No. _____

In The
Supreme Court of the United States

CHINYERE OGBONNA-MCGRUDER,
Petitioner,

v.

AUSTIN PEAY STATE UNIVERSITY;
TUCKER BROWN, AND MARSHA LYLE-GONGA,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHINYERE OGBONNA-MCGRUDER,
Plaintiff-Appellant,

v. No. 23-5557

AUSTIN PEAY STATE UNIVERSITY; TUCKER BROWN and MARSHA LYLE-GONGA, in their individual capacities,
Defendants-Appellees

Appeal from the United States District Court for the Middle District of Tennessee at Nashville.
No. 3:21-cv-00506—Eli J. Richardson, District Judge.

Decided and Filed: January 30, 2024

Before: GRIFFIN, BUSH, and READLER, Circuit Judges.

COUNSEL

ON BRIEF: James W. Edwards, CORLEY HENARD LYLE LEVY & LANGFORD, PLC, Hendersonville, Tennessee, for Appellant. Toni-Ann M. Dolan, Valerie M. Stoneback, E. Ashley Carter, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellees.

OPINION

JOHN K. BUSH, Circuit Judge. Chinyere Ogbonna-McGruder sued her employer, Austin Peay State University (APSU), and two of her supervisors, alleging that they engaged in racial discrimination, created a hostile work environment, and retaliated against her when she opposed their unlawful conduct. She also claimed that her supervisors violated her constitutional rights under 42 U.S.C. § 1983. The district court granted defendants motions to dismiss all counts for failure to state a claim. For reasons that follow, we AFFIRM.

I.

Because this appeal arises from a motion to dismiss, we draw the facts from the allegations in the operative pleading, the First Amended Complaint. In 2003, APSU hired plaintiff Ogbonna-McGruder, who is African American, to teach classes in criminal justice and public management. Her problems with the university began in 2017, when it underwent a series of organizational changes. In the spring of that year, she learned that the public management and criminal justice department would

be split: the criminal justice side would operate independently as a single department, and the public management side would merge with the political science department. Following the switch, she could either (1) select a single department to join, which did not require faculty approval; or (2) seek a joint appointment to both departments, which required faculty review of her qualifications.

Ogbonna-McGruder claims that she was unlawfully denied the opportunity to select her department after then-Dean David Denton rejected her request for joint appointment. She filed a complaint with APSU's Office of Equal Opportunity and Affirmative Action, alleging that Denton engaged in racial discrimination when he denied her request. According to Ogbonna- McGruder, APSU's internal investigation found that Denton's actions "were wrong," but the university took no action. First Amended Complaint (FAC), R. 53, PageID 455. Having found no remedy with the university, she filed a complaint with the Equal Employment Opportunity Commission (EEOC) in September 2019.

She claims that from summer 2019 through summer 2022, defendants "perpetuate[d] a hostile work environment" based on her race and in response to her filing the 2019 EEOC charge. *Id.*, PageID 456. She alleges that the following incidents contributed to a hostile work environment:

> • In September 2019, defendant Dr. Tucker Brown, Dean of the College of Behavioral and Health Sciences, instructed her "to move from [her] office to a basement office." *Id.*

• In October 2019, she was denied the opportunity to draft a grant proposal for a juvenile detention center in Tennessee. Brown had previously "assured [her] in writing" that she could participate, and a County Commissioner specifically requested that she join the drafting process. *Id.*, PageID 456–57.

• On October 9, 2019, Brown yelled at her in front of a white faculty member.

• In March 2020, defendant Dr. Marsha Lyle-Gonga, Chair of the Department of Political Science and Public Management, refused to complete Ogbonna-McGruder's faculty evaluation for the 2019–2020 academic year. She appealed the failure to receive an evaluation, and Brown scheduled a Zoom call to address the issue. During the call, Brown "denigrated [her] teaching and research done with minority students" and "indicated that [her] teaching pedagogy was questionable," ignoring the high ratings she had received from her students. *Id.*, PageID 457–59.

• She received a 4.45 out of 6.0 in her evaluation for the 2020–2021 academic year, but Lyle-Gonga lowered the evaluation score to 4.25. Lyle-Gonga reinstated the original score after Ogbonna-McGruder complained. Additionally, she received a low evaluation for the 2021–2022 year after Lyle-Gonga "purposefully misrepresented the criteria used" for evaluations. *Id.*, PageID 462.

> • Professors in the Department of Political Science and Public Management voted in favor of her proposal to create a masters program in January 2020, but Brown and Lyle-Gonga "deliberately refused to confer with [her] about [the] matter." *Id.*, PageID 458.
>
> • In spring 2020, she received word that a white adjunct professor was replacing her to teach a class during the fall 2020 semester. Although she repeatedly asked Lyle-Gonga and Brown for a replacement class, Brown did not notify her of a replacement until summer 2020.
>
> • Lyle-Gonga denied Ogbonna-McGruder's request to teach political science classes in 2021 and 2022 and assigned her to teach public management courses instead. Lyle-Gonga reasoned that Ogbonna-McGruder "was not qualified to teach political science classes due to not having a political science or law degree" although she had taught political science courses at APSU for 18 years. *Id.*, PageID 460–62. • She was denied the opportunity to teach summer semester classes in 2019 and 2021. • Her work was omitted from APSU's College of Behavioral & Health Sciences' year-end report of presentations and research completed by faculty members.

In September 2020, Ogbonna-McGruder filed her second EEOC complaint, asserting that APSU, Brown, and Lyle-Gonga discriminated against her because of her race. Her third EEOC complaint followed on June 17, 2021, alleging that APSU

retaliated in response to her prior EEOC claims. Soon after she received right-to-sue letters for her second and third EEOC complaints, she filed this action under Title VII of the Civil Rights Act of 1964. She thereafter amended her Complaint.

The First Amended Complaint does not specify which claims are brought under Title VII. But the district court discerned (and Ogbonna-McGruder does not dispute) that she alleges the following claims against the university under Title VII: that it (1) created a hostile work environment based on her race; (2) discriminated against her on the basis of her race; (3) unlawfully retaliated against her for opposing APSU's discriminatory practices; and (4) created a hostile work environment in retaliation for her opposing the discrimination. She also asserts claims against Brown and Lyle-Gonga in their individual capacities under 42 U.S.C. § 1983, alleging that they "engaged in conspiratorial behavior that has caused [her] to be deprived of rights to which she is entitled under laws of the United States, including but not limited to retaliation for having reported the violations of her rights." *Id.*, PageID 463.

The district court granted Brown and Lyle-Gonga's motion to dismiss, explaining that Ogbonna-McGruder did not properly plead any claim under § 1983 because she made "absolutely no reference to any constitutional violation, or for that matter any violation of federal law other than Title VII." Order Granting Individual Defs.' Mot. to Dismiss, R. 84, PageID 875– 90. The district court later granted APSU's motion to dismiss all remaining claims under Federal Rule of Civil Procedure 12(b)(6). Ogbonna-McGruder timely appealed.

II.

We review the district court's dismissal of the First Amended Complaint de novo. *West v. Ky. Horse Racing Comm'n*, 972 F.3d 881, 886 (6th Cir. 2020). To survive a motion to dismiss under Rule 12(b)(6), a complaint "must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In determining whether a plaintiff has stated a plausible claim for relief, the court must accept any factual allegations as true and draw all reasonable inferences in the plaintiff's favor. *Fisher v. Perron*, 30 F.4th 289, 294 (6th Cir. 2022). However, "the presumption of truth is inapplicable to legal conclusions." *Id.*

III.

A. Race-Based Hostile Work Environment Claim

Ogbonna-McGruder appeals the district court's dismissal of her claim that APSU created a hostile work environment on account of her race. Notably, at the motion-to-dismiss stage, a plaintiff is not required to plead facts establishing a prima facie case as is required under *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). *See Keys v. Humana, Inc.*, 684 F.3d 605, 608–09 (6th Cir. 2012) (explaining that "application of the *McDonnell Douglas* prima facie case at the pleading stage 'was contrary to the Federal Rules' structure of liberal pleading requirements'" (quoting *Twombly*, 550 U.S.

at 570)). Instead, a plaintiff asserting a hostile work environment claim must allege that her "workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe and pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002) (cleaned up). Additionally, the plaintiff must allege that she is a member of a protected class and that "the harassment was based on race." *Phillips v. UAW Int'l*, 854 F.3d 323, 327 (6th Cir. 2017).

Here, the district court dismissed Ogbonna-McGruder's race-based hostile work environment claim because she did not allege that any harassment she experienced was "specifically due to [her] race." Dist. Ct. Op., R. 100, PageID 1278. Additionally, the district court found that any alleged harassment was not sufficiently severe or pervasive to constitute a hostile work environment. *Id.* at 1278–84. Regardless of whether Ogbonna-McGruder alleged discriminatory animus, the district court did not err in dismissing her race-based hostile work environment claim because she did not allege severe or pervasive harassment.

First, the district court correctly found that the allegations of discrete acts of discrimination could not be characterized as part of the hostile work environment claim. The Supreme Court has explained that under Title VII, a plaintiff may bring a claim alleging that either (1) an employer engaged in "discrete discriminatory acts" such as "termination, failure to promote, denial of transfer, or refusal to hire"; or (2) the employer's "repeated conduct" created a hostile work environment.

Morgan, 536 U.S. at 114–15; *Hunter v. Sec'y of U.S. Army*, 565 F.3d 986, 993–94 (6th Cir. 2009). Because the two claims are "different in kind," we have consistently held that allegations of discrete acts may be alleged as separate claims, and as such "cannot properly be characterized as part of a continuing hostile work environment." *Sasse v. U.S. Dep't of Labor*, 409 F.3d 773, 783 (6th Cir. 2005); *see Morgan*, 536 U.S. at 115; *Taylor v. Donahoe*, 452 F. App'x 614, 620 (6th Cir. 2011) ("First, the alleged wrongs identified by plaintiff represent discrete acts of alleged retaliation (or discrimination) rather than acts contributing to a hostile work environment."); *Jones v. City of Franklin*, 309 F. App'x 938, 942– 44 (6th Cir. 2009) (distinguishing allegations supporting a hostile work environment claim from allegations of discrete acts of discrimination); *Clay v. United Parcel Serv., Inc.*, 501 F.3d 695, 708 (6th Cir. 2007) (holding that employer's refusal to remove the plaintiff from an unfavorable post was "more akin to a discrete act, which is decidedly not actionable as a hostile-work-environment claim").

We agree with the district court that most of Ogbonna-McGruder's allegations do not constitute "harassment" contributing to the hostile work environment claim. Her allegations that she was denied the opportunity to draft a grant proposal and teach summer courses, received low evaluations, was replaced by a white adjunct professor, and was reassigned to teach public management courses represent discrete acts that could perhaps support separate claims of discrimination or retaliation under Title VII. *See Hunter*, 565 F.3d at 994 (holding that "failure to promote an employee or select him for a training program is a discrete act"); *Jones*, 309

F. App'x at 942 (finding that allegations of "lowered evaluation scores, disciplinary actions, and the lack of promotions" were "discrete acts of racial discrimination"); *Cecil v. Louisville Water Co.*, 301 F. App'x 490, 496 (6th Cir. 2008) (claims that employer denied plaintiff training, gave her "unattainable and undesirable work assignments" and "outsource[ed] her job responsibilities" were discrete acts).

By contrast, only four incidents in the First Amended Complaint could constitute harassment to support Ogbonna-McGruder's hostile work environment claim: that (1) Brown instructed her to move to the basement; (2) Brown scolded her in front of a white faculty member; (3) Brown denigrated her teaching abilities during a video call; and (4) Lyle-Gonga stated that she was not qualified to teach political science courses.

But even viewing those allegations as a whole, Ogbonna-McGruder did not sufficiently allege facts from which we may infer that the harassment she experienced was severe or pervasive. Courts consider the totality of circumstances in determining the severity and pervasiveness of alleged harassment, including "the frequency of the discriminatory conduct; its severity; whether it [was] physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfere[d] with an employee's performance." *Harris v. Forklift Sys.*, 510 U.S. 17, 23 (1993). Notably, the alleged harassment must be both objectively and subjectively severe and pervasive to be actionable. *Id.* at 21–22. Allegations of "simple teasing, . . . offhand comments, and isolated incidents (unless extremely serious)" do not suffice. *Faragher v. City of*

Boca Raton, 524 U.S. 775, 788 (1998) (internal quotation marks omitted).

The district court did not err in concluding that the four alleged incidents fail to establish severe or pervasive harassment. As an initial matter, those events occurred over a period of approximately two and a half years—that is too infrequent to demonstrate that her workplace was "permeated with" ridicule and insult. *See Phillips*, 854 F.3d at 327–28 (holding that four racially offensive statements made over a two-year period were too isolated to constitute severe and pervasive harassment); *Clark*, 400 F.3d at 351–52 (concluding that three incidents over two and a half years was not severe or pervasive). And defendants' comments about her teaching abilities and qualifications, while undoubtedly offensive, are not sufficiently serious to constitute severe harassment. *Faragher*, 524 U.S. at 788 (noting that "the ordinary tribulations of the workplace, such as the sporadic use of abusive language" does not amount to hostility under Title VII (internal quotations marks and citation omitted)). Moreover, she did not allege that the harassment was physically threatening. Her conclusory assertions that defendants' actions "unreasonably interfered with [her] work performance," without alleging supporting factual allegations, is insufficient for purposes of a motion to dismiss. FAC, R. 53, PageID 464. Because she failed to plausibly allege severe or pervasive harassment, the district court did not err in dismissing her race-based hostile work environment claim.

