Alexander v. Brookhaven Sch. Dist.*, 428 F. App'x 303, 307 (5th Cir. 2011) (district court correctly granted qualified immunity on a motion to dismiss where plaintiff failed to carry her burden to "point to allegations and relevant law showing a plausible claim"). Plaintiff has not met her burden to plead facts and identify relevant law sufficient to support an inference that any individual defendant's conduct in and of itself was sufficient under clearly established law to create a hostile work environment in violation of § 1981 and the Equal Protection Clause. *See Linicomn v. Hill*, 902 F.3d 529, 539 (5th Cir. 2018) (affirming

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Cir. 2002)). However, "§ 1981 liability will lie against an individual defendant if that individual is essentially the same as the State for the purposes of the complained-of conduct." *Id.* (internal quotation marks and citation omitted). As to Defendants Anga, Colon-Navarro, Otero, and Walker, Plaintiff has not established that any of these defendants held any position or authority to which this exception applies.

grant of qualified immunity because plaintiff "d[id] not cite to any controlling authority establishing that the [defendants' alleged conduct] would have violated a clearly established right under the circumstances."). At most, the authority Plaintiff does cite clearly establishes "the unlawfulness of discrimination and harassment based on sex and race."[56] But it is not enough that the law is clearly established at such high levels of generality. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) ("This Court has 'repeatedly told courts . . . not to define clearly established law at a high level of generality.'") (quoting *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1775-76 (2015)).

Accordingly, Plaintiff's claims against Defendants Anga, Colon-Navarro, Otero, and Walker are dismissed.

b. Defendant Douglas

Defendant Douglas was the law school's interim dean when Plaintiff made a lengthy complaint to him in September 2016 about the harassment she was experiencing.[57] Plaintiff alleges that Douglas "did absolutely nothing" in response to the complaint and that such lack of action violates clearly established law.[58] "A supervisor can be liable for the hostile work environment created by his subordinates 'if that official, by action or inaction, demonstrates a deliberate indifference to a plaintiff's constitutional rights." *Johnson v. Halstead*, 916 F.3d 410, 416-17 (5th Cir. 2019) (affirming denial of qualified immunity on a theory of

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[56] Document No. 27 at 13-14.

[57] Document No. 24 ¶ 8.

[58] *Id.*

supervisory liability for hostile work environment) (quoting *Southard v. Tex. Bd. of Criminal Justice*, 114 F.3d 539, 551 (5th Cir. 1997)). By pleading that Douglas did "absolutely nothing" when he at the time held supervisory authority over Plaintiff and the rest of the faculty, Plaintiff effectively has pled that he was "deliberately indifferent" to the alleged hostile work environment. If proven, these allegations would amount to a violation of clearly established law. Accordingly, at this stage where Plaintiff's allegations are construed favorably to the pleader and accepted as true, Defendant Douglas' motion to dismiss on the basis of qualified immunity is DENIED.

D. Invasion of Privacy

Plaintiff alleges under state law that all five Individual Defendants invaded her privacy. Texas recognizes three separate types of invasion of privacy: (1) intrusion upon seclusion or solitude or into one's private affairs; (2) public disclosure of embarrassing private facts; and (3) wrongful appropriation of one's name or likeness. *Doggett v. Travis Law Firm, P.C.*, 555 S.W.3d 127, 130 (Tex. App.-Houston [1st Dist.] 2018, pet. denied) (citing *Cain v. Hearst Corp.*, 878 S.W.2d 577, 578 (Tex. 1994)). Plaintiff does not plead facts to allege that any Defendant publicly disclosed embarrassing private facts about her or appropriated Plaintiff's name or likeness. The third possibility—an invasion of privacy by intrusion—under Texas law "must consist of an unjustified intrusion of the plaintiff's solitude or seclusion of such magnitude as to cause an ordinary individual to feel severely offended, humiliated, or outraged." *K-Mart Corp. Store No. 7441 v. Trotti*, 677 S.W.2d 632, 636 (Tex. App.—Houston

[1st Dist.] 1984), writ ref'd n.r.e., 686 S.W.2d 593 (Tex. 1985).

In her Second Amended Complaint, Plaintiff alleges that the Individual Defendants, her coworkers, invaded her privacy when they "physically and offensively touched the Plaintiff, threatened the Plaintiff with harmful or offensive physical contact, blocked the Plaintiff physically, lied about the Plaintiff to students, interfered with Plaintiff's relationships with students, and made numerous false allegations against Plaintiff for the purpose of harassing her."[59]

Under Fifth Circuit precedent, none of these allegations is cognizable under the invasion of privacy cause of action. In *Cornhill Ins. PLC v. Valsamis, Inc.*, 106 F.3d 80, 83 (5th Cir. 1997), a plaintiff alleged that her supervisor "made sexual remarks to her, touched her in an inappropriate and offensive manner, exposed himself, made threatening and obscene gestures, and eventually attempted to force himself on her in a supply room" and that when she complained to the president of the company, the president "failed to address . . . [the] conduct, tried to kiss her, asked her out repeatedly, and arranged to meet her alone under pretenses of work." The Fifth Circuit held that even such extreme and offensive conduct, which included physical assault, could not form the basis of an invasion of privacy claim under Texas law, noting that such cause of action is "generally associated with either a physical invasion of a person's property or eavesdropping on another's conversation with the aid of wiretaps, microphones or spying." *Id.* at 85 (citing *Wilhite v. H.E. Butt Co.*, 812 S.W.2d 1, 6 (Tex.App.—

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[59] Document No. 24 ¶ 99.

Corpus Christi 1991)). Plaintiff's allegations likewise fall outside the realm of conduct that the Texas invasion of privacy tort is intended to address.

In her response, Plaintiff emphasizes her allegation that Defendant Anga once blocked Plaintiff from pulling into Plaintiff's reserved parking spot at the law school in a hostile encounter and her allegation that Defendant Walker carried Plaintiff's cell phone into Plaintiff's office without informing Plaintiff.[60] These allegations may come closer to "physical invasion of a person's property or eavesdropping" but still fall short. Plaintiff's reserved parking spot at the law school is not her property nor does one imagine that a parking place in a university's parking lot is a location of particular seclusion or solitude; and Plaintiff does not allege that Walker examined the content of Plaintiff's phone or otherwise invaded Plaintiff's privacy in the device. Accordingly, Plaintiff fails to state a claim upon which relief can be granted for invasion of privacy under Texas law. The allegations are dismissed.

IV. Order

For the foregoing reasons, it is

ORDERED that Defendants' Amended Motion to Dismiss (Document No. 25) is GRANTED, except for (i) Plaintiff's discrimination claim against TSU under Title VII for a hostile work environment based on race and (ii) Plaintiff's § 1983 claim against Interim Dean James Douglas in his personal capacity for race discrimination based on a hostile work environment.

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[60] Document No. 27 at 22.

All of Plaintiff's claims against Defendants Anga, Colon-Navarro, Otero, and Walker, and Plaintiff's claims against Defendant TSU for Title VII hostile work environment based on sex discrimination and for retaliation, are DISMISSED on the merits for failure to state a claim. All of Plaintiff's claims against Defendant TSU based on 42 U.S.C. § 1983 are DISMISSED based on sovereign immunity under the Eleventh Amendment.

The Clerk will enter this Order and provide a correct copy to all parties.

SIGNED at Houston, Texas on this 29th day of August, 2019.

/s/ Ewing Werlein, Jr.
United States District Judge