B. Retaliatory Hostile Work Environment Claim

We affirm the district court's dismissal of the retaliatory hostile work environment claim on similar grounds. A plaintiff asserting such a claim must allege that she "was subjected to severe or pervasive retaliatory harassment by a supervisor" after she engaged in activity protected by Title VII, and that "there was a causal connection between the protected activity and the . . . harassment." *Morris v. Oldham Cnty. Fiscal Ct.*, 201 F.3d 784, 792 (6th Cir. 2000) (emphasis omitted). The district court dismissed Ogbonna-McGruder's claim because she did not plausibly allege that she was subjected to severe or pervasive discrimination in retaliation for her complaints about APSU's discriminatory conduct, or that her harassment was causally connected to any protected activity.

Her objection to the district court's holding is twofold. First, she claims that the district court should have recognized, "based on its judicial experience and common sense," that the harassment she experienced was causally related to her filing her 2019 Complaint with the EEOC. Appellant Br. at 30. But even if she had alleged a causal connection, her claim nonetheless fails because she did not plausibly allege that the harassment she suffered was severe or pervasive, as explained above.

Ogbonna-McGruder next contends that she was not required to allege that the harassment was severe or pervasive for purposes of her retaliatory hostile work environment claim. In support, she relies on *Tonkyro v. Sec'y, Dep't of Veterans Affs.*, in which the Eleventh Circuit held that a plaintiff

alleging a retaliatory hostile work environment claim was only required to prove that her employer's conduct would cause a reasonable worker to be dissuaded from filing or supporting a complaint of racial discrimination—rather than the familiar "severe or pervasive" standard. 995 F.3d 828, 836 (11th Cir. 2021). She also cites *Burlington N. & Santa Fe Ry. Co. v. White*, in which the Supreme Court applied a similarly lowered standard to a general retaliation claim. 548 U.S. 53, 68 (2006). However, neither decision controls our analysis here: *Tonkyro*, an out-of-circuit decision, does not bind this court; and *Burlington* does not apply in the context of a retaliatory hostile work environment claim. *See id.* at 64–65 (explaining that other cases were inapposite because they dealt with hostile work environment claims as opposed to a retaliation claim). And our circuit has repeatedly held that a retaliatory hostile work environment claim must include evidence that the harassment was severe or pervasive. *See, e.g.*, *Wyatt v. Nissan N. Am., Inc.*, 999 F.3d 400, 419 (6th Cir. 2021); *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 595 (6th Cir. 2007); *Morris*, 201 F.3d at 792; *Middleton v. United Church of Christ Bd.*, No. 20-4141, 2021 WL 5447040, at *5 (6th Cir. Nov. 22, 2021) (citing *Harris*, 510 U.S. at 21); *Mulvey v. Hugler*, No. 17-5633, 2018 WL 2771346, at *5 (6th Cir. Apr. 3, 2018); *Cleveland v. S. Disposal Waste Connections*, 491 F. App'x 698, 707 (6th Cir. 2012). Accordingly, we affirm the district court's dismissal of the retaliatory hostile work environment claim.

C. Discrimination Claim

Ogbonna-McGruder next challenges the district court's dismissal of her discrimination claim. Title VII prohibits employers from "discriminat[ing] against any individual with respect to her compensation, terms, conditions, or privileges of employment because of such individual's race." 42 U.S.C. § 2000e–2(a). Notably, she was not required to plead a prima facie case of discrimination under *McDonnell Douglas*, which requires that a plaintiff show (1) that she was a member of a protected class, (2) an adverse employment action, (3) that she was qualified for her position, and (4) that she was "replaced by someone outside the protected class or was treated differently from similarly situated members of the unprotected class." *Warfield v. Lebanon Corr. Inst.*, 181 F.3d 723, 728–29 (6th Cir. 1999). Instead, the plausibility pleading standard of Rule 12(b)(6) applies. *See Keys*, 684 F.3d at 608–09.

Ogbonna-McGruder abandoned her discrimination claim in her briefing before the district court. In its motion to dismiss, APSU argued that the discrimination claim was time barred because she failed to file an EEOC charge within 300 days of the alleged discriminatory acts in her complaint. APSU Mot. to Dismiss, R. 56-1, PageID 523–25. In response, Ogbonna- McGruder argued that her claims were timely because the discriminatory conduct listed in her complaint supported her hostile work environment claim and did not state that she was alleging a separate discrimination claim. *See, e.g.,* Resp. in Opp. to Mot. to Dismiss, R. 59, PageID 577 ("Here, there are a number of discrete acts that have occurred over what

is now a 5-year period; however, collectively . . . they are part of a hostile work environment and in fact constitute one unlawful employment practice."). Indeed, the First Amended Complaint adopted the same position when it alleged that her claims "arise from a series of separate acts that collectively constitute an unlawful employment practice." FAC, R. 53, PageID 462. Accordingly, the district court held that Ogbonna-McGruder abandoned her discrimination claim when she exclusively relied on her hostile work environment claim to satisfy the statute of limitations requirements.

On appeal, Ogbonna-McGruder has forfeited any challenge to the district court's determination that she abandoned her claim by not addressing the issue in her opening brief. An appellant "abandons all issues not raised and argued in its initial brief on appeal." *United States v. Johnson*, 440 F.3d 832, 845–46 (6th Cir. 2006) (internal quotation marks and citation omitted). Moreover, "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation," are forfeited. *Strickland v. City of Detroit*, 995 F.3d 495, 511 (6th Cir. 2021) (citation omitted).

Ogbonna-McGruder addressed the district court's holding that she abandoned her claim twice in her initial brief: once in her statement of the issues, and again when she "denie[d] that she ha[d] abandoned a claim of general discrimination based on race." Appellant Br. at 8, 27. However, she did not provide any explanation why the district court's decision was erroneous or cite any supporting authority. And her conclusory statements make no reference to the district court's discussion of whether her discrimination claim would comply with the

relevant limitations requirements. Because she made no effort to develop her argument regarding abandonment, we hold that she forfeited the issue on appeal and affirm the district court's dismissal of her discrimination claim.

In any event, we agree with the district court that Ogbonna-McGruder failed to state a discrimination claim because she did not allege that any adverse employment action she experienced was motivated by discriminatory animus. For example, she does not explain how her supervisors' failure to complete her faculty evaluation or her reassignment to public management courses—to the extent those actions are adverse employment decisions under Title VII—were racially motivated. Ogbonna-McGruder's claim that she was replaced by a white adjunct to teach a course is similarly insufficient because she does not allege that she was replaced because of her race, or that she was otherwise similarly situated to the Caucasian professor who replaced her. *But see Keys*, 684 F.3d at 610 (finding that plaintiff stated a claim for employment discrimination where she alleged that she was treated "differently than her Caucasian management counterparts" and that she "and other African Americans received specific adverse employment actions notwithstanding satisfactory employment performances"). Moreover, her conclusory statement that APSU treated her poorly "because of her race" is insufficient for purposes of a motion to dismiss. FAC, R. 53, PageID 462.

D. Retaliation Claim

Similarly, we need not address the merits of Ogbonna-McGruder's retaliation claim because she did not properly preserve the issue on appeal. The district court held that she abandoned her retaliation claim when, in response to APSU's argument that her claim was untimely, she denied bringing such a claim and maintained that she was instead asserting a retaliatory hostile work environment claim. She identifies the district court's dismissal of her retaliation claim as an issue in her opening brief, but she provides no argument in support of her claim. Appellant Br. at 8. She also makes no mention of her retaliation claim in her reply brief. We therefore affirm the dismissal of her retaliation claim.

E. Individual Defendants' Motion to Dismiss

Finally, Ogbonna-McGruder appeals the dismissal of her claims under 42 U.S.C. § 1983 against the individual defendants. Section 1983 authorizes a private cause of action against anyone who, "under color of state law, deprives a person of rights, privileges, or immunities secured by the Constitution or conferred by federal statute." *Wurzelbacher v. Jones-Kelley*, 675 F.3d 580, 583 (6th Cir. 2012). She claims that Brown and Lyle-Gonga violated § 1983 when they "engaged in conspiratorial behavior that has caused her to be deprived of rights to which she is entitled under laws of the United States." FAC, R. 53, PageID 463. Defendants argue, and the district court held, that the § 1983 claim must be dismissed because it did not allege that

Brown and Lyle-Gonga's conduct violated any constitutional rights. We agree.

We have previously recognized that a plaintiff asserting a claim under Title VII is not categorically precluded from bringing a parallel constitutional claim under § 1983. *Day v. Wayne Cnty. Bd. of Auditors*, 749 F.2d 1199, 1205 (6th Cir. 1984) (holding that "an employee may sue her public employer under both Title VII and § 1983 when the § 1983 violation rests on a claim of infringement of rights guaranteed by the Constitution"); *see also Toth v. City of Toledo*, 480 F. App'x 827, 831 (6th Cir. 2012). However, when asserting both claims, the plaintiff must allege that the conduct forming the basis of her § 1983 claim violates a constitutional right apart from the rights protected under Title VII. *See Seigner v. Twp. Of Salem*, 654 F. App'x 223, 233 (6th Cir. 2016) (granting summary judgment to defendants on § 1983 claim where plaintiff made "only oblique references to the First Amendment, and . . . never allege[d] a constitutional violation independent of his Title VII claims"); *Day*, 749 F.2d at 1204 ("Title VII provides the exclusive remedy when the only § 1983 cause of action is based on a violation of Title VII.").

The First Amended Complaint stated that defendants violated rights secured "under laws of the United States," but did not allege that their conduct violated a specific constitutional provision. FAC, R. 53, PageID 463. Ogbonna-McGruder contends that she adequately notified defendants that their conduct violated her rights under the Fourteenth Amendment by including language from § 1983 in her pleading, which refers to rights secured under the "Constitution and laws." Appellant Br. at

37. But this broad reference to legal texts, without providing a specific provision, does not adequately put defendants on notice of her claims for purposes of a motion to dismiss.

Moreover, Ogbonna-McGruder was not entitled to further amendment of her complaint to correct the deficiency. The magistrate judge denied Ogbonna-McGruder's motion to amend her Complaint a second time because she did not establish good cause for failing to seek earlier leave to amend under Federal Rule of Civil Procedure 16(b). See Op. Denying Mot. to Amend Compl., R. 89, PageID 989 (explaining that a plaintiff seeking to amend a complaint after a deadline established by a scheduling order must "first show good cause under Rule 16(b) for failure earlier to seek leave to amend . . . before a court will consider whether amendment is proper under Rule 15(a)") (citing *Com. Benefits Grp., Inc. v. McKesson Corp.*, 326 F. App'x 369, 376 (6th Cir. 2009)). She did not file objections to the magistrate judge's order as required under Federal Rule of Civil Procedure 72(a), forfeiting her right to raise this issue on appeal. *Berkshire v. Dahl*, 928 F.3d 520, 530–31 (6th Cir. 2019). Although the failure to object may be excused "in the interests of justice," *Thomas v. Arn*, 494 U.S. 140, 155 (1985), we decline to do so. Her brief just mentions the denial of her motion to amend once in her statement of issues and in a single sentence in her conclusion, *see* Appellant Br. at 9, 39, which is insufficient to preserve her claim on appeal, *see Strickland*, 995 F.3d at 511.

IV.

For the foregoing reasons, we AFFIRM.

Filed January 30, 2024

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 23-5557

CHINYERE OGBONNA-MCGRUDER,
Plaintiff - Appellant,

v.

AUSTIN PEAY STATE UNIVERSITY; TUCKER BROWN and MARSHA LYLE-GONGA, in their individual capacities,
Defendants - Appellees.

Before: GRIFFIN, BUSH, and READLER, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/Kelly L. Stephens, Clerk

Filed May 19, 2023

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

NO. 3:21-cv-00506
JUDGE RICHARDSON

CHINYERE OGBONNAMCGRUDER,
Plaintiff,

v.

AUSTIN PEAY STATE UNIVERSITY et al.,
Defendants.

MEMORANDUM OPINION

Pending before the Court is "Defendant Austin Peay's Motion to Dismiss" (Doc. No. 56, "Motion"), filed by Defendant Austin Peay State University ("APSU" or "Defendant"). Via the Motion, APSU requests pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure the dismissal of all claims asserted against it in Plaintiff's First Amended Complaint (Doc. No. 53), the currently operative complaint in this case. APSU filed a brief in support of the Motion (Doc. No. 56-1, "Brief in Support"), and Plaintiff filed a brief in opposition to the motion (Doc. No. 59, "Opposition"), whereafter APSU filed a reply in support of the Motion (Doc. No. 61, "Reply").

FACTUAL ALLEGATIONS

In its Brief in Support, APSU provides a summary of the factual allegations from the First Amended Complaint that are relevant to this instant action as a whole.[1] Comparing that summary to the First Amended Complaint, the Court is satisfied (and Plaintiff does not seem to dispute) that the summary is accurate in both in its overall tenor and in its individual components. Thus, the Court adopts and sets forth that summary below, although the Court has taken the liberty to tweak the summary in particular ways as noted in the accompanying footnote,[2] primarily to clarify what allegations the

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[1] That is not to say that everything set forth in such summary is necessarily indispensable or even relevant to the resolution of the instant Motion, but the summary nevertheless is worth setting forth nearly in its entirety.

[2] In this summary, where (alleged) facts are recounted without qualification, they are accepted as true for purposes of the instant motion. Conversely, where the (alleged) facts are qualified in some way (as for example by "Plaintiff claims"), they are not accepted as true for purposes of the present Motion.

In some places, the Court includes ellipses to omit the Brief in Support's language that qualifies the allegations of the First Amended Complaint to suggest that such allegations are not necessarily true, but rather merely alleged by Plaintiff (in the First Amended Complaint). Where the Court does so, its purpose is to make clear that it is unqualifiedly accepting the allegations as true for present purposes. In other places, the Court leaves in the qualifying language used in the Brief in Support, or adds a qualifying term in brackets, believing such qualification appropriate because, under *Iqbal* and *Twombly*, the corresponding allegations are treated not as true but instead as merely alleged by Plaintiff.

Court is (and what the Court is not) accepting as true for purposes of the instant 12(b)(6) motion to dismiss.

> Plaintiff has been employed by APSU since 2003. (Doc. No. 53, ¶ 29.) Plaintiff was hired as a college professor, to teach classes in criminal justice and public management. (Id.) In Spring 2017, APSU faculty were advised by former Dean Denton that the-then Public Management/Criminal Justice Department would be split into two departments. (Id. at ¶ 31.) According to Plaintiff, faculty could request joint appointment, based on chair approval, with the two newly created departments – Criminal Justice and Public Management/Political Science. (Id. at ¶ 32.) Faculty from the original Public Management/Criminal Justice Department were told that they could self-select which department they wanted to join. (Id. at ¶ 33.) The self-selection did not include a review of faculty qualifications. (Id.) Dean Denton rejected Plaintiff's request and chair approval for joint appointment and denied her the opportunity to self-select her department. (Id. at ¶ 34.) Dean Denton made the selection for Plaintiff. (Id. at ¶ 36.) Plaintiff claims that, as an African

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In this summary, notably, where the brackets and the language therein are set forth in bold face, they were added by the Court to APSU's summary. Otherwise, the brackets and the language therein are original to APSU's summary.

American, she was denied the opportunity to self-select her department. (Id. at ¶ 35.)

Plaintiff filed a formal complaint with APSU's Office of Equal Opportunity and Affirmative Action in 2017, alleging that Dean Denton engaged in race discrimination. (Id. at ¶¶ 37, 40.) APSU responded to the complaint in Summer 2019. (Id. at ¶ 37.) Plaintiff claims that the individual actions of Brown from Summer 2019 through the present, and the individual actions of Lyle-Gonga from 2020, "began to perpetuate a hostile work environment resulting in retaliatory treatment of Plaintiff." (Id. at ¶ 43.) Brown was Dean of the College of Behavioral and Health Sciences at APSU from 2019 through December 2021. (Id. at ¶ 4.) Lyle- Gonga, beginning January 1, 2020, was at all times relevant to the Complaint, Chair of the Department of Political Science and Public Management. (Id. at ¶ 5.)

In September 2019, Plaintiff filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC") (See EEOC Charge No.: 494-2019-02950, Doc. No. 53-1) (Id. at ¶ 41.) Plaintiff's September 2019 EEOC Charge was closed to allow the parties to negotiate but reopened after the parties failed to reach an agreement. (Id. at ¶ 42.) On September 29, 2020, Plaintiff filed another charge of discrimination with the EEOC, which was assigned the same EEOC Charge number as the September 2019 Charge. (Id. at ¶ 9.) Plaintiff claimed that she was discriminated

against based on her race and sex in violation of Title VII of the Civil Rights Act of 1964. (See EEOC Charge No.: 494-2019-02950, Doc. No. 53-1.) Plaintiff filed a second charge of discrimination with the EEOC on or about June 17, 2021, alleging retaliation. (See EEOC Charge No.: 494-2021-01993, Doc. No. 53-2.)

As can be gleaned from the Complaint, Plaintiff's claims of race discrimination and the subsequent alleged retaliation and hostile work environment she suffered arise from the 2017 split in departments. (See generally, Doc. No. 53, ¶¶ 19, 31, 35-44.) Specifically, Plaintiff alleges:

> Defendants' discriminatory practices include, but are not limited to: (1) creating or permitting a hostile work environment heavily charged with discrimination; (2) maintaining wages, job assignments and other conditions of employment that unlawfully operate to deny equal opportunity to Plaintiff because of her race; (3) creating a hostile, racially charged work environment such that no reasonable person would be expected to endure, and (4) retaliating against Plaintiff for opposing discriminatory conduct.

(Id. at ¶ 28.) As to Plaintiff's race discrimination claims, she states **[that she,]** "as a tenured African American was denied the opportunity to self-select her department

of out the two newly created departments[.]" (Id. at ¶ 35.) She also claims that "in Spring 2020, [she] was scheduled to teach a particular class in the [F]all 2020 but a white adjunct professor replaced her." (Id. at ¶ 71.) The Complaint further states that in October 2019, "Brown yelled at plaintiff in front of a white faculty member" (Id. at ¶ 89) and "[s]aid harassment and inappropriate verbal scolding in the presence of a white faculty member was offensive and caused Plaintiff great shame and embarrassment[.]" (Id. at ¶ 90.)

With respect to Plaintiff's hostile work environment allegations, she generally claims that APSU "failed to exercise reasonable care to prevent and correct promptly any harassing, and/or offending behavior. The frequency of the discriminatory conduct, its severity, and pervasiveness are threatening and humiliating to Plaintiff and unreasonably interfered with Plaintiff's work performance. These actions adversely affected her emotional and/or psychological well-being. Such facts constitute a 'hostile and/or abusive' work environment." (Id. at ¶¶ 111-12.) Plaintiff further claims that since she is "an experienced and tenured African American professor, Defendants must find 'cause' to terminate her employment." (Id. at ¶ 24.) And in the absence of allegedly being able to find "cause", **[allegedly]** "Defendants have intentionally created a hostile work environment in hopes it would cause her to

resign[.]" (Id. at ¶¶ 25, 27, 62, 66, 74, 77, 90, 93, 104.)

Specifically, the actions by Dean Brown and/or Department Chair Lyle- Gonga which allegedly perpetuated a hostile work environment include requesting that she move her office (Id. at ¶¶ 45-46), exclusion from a grant proposal (Id. at ¶¶ 47-53), refusing to confer with Plaintiff about the creation of a master's program (Id. at ¶¶ 58-60, 99), refusal to act on Plaintiff's appeal based on the lack of a faculty appraisal (Id. at ¶¶ 61-63), denigrating Plaintiff's teaching and research done with minority students (Id. at ¶¶ 64-68), failure to timely receive clarification about a replacement class she would be teaching (Id. at ¶¶ 71-77), denied the ability to teach summer classes (Id. at ¶ 88), harassment and verbal scolding in the presence of a white faculty member (Id. at ¶¶ 89-90), failure to recognize Plaintiff's accomplishments in the conduct of her annual evaluations, and evaluations and appeals generally (Id. at ¶¶ 55, 78-80, 91-95), not assigning courses Plaintiff selected to teach (Id. at ¶¶ 81-87, 96-98), and criticism of her speech accent and thereby her natural origin. (Id. at ¶ 109).

Lastly, Plaintiff claims that, since the filing of her complaint with APSU in 2017, she has experienced retaliation by Defendants. (Id. at ¶ 23.) Plaintiff then states that by and through the actions of the Department Chair and Dean, APSU has engaged in retaliatory treatment of Plaintiff

from Summer of 2019 through the present. (Id. at ¶ 43.) Such **[alleged]** retaliatory conduct . . . includes the following:

• In September 2019, Plaintiff was instructed by Brown to move from her office to a basement office as a form of retaliation after reporting and opposing previous racially charged discriminatory conduct. This was the second attempt in 2019 to transfer her to a basement office. (Id. at ¶¶ 45-46) (emphasis added) (hereinafter "the request to change offices".) new juvenile detention center in Tennessee. Plaintiff claims she was purposefully excluded from participation as evidenced in the final brochure. (Id. at ¶¶ 47-54) (hereinafter "the grant proposal".)

• In March 2020, Plaintiff did not receive an annual evaluation per university policy for her performance in the 2019-2020 academic year under the pretext of Plaintiff not submitting all of the necessary documents. (Id. at ¶¶ 55-57) (hereinafter "the 2019-2020 evaluation".)

• In January 2020, the professors within the political science and public management department voted unanimously for Plaintiff to move into phase two of the creation of the master's program. Plaintiff had previously submitted the initial phase one request on "curriculog" and it was approved. Brown and Department Chair [Lyle-] Gonga have deliberately refused to confer with Plaintiff

about this matter. (Id. at ¶¶ 58-60) (hereinafter "the master's program".)

• In February 2022, Plaintiff was not assigned the courses that she requested to teach. Plaintiff was advised that she was not qualified to teach classes she had previously taught for some 18 years. (Id. at ¶¶ 96-98) (hereinafter "course choices".)

(Doc. No. 57-1 at 2-6) (footnotes omitted).

Based on these allegations, the First Amended Complaint (without clearly breaking out Plaintiff's claims into separate counts) asserted that APSU has violated particular provisions of Title VII of the Civil Rights Act of 1964 as amended. (Doc. No. 53 at ¶ 26). In particular, it asserted a claim of discrimination on the basis of race in violation of Section 703(a) of Title VII (codified at 42 U.S.C. § 2000e-2(a)); for whatever reason, it specifically invoked Section 703(a)(2) of Title VII, rather than the more familiar Section 703(a)(1).[3] (*Id.*). And she also brings a claim of

[3] Each of these two paragraphs of Section 703(a) outlaws discrimination based on a protected classification (such as racial discrimination), but they facially outlaw different kinds of discriminatory treatment. Specifically, Section 703(a)(1) declares it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]" 42 U.S.C. § 2000e-2(a)(1). By contrast, Section 703(a)(2) declares it an unlawful employment practice for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or

retaliation in violation of Section 704(a) of Title VII (which is codified at 42 U.S.C. § 2000e- 3(a)).[4]

The Court gleans (largely though not exclusively from paragraph 28 of the First Amended Complaint), as apparently did Defendant, that the First Amended Complaint brought the following claims, all under Title VII: (1) hostile work environment based on race; (2) discrimination against Plaintiff in

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otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2). It strikes the Court that it is the former, rather than the latter, paragraph of Section 703 that better fits the fact pattern set forth in the First Amended Complaint, but the Court, construing the First Amended Complaint in favor of Plaintiff as required, finds that it sufficiently invokes the applicable paragraph (whatever it is) to put APSU and the Court on notice that she is asserting a claim of race discrimination under Title VII and thus will not fail by virtue of (arguably) invoking the wrong paragraph of Section 703(a) in so doing.

[4] That subsection provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labormanagement committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

the terms and conditions of her employment (what the Court herein will call "general discrimination," to distinguish it both from general retaliation and from and race-based or retaliatory hostile work environment) based on her race; (3) retaliation against Plaintiff in the terms and conditions of her employment (what the Court herein will call "general retaliation," to distinguish it both from general discrimination and from and race-based or retaliatory hostile work environment) for opposing alleged race-based discrimination; and (4) retaliatory hostile work environment.

LEGAL STANDARDS

The instant Motion is brought under Rule 12(b)(6), and this is appropriate because the motion asserts that Plaintiff has failed to state a claim against the Individual Defendants upon which relief can be granted. The Court thus will state below the legal principles generally applicable to a Rule 12(b)(6), before noting (in the following section hereof) that many of these principles are not implicated with respect to the *first* of the below-stated two issues the Court must decide.

For purposes of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court must take all of the factual allegations in the complaint as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Id*. 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. *Id.* Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.* When there are wellpleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. *Id.* at 679. A legal conclusion, including one couched as a factual allegation, need not be accepted as true on a motion to dismiss, nor are mere recitations of the elements of a cause of action sufficient. *Id.*; *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010), *cited in Abriq v. Hall*, 295 F. Supp. 3d 874, 877 (M.D. Tenn. 2018). Moreover, factual allegations that are merely *consistent* with the defendant's liability do not satisfy the claimant's burden, as mere consistency does not establish *plausibility* of entitlement to relief even if it supports the *possibility* of relief. *Iqbal*, 556 U.S. at 678.

In determining whether a complaint is sufficient under the standards of *Iqbal* and its predecessor and complementary case, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), it may be appropriate to "begin [the] analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 680. This can be crucial, as no such allegations count toward the plaintiff's goal of reaching plausibility of relief. To reiterate, such allegations include "bare assertions," formulaic recitation of the elements, and "conclusory" or "bold" allegations. *Id.* at 681. The question is whether the remaining allegations—factual allegations, *i.e.*, allegations of factual matter—plausibly suggest an entitlement to relief. *Id.* If not, the pleading fails to meet the standard of Federal Rule of Civil Procedure

8 and thus must be dismissed pursuant to Rule 12(b)(6). *Id*. at 683.

On a Rule 12(b)(6) motion to dismiss, "[t]he moving party has the burden of proving that no claim exists." *Total Benefits Plan. Agency, Inc. v. Anthem Blue Cross and Blue Shield,* 552 F.3d 430, 433 (6th Cir.2008). To put it only slightly differently, "[a] Rule 12(b)(6) movant 'has the burden to show that the plaintiff failed to state a claim for relief.'" *Willman v. Att'y Gen. of United States*, 972 F.3d 819, 822 (6th Cir. 2020) (quoting *Coley v. Lucas Cnty.*, 799 F.3d 530, 537 (6th Cir. 2015)). That is not to say that the movant has some *evidentiary* burden; as should be clear from the discussion above, evidence (as opposed to *allegations* as construed in light of any allowable matters outside the pleadings) is not involved on a Rule 12(b)(6) motion. The movant's burden, rather, is a burden of *explanation*; since the movant is the one seeking dismissal, it is the one that bears the burden of explaining—with whatever degree of thoroughness is required under the circumstances—why dismissal is appropriate for failure to state a claim.

Importantly, as Plaintiff correctly notes and Defendant does not dispute, the familiar burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), holding modified by *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), is inapplicable on a Rule 12(b)(6) motion to dismiss.[5]

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[5] The Sixth Circuit has summarized the applicability and workings of the *McDonnell Douglas* framework as follows:

> A plaintiff may show discrimination by direct evidence, or a plaintiff lacking direct evidence of discrimination may succeed on a Title VII claim by

That means that a plaintiff need not allege facts specifically indicating that the plaintiff could carry the burden she might ultimately bear under *McDonnell Douglas*. This is because *McDonnell Douglas* "is an evidentiary standard, not a pleading requirement." *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 510 (2002). And that is because a plaintiff is not required to plead what would qualify as a prima facie case for purposes of *McDonnell Douglas*. *See, e.g.*, *Keys v. Humana, Inc.*, 684 F.3d 605, 609 (6th Cir. 2012) ("The district court's requirement that [the plaintiff's] complaint establish a prima facie case under *McDonnell Douglas* and its progeny is contrary to Supreme Court and Sixth Circuit precedent."); *Clough v. State Farm Mut. Auto. Ins. Co.*, No. 13-2885-STA-tmp, 2014 WL 1330309, at *6 (W.D. Tenn. Mar. 28, 2014) ("In light of *Swierkiewicz*, the Court concludes that strictly speaking Plaintiff need not plead all of the elements of the prima facie case in order to survive a motion to dismiss."). The undersigned explained this in

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> presenting indirect evidence under the framework first set forth in *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 802–03, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973). To succeed under the *McDonnell Douglas* framework, the plaintiff must first make out a prima facie case of discrimination by a preponderance of the evidence. . . . Once the plaintiff makes out a prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for" the adverse employment action. Should the defendant do so, the plaintiff then must prove by a preponderance of the evidence that the stated reasons were a pretext for discrimination.

Redlin v. Grosse Pointe Pub. Sch. Sys., 921 F.3d 599, 606–07 (6th Cir. 2019) (citations omitted).

some detail in resolving a motion to dismiss a plaintiff's claims brought under the Tennessee Human Rights Act ("THRA"):[6]

> But since this is a Motion to Dismiss, and not a motion for summary judgment, Plaintiff is not required to carry a burden of presenting evidence establishing a prima facie case under *McDonnell Douglas*. *Keys v. Humana, Inc.*, 684 F.3d 605, 609 (6th Cir. 2012). *McDonnell Douglas* "is an evidentiary standard, not a pleading requirement." *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 510-11 (2002). "[T]he precise requirements of a prima facie case can vary depending on the context and before discovery has unearthed the relevant facts and evidence, it may be difficult to define the appropriate formulation. Significantly, the Supreme Court identified the possibility that discovery may produce direct evidence of discrimination, rendering the *McDonnell Douglas* burden-shifting framework inapplicable to a plaintiff's claims." *Keys*, 684 F.3d at 609 (discussing *Swierkiewicz*) (internal citation omitted).
>
> This only stands to reason. After all, the *McDonnell Douglas* framework contemplates that a defendant can, if necessary, attempt to prevail by setting forth its position on a

[6] THRA claims are generally analyzed under Title VII standards. *See Armstrong v. Tennessee Education Lottery Corp.*, 219 F. Supp. 3d 708, 714 at n.1 (M.D. Tenn. 2016). Therefore, the Court's discussion here is applicable to Title VII claims.

> factual issue (*i.e.*, as to the existence of a legitimate, nondiscriminatory reason for its challenged employment actions). 411 U.S. at 802. But except perhaps in a very limited sense (as for example when a district court will consider, if uncontradicted in a plaintiff's reply brief, a defendant's factual assertions as to the content in a document referred to in the plaintiff's complaint) a defendant's position regarding the facts simply is not [to] be considered on a Rule 12(b)(6) motion to dismiss. *See Burns v. United States*, 542 F. App'x 461, 466-67 (6th Cir. 2013). Therefore, the *McDonnell Douglas* framework does not apply on this Motion, and Plaintiff is not required here to make out a prima facie case as required by *McDonnell Douglas* on a motion for summary judgment; instead Plaintiff must satisfy the plausibility requirement for a motion to dismiss.

Jodry v. Fire Door Sols., LLC, No. 3:20-cv-00243, 2020 WL 7769924, at *3–4 (M.D. Tenn. Dec. 30, 2020) (Richardson, J.). So as noted in *Keys*, *McDonnell Douglas* ultimately may not apply at all in a particular case; specifically, it would not apply if the plaintiff can rely on direct evidence of discrimination, rather than indirect evidence of discrimination (which is what *McDonnell Douglas* deals with). And even if *McDonnell Douglas* would apply at later stages of the case, it cannot sensibly be applied at the pleading stage, and so its requirement of a showing of a *prima facie* case must not be applied at the pleadings stage.

DISCUSSION

The Court will address in turn each of the three above-identified claims.

A. The First Amended Complaint fails to set forth factual matter plausibly suggesting a racebased hostile work environment.

Consistent with the discussion above regarding the inapplicability of *McDonnell Douglas* at the pleading stage, this Court has noted specifically with respect to claims of hostile work environment:

> Although a plaintiff must ultimately prove all of the [ ] elements [of an indirect-evidence prima facie case of hostile work environment] to prevail, she does not have the initial burden of establishing a prima facie hostile work environment claim to survive a motion to dismiss. *See Swierkiewicz*, 534 U.S. at 512, 122 S. Ct. 992. Instead, the Complaint need only allege "sufficient 'factual content' from which a court, informed by its 'judicial experience and common sense,' could 'draw the reasonable inference'" that the plaintiff was subject to a hostile work environment. *Keys v. Humana, Inc.*, 684 F.3d 605, 610 (6th Cir. 2012) (quoting *Iqbal*, 556 U.S. at 678, 129 S. Ct. 1937).

Austin v. Alexander, 439 F. Supp. 3d 1019, 1024 (M.D. Tenn. 2020).[7] But something additional must

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[7] It is worth noting that a plaintiff that does so will inevitably have gone a long way towards establishing an indirect-evidence prima facie case of hostile work environment, which the Sixth Circuit has described as follows:

> Like discriminatory actions, hostile-work-environment claims based on indirect evidence are analyzed under a version of the *McDonnell Douglas* framework. To make out a prima facie case, a plaintiff must show: "(1) she was a member of a protected class; (2) she was subjected to unwelcomed harassment; (3) the harassment was based on sex or race; (4) the harassment created a hostile work environment; and (5) employer liability."

Kubik v. Cent. Michigan Univ. Bd. of Trustees, 717 F. App'x 577, 584 (6th Cir. 2017) (quoting *Ladd v. Grand Trunk W. R.R.*, 552 F.3d 495, 500 (6th Cir. 2009)). If a plaintiff alleges facts from which a protected class-based hostile work environment reasonably could be inferred, then she well may also have plausibly alleged at least the first four of these five elements.

Significantly, in the case of hostile work environment, the indirect-evidence prima facie case has built into it (in the third element) the explicit notion of protected class-based discriminatory animus. (This reality, not to mention some other realities, arguably calls into question whether what the Sixth Circuit refers to as an indirect-evidence prima facie case actually is an "indirect evidence" case, given that it directly incorporates the notion of discriminatory animus based on a protected classification). By contrast, in the case of multiple other kinds of Title VII claims (*i.e.*, general discrimination and general retaliation, as the Court has defined those terms above), the elements of an indirect-evidence prima facie case entirely omit anything close to an explicit reference to discriminatory (or retaliatory) animus. *See, e.g.*, *Tennial v. United Parcel Serv., Inc.*, 840 F.3d 292, 303 (6th Cir. 2016) (noting that to establish an indirect-evidence prima facie case of general discrimination in violation of Title VII, a plaintiff must show that she was "(1) a member of a protected class, (2)

be noted here: the reasonable inference that must be drawn is that the plaintiff was subject not merely to a hostile work environment, but rather to a hostile work environment *based on a protected classification*—here, race.[8] *See, e.g.*, *Faragher v. City*

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subject to an adverse employment action, (3) qualified for the position, and (4) replaced by a person outside the protected class or treated differently than similarly situated nonminority employees."). Notably, unlike the third element of the so-called indirect-evidence prima facie case of hostile work environment, the fourth element of an indirect-evidence prima facie case of general discrimination (which comes closer than the other three elements to setting forth an explicit requirement to show discriminatory animus) does not require a showing of discriminatory animus; instead, it requires a showing of not-necessarily nefarious circumstances that, together with the other three sets of circumstances, are treated as raising for summary judgment purposes an *inference* of discriminatory animus (an inference a jury would be free to reject if it were suggested by the plaintiff at trial if summary judgment were denied). But the Court follows binding Sixth Circuit precedent in treating the above five elements not as elements required for *every claim* of hostile work environment, but rather as elements for an indirect-evidence case of hostile work environment in those cases in which the plaintiff does choose to pursue a claim of hostile work environment under *McDonnell Douglas* in order to avoid summary judgment. Having said that, the Court notes that consistent with its observations above, the kind of evidence that would satisfy the third element of an indirect-evidence case likely would often constitute direct evidence of hostile work environment based on animus towards a protected class.

[8] *Austin* omits any reference to a complaint needing to plausibly allege *employer liability for* a hostile work environment. Presumably, the complaint indeed must do so, because otherwise the complaint has not plausibly alleged the *defendant's liability*, as required by *Iqbal* and *Twombly*. But the Court herein will assume arguendo, to Plaintiff's benefit, that a complaint need not do so.

of Boca Raton, 524 U.S. 775, 786–87, (1998). This follows easily from the fact that subjecting an employee to a hostile work environment is a form of the discrimination outlawed by Section 703(a)—*i.e.*, discrimination based on a protected classification. An employer is not liable under Section 703(a) for a hostile work environment that is not based on a protected classification, and so a complaint does not plausibly suggest liability under Section 703(a) based on a hostile work environment unless it plausibly suggests that the hostile work environment was based on a protected classification (meaning, here, race).

To be actionable, the (protected class-based) harassment creating the hostile work environment must be extreme. *See, e.g., id.* Title VII is not a "general civility code," and so "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing" are insufficient to support a claim of hostile work environment (even if it is based on a protected classification). *Id.* (internal quotation marks omitted). Putting it somewhat differently, the Supreme Court has noted that to constitute a hostile work environment, the collective conduct must be "severe" or "pervasive," both objectively (*i.e.*, from the perspective of the hypothetical reasonable person) and subjectively (*i.e.*, from the perspective of the plaintiff herself). *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive

the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation."), *overruled on other grounds by Burlington N. & Santa Fe Ry. Co.*, 548 U.S. 53 (2006). As the Sixth Circuit has noted:

> Therefore, a court should first determine what harassment was based on a plaintiff's race, and then ask whether that harassment in its totality was sufficiently severe or pervasive to create a jury question on this element. . . . . Harassment is based on race when it would not have occurred but for the plaintiff's race; the harassing conduct need not be overtly racist to qualify." *Id.* (internal citation omitted).

Williams v. CSX Transp. Co., 643 F.3d 502, 511 (6th Cir. 2011).[9]

Under these standards, the First Amended Complaint plainly does not state a valid claim of hostile work environment based on Plaintiff's race. As Defendant correctly notes, Plaintiff has not alleged that APSU or its employees "'made any statements concerning her race, nor does she allege that [APSU] or its employees engaged in any conduct whatsoever that could reasonably be interpreted as

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[9] *Williams* made these observations in assessing whether the plaintiff could establish an indirect-evidence prima facie case, in reviewing the district court's resolution of the defendant's summary-judgment motion. But the Court has no doubt that these observations are equally applicable to a court assessing whether a plaintiff has made allegations plausibly suggesting a protected class-based hostile work environment, in reviewing a defendant's Rule 12(b)(6) motion to dismiss.

racially motivated.'" (Doc. No. 56-1 at 13) (quoting *Veasy v. Teach for Am., Inc.*, 868 F. Supp. 2d 688, 696 (M.D. Tenn. 2012)). Beyond wholly conclusory assertions (which the Court must disregard in its analysis, as noted above) that the purported hostile work environment was race-based, Plaintiff makes no allegations that would support the notion that any alleged hostile work environment was hostile specifically due to Plaintiff's race. She makes no allegations that suggest harassing conduct that was racist or racial—whether overtly or covertly (by innuendo, suggestion, etc.).

Still less does Plaintiff assert conduct that is severe or pervasive in its harassing nature, even under an expansive view of what could be objectively viewed as abusive. In making this determination, the Court begins by identifying what kind of conduct can even count towards a finding of a hostile work environment.

A hostile work environment is created by conduct—namely, "discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment . . . ." *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 514 (6th Cir. 2009) (quoting *Harris*, 510 U.S. at 21). That is to say, it is the sufficient accumulation of this sort of conduct that eventually amounts to a hostile work environment. And it is this sort of conduct—to repeat, *discriminatory intimidation, ridicule, and insult*—[10] that contributes to a finding of a hostile work

[10] Presumably this description is broad enough to encompass all manner of slurs, insults, offensive verbal or practical jokes, unwanted physical contact, and the like.

environment. *Hunter v. Sec'y of U.S. Army*, 565 F.3d 986, 994 (6th Cir. 2009) ("[H]ostile-work-environment claims 'involve[ ] repeated conduct' and require the plaintiff to demonstrate that "the workplace is permeated with discriminatory intimidation, ridicule, and insult [.]").

To put the matter somewhat differently, acts that contribute towards of a finding of a hostile work environment are acts of *harassment*. *See, e.g., Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002) (noting that hostile work environment claims by "[t]heir very nature involve[] repeated conduct," and indicating that they require "repeated . . . harassment" and that "a single act of harassment may not be actionable on its own"). Hostile work environment claims are about *harassment;* this applies to hostile work environment claims based on race just as it applies to hostile work environment based on sexual harassment. *See id.* at 116 n. 10; *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 66-67 (1986) (referring repeatedly to a hostile work environment, including but not limited to ones involving sexual harassment, in terms of an environment of "harassment")

And, as noted above, this means harassment in the sense of intimidation, ridicule, and insult (and the like). Many kinds of actions suffered by employees simply do not fit this description. In particular, actual *employment-related* actions taken by an employer against an employee (negative though they may be for an employee) do not fit that description. *Cf.*, *Haley v. Clarksville-Montgomery Cnty. Sch. Sys.*, 353 F. Supp. 3d 724, 735 (M.D. Tenn. 2018) (drawing a distinction between (a) actions that would support a claim of hostile work

environment subject to the below-discussed plaintiff-friendly limitations analysis of *Morgan*, and (b) "'discrete acts' related to [the plaintiff's] employment."). This is because employment-related actions (whether or not they are illegally discriminatory or otherwise wrongful) are not in the nature of harassment in the form of intimidation, ridicule, or insult. Such an action itself (as distinguished from any surrounding circumstances indicating that such action was motivated by discriminatory animus and thus constituted illegal discrimination) is not part a hostile work environment. Employment-related actions such as a suspension, termination, denial of transfer, or refusal to hire, each is a discrete act, which "cannot properly be characterized as part of a continuing hostile work environment." *Sasse v. U.S. Dep't of Lab.*, 409 F.3d 773, 783 (6th Cir. 2005); *see also Taylor v. Donahoe*, 452 F. App'x 614, 620 (6th Cir. 2011) ("First, the alleged wrongs identified by plaintiff represent discrete acts of alleged retaliation (or discrimination) rather than acts contributing to a hostile work environment.").[11] In short, "[w]here[as]

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[11] By the same token, a single act (a slur, attempt at intimidation, etc.) that contributes to a hostile work environment generally would never itself be an "adverse employment action" for purposes of a Title VII general discrimination claim, which is defined as an action by the employer that "'constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 402 (6th Cir. 2008) (quoting *Burlington Industries v. Ellerth*, 524 U.S. 742, 761 (1998)). This is because "offhand comments and isolated incidents, unless extremely serious, will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Sessin v.*

the prohibition of discrete discriminatory acts guards against illegally motivated adverse employment action, a hostile work environment claim 'offers employees protection from a "workplace[ ] permeated with discriminatory intimidation, ridicule, and insult."'" *Curry v. SBC Commc'ns, Inc.*, 669 F. Supp. 2d 805, 832 (E.D. Mich. 2009) (quoting *Barrett,* 556 F.3d at 514 (quoting *Harris*, 510 U.S. at 21)). Much of the case law distinguishing employment-related actions from acts contributing towards a hostile work environment happens to refer to employment-

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Thistledown Racetrack, LLC, 187 F. Supp. 3d 869, 877 (N.D. Ohio 2016) (citing *Hafford v. Seidner*, 183 F.3d 506, 512- 13 (6th Cir. 1999)). As discussed further herein, in the Title VII retaliation context, "adverse employment action is defined more broadly as something that "'a reasonable employee would have found . . . materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Taylor v. Geithner*, 703 F.3d 328, 336 (6th Cir. 2013) (quoting *Garner v. Cuyahoga Cnty. Juvenile Court,* 554 F.3d 624, 639 (6th Cir. 2009)). A single act of harassment comprising part of a hostile work environment is more likely to constitute an adverse employment action for purposes of a general retaliation claim than for purposes of a general discrimination claim. Even so, such an act naturally would have to be fairly serious to dissuade a worker from asserting her rights under Title VII, and thus would not generally rise to the level of an adverse employment action even for purposes of a retaliation claim.

As is relevant to the First Amended Complaint in particular, in the Court's view of what a reasonable jury could conclude about the reaction of a reasonable employee to a single instance of being yelled at, such an instance as a matter of law does not rise to the level of an adverse employment action for purposes of a general discrimination claim. Perhaps the results could be different of the circumstances surrounding the yelling were especially egregious, but the First Amended Complaint, in its barebones recounting of this incident, alleges no such circumstances.

related actions that rise to the level of an "adverse employment action," *i.e.* something that constitutes a separate "unlawful employment practice" on its own." *E.g.*, *Morgan*, 536 U.S. at 114-115. But the undersigned sees no reason why the distinction does not apply equally to employment related-actions that do not rise to the level. For example, being placed on paid leave is not an "adverse employment action." *Townsend v. Rockwell Automation, Inc.*, 852 F. App'x 1011, 1016 (6th Cir. 2021). But it is nevertheless indisputably an employment-related action and is entirely distinguishable from the kind of acts—intimidation, ridicule, and insults—that contribute towards a hostile work environment.

True, any employment-related action conceivably could be motivated by discriminatory intent (and thus violate Title VII), and such discriminatory intent may be proven in part by prior discriminatory intimidation, ridicule, and insult. But that does not mean that the employment-related action itself constitute acts of discriminatory intimidation, ridicule, and insult that could contribute towards a hostile work environment.

Of course, a plaintiff could always claim to have felt "harassed"—or, more specifically, "intimidated" or "insulted"—by an employment-related action that the plaintiff perceives as negative towards him or her. But that is simply not the kind of harassment, intimidation or ridicule that contributes towards a hostile work environment.

Viewed against these standards, most of the alleged conduct that supposedly created the hostile work environment for Plaintiff is not the kind of conduct that can even contribute towards a finding of a hostile work environment. As listed by Plaintiff,

(Doc. No. 59 at 8-9), such conduct consists primarily not of *harassment* (intimidation, ridicule, insult and the like) but rather of *employment-related actions*[12] negatively affecting her status as an employee.[13] So the Court, in assessing whether Plaintiff has plausibly alleged conduct amounting to a hostile work environment, disregards such employment-related actions.

As for the acts listed by Plaintiff that are (or arguably are) less employment-related actions and more in the nature of harassing conduct, the Court perceives only three at most. Two are arguably insults—"Gonga's assertion that Plaintiff was not qualified to teach classes she had previously taught for some 18 years" and "Brown's denigration of Plaintiff's work despite having never observed it." (Doc. No. 59 at ¶¶ 65, 86). The third is arguably intimidation: "Brown's public scolding of Plaintiff in the presence of a white employee." (*Id.* at ¶ 89). These incidents occurred, respectively, in spring 2021, on October 9, 2019 (Doc. No. 53 at ¶ 89, ¶¶64-65, ¶¶ 81-86).

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[12] Some of these employment-related actions are alleged failure[s], non-responses, and so forth on the part of Gonga or Brown. These may be thought of alternatively as employment-related *in*actions, but for purposes of the instant analysis they amount to employment-related actions.

[13] To the extent that such employment-related actions rise to the level of an adverse employment action, they each conceivably could be alleged separately as an unlawful employment practice in support of a claim of general discrimination. But as noted herein, Plaintiff has made clear in her Opposition that she is not at this time pursuing any claims of general discrimination.

In assessing a claim of hostile work environment, the Sixth Circuit has noted:

> The harassing conduct cannot be viewed in isolation, but [rather] "we must consider the totality of the circumstances in determining whether the harassment was sufficiently severe and pervasive." *Randolph v. Ohio Dep't of Youth Servs.*, 453 F.3d 724, 733 (6th Cir. 2006) (citing *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 826 (6th Cir. 1997)). "Specifically, we must consider 'the frequency of the discriminatory conduct; its severity; whether it [was] physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfere[d] with an employee's performance.' " *Id.* (alterations in original) (quoting *Harris*, 510 U.S. at 23, 114 S. Ct. 367).

Strickland v. City of Detroit, 995 F.3d 495, 506 (6th Cir. 2021)(decided in context of alleged racebased hostile work environment). A dozen years ago, a district court in this district made pertinent observations that are still apt:

> The more severe the incidents, the less pervasive and frequent they need to be to create a hostile work environment. *Rabidue v. Osceola Ref. Co.,* 805 F.2d 611, 620 (6th Cir.1986) "The harassment should be ongoing"; mere "isolated instances" are insufficient. *Clark v. United Parcel Serv., Inc.,* 400 F.3d 341, 351–52 (6th Cir.2005)

> (holding that three instances of harassment over a period of approximately two and a half years were insufficient to be severe or pervasive, but that seventeen instances during the same time period were sufficient to reverse the District Court's grant of summary judgment in favor of the defendant). Cases in the Sixth Circuit are not quick to find a racially discriminatory hostile work environment.

Neal v. Shelby Cnty. Gov't Cmty. Servs. Agency, 815 F. Supp. 2d 999, 1005 (W.D. Tenn. 2011)

With all of these principles in mind, the Court proceeds to address these factors with respect to the three incidents. Arguably, the instance of being yelled at and the instance of being told she was unqualified to teach certain classes, qualifies as humiliating; but the First Amended Complaint does not provide nearly enough factual matter to solidify the humiliating (or, for that matter, the otherwise "severe") nature of these incidents. None of the three qualifies as physically threatening. Collectively, the three incidents could have had some negative effect on Plaintiff that could tangentially interfere with Plaintiff's work performance, but on balance they simply would not have the effect of interfering substantially with Plaintiff's performance of her job duties as a professor. But ultimately what dooms Plaintiff's claim here is the lack of frequency; she has alleged a grand total of three acts of harassment within 18 months. This is not frequent.

The Court of course is aware that this case is only at the pleadings stage. But the applicable

pleading (the First Amended Complaint) nevertheless must satisfy *Iqbal* and *Twombly*. Even collectively, the three alleged instances of harassment upon which Plaintiff relies fail to plausibly suggest a hostile work environment based on race. That is, as discussed above it does not plausibly suggest abuse based on race. Nor does it plausibly suggest severity or pervasiveness of abuse.

Accordingly, the cause of race-based hostile work environment must be dismissed for failure to state a claim upon which relief may be granted.[14]

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[14] For this reason, the Court need not here ultimately resolve Defendant's argument that all of Plaintiff's claims are either time-barred or subject to dismissal for failure to exhaust administrative remedies. But the argument is worth discussing nevertheless

Title VII requires an employee to file a charge with the EEOC within either 180 days or 300 days of an allegedly unlawful employment practice, depending on the law of the applicable state and whether that state is a "deferral state." 42 U.S.C. §2000e-5(e)(1); *Alexander v. Local 496, Laborers' Int'l Union of N. Am.*, 177 F.3d 394, 407 (6th Cir. 1999). "The United States Supreme Court has held that these time periods operate, essentially, as a form of [limitations period]." *Whitehead v. Grand Home Furnishings, Inc.*, No. 2:19-CV-00040-DCLC, 2020 WL 1237423, at *4 (E.D. Tenn. Mar. 13, 2020) (citing *Nat'l R.R. Pass. Corp. v. Morgan*, 536 U.S. 101, 122 (2002)). Tennessee is a deferral state, and so the 300-day limitations period, instead of the 180-day limitations period, applies if a plaintiff who has filed with the EEOC filed first or contemporaneously with the Tennessee Human Rights Commission ("THRC"). *Equal Employment Opportunity Comm'n v. Dolgencorp, LLC*, 196 F. Supp. 3d 783, 799 (E.D. Tenn. 2016), *aff'd*, 899 F.3d 428 (6th Cir. 2018).

Any of the acts upon which Plaintiff relies to support a claim would be separately subject to the 300-day limitations period to the extent that it qualifies by itself as "an unlawful employment practice." Each "adverse employment action" taken with a discriminatory or (as here) retaliatory motive is a

separate "unlawful employment practice" in this sense. *Nat'l R.R. Passenger Corp v. Morgan*, 536 U.S. 101, 114 (2002), ("Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable unlawful employment practice. [Plaintiff] can only file a charge to cover discrete acts that occurred within the appropriate time period."); *Sasse*, 409 F.3d at 783 ("A suspension, like a termination, denial of transfer, or refusal to hire, constitutes a separate actionable 'unlawful employment practice.' "). Relatedly, each alleged "unlawful employment practice" must be administratively exhausted (within the applicable timeframe), meaning that it must be included within the scope of an EEOC charge filed within that timeframe. *See Williams v. Nw. Airlines, Inc.*, 53 F. App'x 350, 352 (6th Cir. 2002).

Defendant here essentially argues that to the extent that any of the various events allegedly is an adverse employment action (and thus an unlawful employment practice) in its own right, it is separately subject to the 300-day statute of limitations and the requirement of administrative exhaustion. Defendant then argues that these requirements were not satisfied with respect to any single act that constituted an adverse employment action.

In response, Plaintiff asserts that Defendant's argument here fails "because the time limit for bringing hostile work environment claims is different in kind from alleging discrete acts." (Doc. No. 59 at 6). As noted below, this assertion is correct. But in relying exclusively here on this assertion, Plaintiff forgoes any reliance on any discrete adverse employment actions. Plaintiff thus has abandoned any claim of adverse employment action other than a claim of hostile work environment. So Plaintiff's claims stand or fall as claims of hostile work environment.

As to claims of hostile work environment, Plaintiff essentially asserts she need not satisfy the 300-day deadline (or the requirement of exhaustion) with respect to every act that she wishes to assert was a contributor to the alleged hostile work environment. This is correct.

Morgan explicitly noted, "Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct . . . Such claims are based on the cumulative

effect of individual acts." *Morgan*, 536 U.S. at 115. The Court went on to say:

> A hostile work environment claim is composed of a series of separate acts that collectively constitute one "unlawful employment practice . . . It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.

Id. at 117. Though *Morgan* stated this principle in deciding whether the applicable alleged incidents of hostile work environment in that case were individually subject to the statute of limitations, the same principle applies in deciding whether alleged specific incidents of hostile work environment are individually subject to the requirement of administrative exhaustion: As Morgan indicates, a "hostile work environment claim is composed of a series of separate acts that collectively constitute one 'unlawful employment practice'" and so "it does not matter . . . that some of the component acts of the [alleged] hostile work environment" were not administratively exhausted, as long as the overarching claim of hostile work environment (the alleged "unlawful employment practice" at issue) was administratively exhausted. *Id.*

The Court herein will assume arguendo that at least one of the three acts properly deemed to contribute towards a hostile work environment was within the 300-day period and that the claim of hostile work environment (as whole) was properly administratively exhausted before the EEOC (irrespective of whether every act contributing to the hostile work environment was presented to the EOOC). Thus, the Court will not dismiss either of Plaintiff's claims (each a hostile work environment claim) for failing to exhaust administrative remedies within the applicable 300-day time limit.

B. The First Amended Complaint fails to set forth factual matter plausibly suggesting general discrimination based on race, and in any event Plaintiff has abandoned a claim of general discrimination based on race.

The First Amended Complaint is similarly deficient with respect to its claims of race-based general discrimination. The Court has looked in vain for anything therein, beyond mere conclusory assertions, that would suggest that any changes in the terms or conditions of her employment— even assuming that at least one of them constituted an "adverse employment action" as is required to support a claim of general discrimination—[15]were

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[15] Defendant asserts that "Plaintiff has not asserted that her compensation, terms, conditions or privileges of employment were affected because of her race." (Doc. No. 56-1). This assertion is not frivolous, but it is unsupported by any real analysis, such as an examination of what effects are actually alleged in the First Amended Complaint and why none of them amounts to an "adverse employment action." Although the Court realizes that any such examination would be hindered by the First Amended Complaint's less-than ideal specification of all of the alleged adverse employment actions, the First Amended Complaint does allege various negative events that have occurred during the course of Plaintiff's employment with Defendant, and it was incumbent on Defendant (as the movant) to do more than that to show the absence of allegations plausibly suggesting even a single event that amounts to an "adverse employment action" as that notion is elucidated by case law. Thus, the Court declines to find that Plaintiff failed to adequately allege even a single actionable adverse employment action. (The Court herein does conclude, however, with respect to the two events as to which the First Amended Complaint does set forth alleged factual matter related to race, that neither of those two incidents reflected an adverse employment action). Ultimately, though, the claim of general discrimination

race-based, *i.e.*, based on discriminatory animus towards her because she was African-American.

Obviously, the fact that someone is African-American and experiences an adverse employment action does not mean that she experienced the adverse employment action *because* she was African American. There needs to be something more. At the pleading stage, there does not necessarily need to be a whole lot, but there does need to be factual matter (as opposed to conclusory assertions) plausibly suggesting that discriminatory animus. And to the extent that the actual content of Plaintiff's two charges of discrimination filed with the EEOC (Doc. Nos. 53-1, 53-2) is considered to have been incorporated into the First Amended Complaint, they likewise fail to include any factual matter plausibly suggesting racial animus for anything that (allegedly) happened to Plaintiff. The closest the First Amended Complaint comes is when it alleges that Plaintiff was replaced, in teaching a particular class in Spring 2020, by a white adjunct professor. But merely being replaced in teaching a class is not an adverse employment action. *See Howard v. Bd. of Educ. of Memphis City Sch.*, 70 F. App'x 272, 280 (6th Cir. 2003) (finding teacher's transfer from her classroom at one school to another did not constitute an adverse employment action for purposes of a Title VII general discrimination claim); *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 885 (6th Cir. 1996) ("This court has held that reassignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims."); *Hamido v.*

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nevertheless is subject to dismissal for the reasons set forth herein.

Tennessee State Univ., No. 3:16-CV-2733, 2018 WL 1964413, at *3 (M.D. Tenn. Apr. 26, 2018) (finding that reassignment of classes away from teacher-plaintiff did not constitute adverse employment action for purposes of a Title VII general discrimination claim). Alternatively, the Court believes that Plaintiff's replacement in teaching a class by a white adjunct professor—while *consistent* with a racially discriminatory animus for the replacement—does not make discriminatory animus *plausible*.[16]

The First Amended Complaint's only other reference to factual matter concerning race is its reference to Plaintiff being yelled at in front of someone who is white. But as discussed in a footnote above, merely being yelled at is not an adverse employment action for purposes of a general discrimination claim. Alternatively, the mere fact that such yelling happened to have been done in front of a white person— although consistent with racial animus—does not plausibly suggest racial animus, because it does not plausibly suggest that the yelling had anything at all to do with the race of the person being yelled at.

In short, Plaintiff has not plausibly alleged that anything that happened to her (including, most importantly, anything that potentially could properly be considered an adverse employment action for purposes of a Title VII claim of general discrimination) was based on racial animus.

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[16] The Court so states despite its realization that replacement in a job position by someone outside the Plaintiff's protected class does happen to satisfy one element of an indirect-evidence prima facie case of general discrimination.

Accordingly, her claim of general discrimination must be dismissed.

Finally, the Court finds alternatively, as discussed below in connection with Plaintiff's retaliation claim, that Plaintiff in any event has abandoned any claim based on discrete adverse employment actions, and instead has placed all of her eggs in the hostile-work-environment basket. For this reason also, claims of general discrimination in violation of Title VII must be dismissed.

C. The First Amended Complaint fails to set forth factual matter plausibly suggesting a retaliatory hostile work environment.

Plaintiff also alleges retaliation claims under Title VII, alleging that she suffered retaliation for complaining about the alleged racial discrimination. Defendant makes three arguments specific to Plaintiff's claim of retaliation. The first is that Plaintiff did not adequately allege a discrete "adverse employment action" taken with a retaliatory motive. The second is that Plaintiff did not adequately allege retaliatory harassment that was severe or pervasive as required. And the third is that Plaintiff has not set forth factual matter plausibly suggesting the required causal connection between Plaintiff's protected conduct (complaining about alleged racial discrimination) and the alleged adverse employment actions.

Title VII's anti-retaliation provision prohibits an employer from discriminating against any employee "because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title

VII]." 42 U.S.C. § 2000e–3(a). The Sixth Circuit has found that "a retaliatory hostile work environment claim [is] a variety of retaliation." *Khamati v. Sec'y of Dep't of the Treasury*, 557 F. App'x 434, 443 (6th Cir. 2014). *See also Noviello v. City of Bos.*, 398 F.3d 76, 90 (1st Cir. 2005) (that to "' discriminate' in the antiretaliation clause includes subjecting a person to a hostile work environment"). The upshot is that subjecting a plaintiff to a retaliatory work environment—a hostile work environment to which Plaintiff was subjected for complaining about alleged racial discrimination—is to subject the plaintiff to an adverse employment action. *See, e.g.*, *id.* at 89 ("The weight of authority supports the view that, under Title VII, the creation and perpetuation of a hostile work environment can comprise a retaliatory adverse employment action under 42 U.S.C. § 2000e–3(a). . . . We hold explicitly that a hostile work environment, tolerated by the employer, is cognizable as a retaliatory adverse employment action for purposes of 42 U.S.C. § 2000e–3(a). This means that workplace harassment, if sufficiently severe or pervasive, may in and of itself constitute an adverse employment action.").

This in turn necessarily means that if a plaintiff has adequately alleged a retaliatory hostile work environment, the plaintiff need not otherwise adequately allege an adverse employment action as would be necessary to support of claim of general retaliation. Plaintiff clearly is pursuing a claim of retaliatory hostile work environment, and the Court will address that claim first.

Claims of retaliation, like claims of general discrimination, can defeat summary judgment via direct evidence of retaliation or via an indirect-

evidence prima facie case of retaliation. But, again, an indirect-evidence prima facie case of retaliation need not be alleged in the complaint; it is enough that the complaint alleges factual matter that plausibly alleges that the defendant suffered an adverse employment action (which, as noted, could be a retaliatory hostile work environment) as a result of complaining about alleged general discrimination in violation of Title VII.

As discussed below, the Supreme Court has made clear that the standard for "adverse employment action" is relatively low in the context of retaliation claims. That is, acts will meet the standard provided only that were sufficient to dissuade a reasonable worker from making or supporting a charge of discrimination. One might think that, since there is a more lenient (for plaintiffs) standard of "adverse employment action" in the context of retaliation than in the context of general discrimination, and because a retaliatory hostile work environment is an adverse employment action for purposes of a retaliation claim, that there would be in all respects a more lenient standard for establishing a retaliatory hostile work environment than for establishing a protected class-based hostile work environment. One would be mistaken, however, at least to an extent. As with a protected-class based hostile work environment, in the Sixth Circuit[17] a retaliatory hostile work environment requires that the harassment be "severe and pervasive." *Cleveland v. S. Disposal Waste*

[17] The Eleventh Circuit sees things quite differently. It has explicitly rejected the notion that a retaliatory hostile work environment must be severe or pervasive. *Tonkyro v. Sec'y, Dep't of Veterans Affs.*, 995 F.3d 828, 836 (11th Cir. 2021).

Connections, 491 F. App'x 698, 707 (6th Cir. 2012) ("To prevail on a Title VII claim of retaliatory hostile work environment a plaintiff must show [inter alia that she] suffered "severe or pervasive retaliatory harassment by a supervisor. . . .") (citing *Morris v. Oldham Cnty. Fiscal Ct.* 201 F.3d 784, 792 (6th Cir. 2000)).[18] In particular, it must be "severe or pervasive enough to *create an environment that a reasonable person would find hostile or abusive*." *Mulvey v. Hugler*, No. 17-5633, 2018 WL 2771346, at *5 (6th Cir. Apr. 3, 2018) (emphasis added) (citation omitted).

In another sense, however, one would be correct because the required severity and pervasiveness need not sufficient *to alter the terms and conditions of the Plaintiff's employment,* as long as it is sufficient *to dissuade a reasonable worker from making or supporting a charge of discrimination*.[19]

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[18] *Cleveland* and *Morris* each made these observations in assessing whether the plaintiff could establish an indirect-evidence prima facie case, in reviewing the defendant's summary-judgment motion. But the Court has no doubt that these observations are equally applicable to a court assessing whether a plaintiff has made allegations plausibly suggesting a retaliatory hostile work environment, in reviewing a defendant's Rule 12(b)(6) motion to dismiss.

[19] There is arguably some tension between saying that the harassment must be "severe and pervasive" and saying that it need only be sufficient to dissuade a reasonable worker from making or supporting a charge of discrimination. The Eleventh Circuit has resolved this arguable tension by saying that the harassment actually need not be severe and persuasive to support a claim of retaliatory hostile work environment. *Tonkyro.*, 995 F.3d at 836. The Sixth Circuit has not necessarily resolved this arguable tension, but it is clear about what it requires for a claim of hostile work environment. It requires, separate and apart from a showing of material

Contrary to Defendant's suggestion, (Doc. No. 56-1 at 160), based on the definition of "adverse employment action" in the context of retaliation claims, it is apparent that the question is not whether the harassment was sufficiently severe or pervasive to alter the plaintiff's conditions of employment, but rather whether the harassment was sufficiently severe to dissuade a reasonable worker from making or supporting a charge of discrimination.'" The Court so concludes based on the persuasive reasoning of the Fourth Circuit in *Laurent-Workman v. Wormuth*, 54 F.4th 201, 217 (4th Cir. 2022). There the court explained:

> A retaliatory hostile work environment must be so severe or pervasive that it would dissuade a reasonable worker from making or supporting a charge of discrimination. This standard retains the "middle path" set out in *Harris* between accepting "any conduct that is merely offensive" and

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adversity, that the collective conduct that allegedly constitutes the retaliatory harassment be "severe" or "pervasive"; in other words, it requires first that the retaliatory harassment be severe and pervasive, and second that the retaliatory harassment be *sufficiently* severe or pervasive to *create an environment that a reasonable person would find hostile or abusive. See Mulvey v. Hugler*, No. 17-5633, 2018 WL 2771346, at *5 (6th Cir. Apr. 3, 2018). Presumably, whenever the requirement of severity or pervasiveness is met, it necessarily would follow that the requirement of material adversity would be satisfied.

The Court pauses to emphasize that it appears that the harassment must be severe or pervasive enough to do each of two different things: (i) make a reasonable person find the environment hostile or abusive; and (ii) dissuade a reasonable person from making or supporting a charge of discrimination.

> requiring plaintiffs to show a "tangible" injury, 510 U.S. at 21–22, 114 S. Ct. 367. But it also harmonizes that compromise with the goal of the anti-retaliation provision "to provide broad protection from retaliation."

Id. at 217. The Fourth Circuit continued:

> [G]iven the Supreme Court and our precedents, a hostile work environment claim based on retaliation must instead allege that the retaliatory conduct (1) was unwelcome, (2) was sufficiently severe or pervasive that it would dissuade a reasonable worker from making or supporting a charge of discrimination, and (3) can be attributed to the employer.

Id. at 218. Satisfying this standard (sometimes called the "material adversity" standard) is no minor feat. "[As] the Third Circuit has made clear[,] the 'material adversity' standard continues to 'separate significant from trivial harms' and 'unquestionably leaves in place a plaintiff's burden to show the allegedly hostile work environment was motivated by retaliatory animus.'" *Smith v. RB Distribution, Inc.*, 498 F. Supp. 3d 645, 664 (E.D. Pa. 2020) (quoting *Komis v. Sec'y of the Dept. of Labor*, 918 F.3d 289, 299 (3d Cir. 2019)). And yet it is lower than the corresponding standard for claims of general retaliation.

As noted above, in the second of its three above-identified arguments as to retaliation, Defendant argues that Plaintiff did not adequately allege retaliatory harassment that was severe or pervasive

as required. Defendant here does not gear its arguments to the correct, lower, standard for a claim of retaliatory hostile work environment, but rather to the higher standard applicable to a protected class-based hostile work environment. That is, Defendant does not attempt to explain why Plaintiff has not plausibly alleged that she was subjected to acts that (despite perhaps not *separately* amounting to adverse employment actions) collectively were sufficiently severe or pervasive satisfy the material adversity standard—*i.e.*, sufficient *to deter a reasonable person from making or supporting a charge of racial discrimination*. Instead, Defendant claims that the harassment must be "'*sufficiently severe or pervasive to alter the conditions of the victim's employment* and create an abusive working environment.'" (Doc. No. 56-1 at 16) (quoting *Broska v. Henderson*, 70 F. App'x 262, 269 (6th Cir. 2003)).

But encompassed within Defendant's argument is the assertion that the alleged harassment was not "severe or pervasive," period. This assertion is relevant because, as noted, in a footnote, the Sixth Circuit requires an initial determination of severity or pervasiveness before turning to whether the severe or pervasive harassment satisfies the applicable standard (material adversity) for retaliation claims. Defendant does not develop this argument as well as it should have. For example, Defendant does not really address the below-applicable factors for determining severity and pervasiveness. Additionally, Defendant claims that the Complaint "includes [only] one allegation of harassment, [*i.e.*] that Plaintiff was subjected to harassment: 'On October 9, 2019, Brown yelled at plaintiff in front of a white faculty member.'" (Doc.

No. 56-1 at 17). This sells the First Amended Complaint somewhat short, because as indicated above harassment to support a claim of hostile work environment can be in the form of intimidation, ridicule, and insult. And this applies to a claim of retaliatory hostile work environment in particular. *See, e.g., Tonkyro*, 995 F.3d at 835; *Roe v. Gates*, No. 3:03CV192, 2009 WL 3063393, at *8 (S.D. Ohio Sept. 21, 2009). Construing the complaint in Plaintiff's favor, she alleges three such incidents, as discussed above. But as set forth below, Defendant's argument ultimately prevails because, as Defendant asserts, Plaintiff has not plausibly alleged factual matter suggesting severe or pervasive harassment.

As noted above, in assessing severity or pervasiveness, the court considers the totality of the circumstances, and in so doing, it considers "a number of factors, including 'the frequency of the discriminatory [meaning, here, retaliatory] 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.'"[20] *Cleveland*, 491 F. App'x at 707 (quoting *Harris v. Forklift Sys., Inc.,* 510 U.S. at 23). *Cleveland* was decided in the context of an alleged retaliatory hostile work environment, and so it makes clear that the standard for severity or pervasiveness is the same in this context as in the context of alleged protected class-based hostile work environment. And as explained above, the standard is simply not met by the allegations of the First

[20] The Court notes, with respect to the bracketed language it added to the quote here, that "Title VII defines retaliation as a form of discrimination." *Nealy v. Shelly & Sands, Inc*., 852 F. App'x 879, 883 (6th Cir. 2021).

Amended Complaint, because the three instances eligible for consideration here do not plausibly suggest severity or pervasiveness.[21] Accordingly, Plaintiff has not set forth factual matter plausibly suggesting a retaliatory hostile work environment, and so this claim must be dismissed.

D. Plaintiff has abandoned a claim of general discrimination retaliation.

The first of Defendant's three above-referenced arguments is geared towards a claim of general retaliation. That is, Defendant argues in essence that Plaintiff has not alleged a discrete adverse employment action to support a claim of retaliation.

As to this, Defendant gets off to a good start, noting the correct standard for ascertaining the existence of an adverse employment action in the context of a claim of retaliation. (Doc. No. 56-1 at 15) (noting that "[a] plaintiff establishes a materially adverse action when she offers proof that the challenged action "might well have dissuaded a reasonable worker from making or supporting a

[21] Defendant additionally relies on the notion that Plaintiff has not adequately alleged that the alleged hostile work environment was based on race. This notion is correct, as discussed above, but it is immaterial here; Plaintiff does not need to allege that a *retaliatory* hostile work environment was based on race; Plaintiff instead needs to plausibly allege that the hostile work environment was (in addition to being sufficiently severe and pervasive to dissuade her from making a complaint of alleged racial discrimination) animated by a *retaliatory motive*. Whether Plaintiff has succeeded in so doing is an issue the Court need not reach, because she has not adequately alleged a hostile work environment of *any* kind, retaliatory or otherwise.

charge of discrimination.") (citing *Taylor v. Geithner*, 703 F.3d 328, 336 (6th Cir. 2013)). But then Defendant goes significantly off track, thereafter treating the standard in the retaliation context as if it was the more stringent standard applicable in the context of general claims of discrimination. It cites multiple cases that, as it turns out, were decided in the context of a general discrimination claim, rather than retaliation claim. (*Id.* at 15-16). It does cite one case decided in the context of a retaliation claim, *White v. Burlington N. & Santa Fe Ry. Co.,* 364 F.3d 789, 795 (6th Cir. 2004), *aff'd sub nom. Burlington Northern and Santa Fe R. Co. v.* White, 548 U.S. 53 (2006); it cites that portion of *White* for the proposition that "employment actions that are *de minimus* are not actionable under Title VII." (*Id.* at 15). But this proposition is unexceptional, and *White* cannot be relied upon for anything more helpful on this point, because as to the standard for "adverse employment actions" in the context of retaliation claims, *White* actually was overruled by the Supreme Court in *Burlington Northern*. Despite affirming the decision in *White*, the Supreme Court disagreed with *White's* view that the standard was the same in the context of retaliation claims as in the context of general discrimination claims. Specifically, the Sixth Circuit "reject[ed] White's and the EEOC's request that we adopt a new definition of adverse employment action for purposes of Title VII retaliation cases, and we reaffirm the definition that we have developed in cases such as *Kocsis* and its progeny," 364 F.3d at 800, meaning a "materially adverse change in the terms and conditions of [plaintiff's] employment." *Id.* at 795 (internal quotation marks omitted). The Supreme Court

disagreed, and opted instead for the approach of certain other circuits.

> As we have explained, Courts of Appeals have used differing language to describe the level of seriousness to which this harm must rise before it becomes actionable retaliation. We agree with the formulation set forth by the Seventh and the District of Columbia Circuits. In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"

Id. at 67-68. *See also Phelan v. Cook Cnty*,, 463 F.3d 773, 781, n. 3 (7th Cir. 2006) (stating that in *Burlington Northern,* the Supreme Court held that "the Title VII retaliation provision protects an employee from a wider range of conduct than the discrimination provision does"), *overruled on other grounds*, *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760 (11th Cir. 2016).

This means that the question of whether something constitutes an adverse employment action for purposes of a retaliation claim is different from the question of whether it constitutes an adverse employment action for purposes of a general discrimination claim, and the two questions must be analyzed separately. *Allen v. Ohio Dep't of Job & Fam. Servs.*, 697 F. Supp. 2d 854, 895 (S.D. Ohio 2010). In making its first argument, Defendant (which, as noted above, has the burden of

explanation as the movant herein) does not properly frame or address the former question, which is the question here.

Ultimately, however, that does not cost Defendant, because Plaintiff has abandoned any claim of general retaliation, *i.e.*, retaliation based on discrete adverse employment actions. Instead, Plaintiff is proceeding based only on a claim of retaliatory hostile work environment.

In summary, Plaintiff has failed to state a claim for retaliatory hostile work environment, and that is her only remaining claim of retaliation. Accordingly, Plaintiff's claim of retaliation must be dismissed for failure to state a claim upon which relief may be granted.22

CONCLUSION

In response to Defendant's assertion that Plaintiff's claims were subject to dismissal for failure to timely exhaust administrative remedies, Plaintiff made clear that she was proceeding based only on a theory of hostile work environment. But she has failed to plausibly allege a hostile work environment with respect either to her claim of race discrimination or her claim of retaliation. Accordingly, the First Amended Complaint must be dismissed in its entirety, with prejudice.

An appropriate order will be entered.

/s/ ELI RICHARDSON
UNITED STATES DISTRICT JUDGE

Filed March 8, 2023

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

NO. 3:21-cv-00506
JUDGE RICHARDSON

CHINYERE OGBONNA-MCGRUDER,
Plaintiff,

v.

AUSTIN PEAY STATE UNIVERSITY et al.,
Defendants.

MEMORANDUM OPINION

Pending before the Court is "The Individual Defendants' Motion to Dismiss" (Doc. No. 57, "Motion"), filed by Defendants Tucker Brown and Marsha Lyle-Gonga ("Individual Defendants"), who are employees of co-Defendant Austin Peay State University ("APSU"). In the Motion, the Individual Defendants primarily request pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure the dismissal of all claims asserted against them in Plaintiff's First Amended Complaint (Doc. No. 53), the currently operative complaint in this case.[1] The

[1] Secondarily, the Individual Defendants request "an award against Plaintiff for attorney's fees and costs related to these individual capacity claims under Tenn. Code Ann. § 29- 20-113." (Doc. No. 57-1 at 1).

Individual Defendants filed a brief in support of the Motion (Doc. No. 57-1, "Brief in Support"), and Plaintiff filed a brief in opposition to the motion (Doc. No. 60, "Opposition"), whereafter the Individual Defendants filed a reply in support of the Motion (Doc. No. 62, "Reply").

FACTUAL ALLEGATIONS

In their Brief in Support, the Individual Defendants provide a summary of the factual allegations from the First Amended Complaint that are relevant to this instant action as a whole.[2] Comparing that summary to the First Amended Complaint, the Court is satisfied (and Plaintiff does not seem to dispute) that the summary is accurate in both in its overall tenor and in its individual components. Thus, the Court adopts and sets forth that summary below, although the Court has taken the liberty to tweak the summary in particular ways as noted in the accompanying footnote,[3] primarily to

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[2] That is not to say that everything set forth in such summary is necessarily indispensable or even relevant to the resolution of the instant Motion, but the summary nevertheless is worth setting forth nearly in its entirety.

[3] In this summary, where (alleged) facts are recounted without qualification, they are accepted as true for purposes of the instant motion. Conversely, where the (alleged) facts are qualified in some way (as for example by "Plaintiff claims"), they are not accepted as true for purposes of the present Motion

In some places, the Court includes ellipses to omit the Brief in Support's language that qualifies the allegations of the First Amended Complaint to suggest that such allegations are not necessarily true, but rather merely alleged by Plaintiff (in the First Amended Complaint). Where the Court does so, its purpose is to make clear that it is unqualifiedly accepting the

clarify what allegations the Court is (and what the Court is not) accepting as true for purposes of the instant 12(b)(6) motion to dismiss.[4]

> Plaintiff has been employed by APSU since 2003. (Doc. No. 53, ¶ 29.) Plaintiff was hired as a college professor, to teach classes in criminal justice and public management. (Id.) In Spring 2017, APSU faculty were advised by former Dean Denton that the-then Public Management/Criminal Justice Department would be split into two departments. (Id. at ¶ 31.) According to Plaintiff, faculty could request joint appointment, based on chair approval, with the two newly created departments – Criminal Justice and Public

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allegations as true for present purposes. In other places, the Court leaves in the qualifying language used by the Brief in Support, or adds a qualifying term in brackets, believing such qualification appropriate because, under *Iqbal* and *Twombly*, the corresponding allegations are treated not as true but instead as merely alleged by Plaintiff.

[4] For reasons that will be discussed below, the resolution of the instant Motion actually is one that, unlike the resolution of so many Rule 12(b)(6) motions, turns less on what allegations are accepted as true and more on what is being alleged (whether it is accepted as true or not) and what is not being alleged. And yet the Court nevertheless perceives some value in making clear what allegations the Court, applying the below-discussed so-called *Iqbal/Twombly* standard, the Court is accepting as true (because they qualify as alleged *factual matter*) and what allegations the Court is not accepting as true (because they amount to legal conclusions or, even to the extent that they could be characterized as "factual" allegations in some sense, amount solely to mere conclusory allegations rather than allegations of true *factual matter*).

Management/Political Science. (Id. at ¶ 32.) Faculty from the original Public Management/Criminal Justice Department were told that they could self-select which department they wanted to join. (Id. at ¶ 33.) The self-selection did not include a review of faculty qualifications. (Id.) Dean Denton rejected Plaintiff's request and chair approval for joint appointment and denied her the opportunity to self-select her department. (Id. at ¶ 34.) Dean Denton made the selection for Plaintiff. (Id. at ¶ 36.) Plaintiff claims that, as an African American, she was denied the opportunity to self-select her department. (Id. at ¶ 35.)

Plaintiff filed a formal complaint with APSU's Office of Equal Opportunity and Affirmative Action in 2017, alleging that Dean Denton engaged in race discrimination. (Id. at ¶¶ 37, 40.) APSU responded to the complaint in Summer 2019. (Id. at ¶ 37.) Plaintiff claims that the individual actions of Brown from Summer 2019 through the present, and the individual actions of Lyle-Gonga from 2020, "began to perpetuate a hostile work environment resulting in retaliatory treatment of Plaintiff." (Id. at ¶ 43.) Brown was Dean of the College of Behavioral and Health Sciences at APSU from 2019 through December 2021. (Id. at ¶ 4.) Lyle- Gonga, beginning January 1, 2020, was at all times relevant to the Complaint, Chair of the Department of Political Science and Public Management. (Id. at ¶ 5.)

In September 2019, Plaintiff filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC") (See EEOC Charge No.: 494-2019-02950, Doc. No. 53-1) (Id. at ¶ 41.) Plaintiff's September 2019 EEOC Charge was closed to allow the parties to negotiate but reopened after the parties failed to reach an agreement. (Id. at ¶ 42.) On September 29, 2020, Plaintiff filed another charge of discrimination with the EEOC, which was assigned the same EEOC Charge number as the September 2019 Charge. (Id. at ¶ 9.) Plaintiff claimed that she was discriminated against based on her race and sex in violation of Title VII of the Civil Rights Act of 1964. (See EEOC Charge No.: 494-2019-02950, Doc. No. 53-1.) Plaintiff filed a second charge of discrimination with the EEOC on or about June 17, 2021, alleging retaliation2. (See EEOC Charge No.: 494-2021- 01993, Doc. No. 53-2.)

As can be gleaned from the Complaint, Plaintiff's claims of race discrimination and the subsequent alleged retaliation and hostile work environment she suffered arise from the 2017 split in departments. (See generally, Doc. No. 53, ¶¶ 19, 31, 35-44.) Specifically, Plaintiff alleges:

> Defendants' discriminatory practices include, but are not limited to: (1) creating or permitting a hostile work environment heavily charged with discrimination; (2) maintaining wages, job assignments and

> other conditions of employment that unlawfully operate to deny equal opportunity to Plaintiff because of her race; (3) creating a hostile, racially charged work environment such that no reasonable person would be expected to endure, and (4) retaliating against Plaintiff for opposing discriminatory conduct.

(Id. at ¶ 28.) As to Plaintiff's race discrimination claims, she states, "as a tenured African American was denied the opportunity to self-select her department of out the two newly created departments[.]" (Id. at ¶ 35.) She also claims that "in Spring 2020, [she] was scheduled to teach a particular class in the [F]all 2020 but a white adjunct professor replaced her. (Id. at ¶ 71.) The Complaint further states that in October 2019, "Brown yelled at plaintiff in front of a white faculty member (id. at ¶ 89) and "[s]aid harassment and inappropriate verbal scolding in the presence of a white faculty member was offensive and caused Plaintiff great shame and embarrassment[.]" (Id. at ¶ 90.)

With respect to Plaintiff's hostile work environment allegations, she generally claims that APSU "failed to exercise reasonable care to prevent and correct promptly any harassing, and/or offending behavior. The frequency of the discriminatory conduct, its severity, and pervasiveness are threatening and

humiliating to Plaintiff and unreasonably interfered with Plaintiff's work performance. These actions adversely affected her emotional and/or psychological well-being. Such facts constitute a 'hostile and/or abusive' work environment." (Id. at ¶¶ 111-12.) Plaintiff further claims that since she is "an experienced and tenured African American professor, Defendants must find 'cause' to terminate her employment." (Id. at ¶ 24.) And in the absence of allegedly being able to find "cause", [allegedly] "Defendants have intentionally created a hostile work environment in hopes it would cause her to resign[.]" (Id. at ¶¶ 25, 27, 62, 66, 74, 77, 90, 93, 104.)

Specifically, the actions by Dean Brown and/or Department Chair Lyle- Gonga which allegedly perpetuated a hostile work environment include requesting that she move her office (Id. at ¶¶ 45-46), exclusion from a grant proposal (Id. at ¶¶ 47-53), refusing to confer with Plaintiff about the creation of a master's program (Id. at ¶¶ 58-60, 99), refusal to act on Plaintiff's appeal based on the lack of a faculty appraisal (Id. at ¶¶ 61-63), denigrating Plaintiff's teaching and research done with minority students (Id. at ¶¶ 64-68), failure to timely receive clarification about a replacement class she would be teaching (Id. at ¶¶ 71-77), denied the ability to teach summer classes (Id. at ¶ 88), harassment and verbal scolding in the presence of a white faculty member (Id. at ¶¶ 89-90), failure to recognize Plaintiff's

accomplishments in the conduct of her annual evaluations, and evaluations and appeals generally (Id. at ¶¶ 55, 78-80, 91-95), not assigning courses Plaintiff selected to teach (Id. at ¶¶ 81-87, 96-98), and criticism of her speech accent and thereby her natural origin (Id. at ¶ 109).

Lastly, Plaintiff claims that, since the filing of her complaint with APSU in 2017, she has experienced retaliation by Defendants. (Id. at ¶ 23.) Plaintiff then states that by and through the actions of the Department Chair and Dean, APSU has engaged in retaliatory treatment of Plaintiff from Summer of 20193 through the present. (Id. at ¶ 43.) Such [allegedly] retaliatory conduct . . . includes the following:

• In September 2019, Plaintiff was instructed by Brown to move from her office to a basement office as a form of retaliation after reporting and opposing previous racially charged discriminatory conduct. This was the second attempt in 2019 to transfer her to a basement office. (Id. at ¶¶ 45-46) (emphasis added) (hereinafter "the request to change offices".)

• In October 2019, Plaintiff requested that she be included in a grant proposal for a new juvenile detention center in Tennessee. Plaintiff claims she was purposefully excluded from participation as evidenced in the final brochure. (Id. at ¶¶ 47-54) (hereinafter "the grant proposal".)

> • In March 2020, Plaintiff did not receive an annual evaluation per university policy for her performance in the 2019-2020 academic year under the pretext of Plaintiff not submitting all of the necessary documents. (Id. at ¶¶ 55-57) (hereinafter "the 2019-2020 evaluation".)
>
> • In January 2020, the professors within the political science and public management department voted unanimously for Plaintiff to move into phase two of the creation of the master's program. Plaintiff had previously submitted the initial phase one request on "curriculog" and it was approved. Brown and Department Chair [Lyle-] Gonga have deliberately refused to confer with Plaintiff about this matter. (Id. at ¶¶ 58-60) (hereinafter "the master's program".)
>
> • In February 2022, Plaintiff was not assigned the courses that she requested to teach. Plaintiff was advised that she was not qualified to teach classes she had previously taught for some 18 years. (Id. at ¶¶ 96-98) (hereinafter "course choices".)

(Doc. No. 57-1 at 2-6).

Based on these allegations, Plaintiff (without clearly breaking out her claims into separate counts) asserts that Defendant Austin Peay has violated particular provisions of Title VII of the Civil Rights Act of 1964 as amended. (Doc. No. 53 at ¶ 26). She also asserts that the Individual Defendants have

violated 42 U.S.C. § 1983,[5] and are liable to Plaintiff for damages as result,[6] in that they allegedly "have unlawfully retaliated against Plaintiff via a hostile work environment based on race in hopes this tenured African American professor would resign." (*Id.* at ¶ 27). *See also id.* at ¶¶ 107, 113. Plaintiff does not assert that the Individual Plaintiffs are liable to her under Title VII.[7]

LEGAL STANDARDS

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[5] "To establish liability under 42 U.S.C. § 1983, a plaintiff must demonstrate: (1) that he was deprived of a right secured by the Constitution or laws of the United States, and (2) that he was subjected or caused to be subjected to this deprivation by a person acting under color of state law." *Gregory v Shelby County Tenn.*, 220 F.3d 433, 442 (6th Cir. 2000). If a plaintiff can demonstrate these things, generally the liability thus established would extend at least to any defendant who is such a "person." Plaintiff here contends that each of the Individual Defendants is such a person.

[6] In her prayer for relief, Plaintiff seeks, among other things, damages against the Individual Defendants for emotional distress, loss of enjoyment of life, embarrassment, and humiliation, as well as punitive damages against the Individual Defendants. (Doc. No. 53 at 16).

[7] Any such assertion would have failed in any event. *Alexander v. Univ. of Memphis*, No. 20-5426, 2021 WL 2579973, at *3 (6th Cir. June 7, 2021) ("The district court correctly dismissed Alexander's racediscrimination and retaliation claims against Rudd for failure to state a claim upon which relief can be granted, *see* Fed. R. Civ. P. 12(b)(6), because 'an individual cannot be held personally liable for violations of Title VII.'" (quoting *Griffin v. Finkbeiner*, 689 F.3d 584, 600 (6th Cir. 2012))). Indeed, Plaintiff correct acknowledges that this is the law. (Doc. No. 60 at 8 ("Title VII contains no provision for actions against individual actors and therefore employee victims no provision to sue those tortfeasors.")).

The instant Motion is brought under Rule 12(b)(6), and this is appropriate because the motion asserts that Plaintiff has failed to state a claim against the Individual Defendants upon which relief can be granted. The Court thus will state below the legal principles generally applicable to a Rule 12(b)(6), before noting (in the following section hereof) that many of these principles are not implicated with respect to the *first* of the below-stated two issues the Court must decide.

For purposes of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court must take all of the factual allegations in the complaint as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Id*. 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. *Id*. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id*. When there are wellpleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. *Id*. at 679. A legal conclusion, including one couched as a factual allegation, need not be accepted as true on a motion to dismiss, nor are mere recitations of the elements of a cause of action sufficient. *Id*.; *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010), *cited in Abriq v. Hall*, 295 F. Supp. 3d 874, 877 (M.D. Tenn. 2018). Moreover, factual allegations that are merely *consistent* with the

defendant's liability do not satisfy the claimant's burden, as mere consistency does not establish *plausibility* of entitlement to relief even if it supports the *possibility* of relief. *Iqbal*, 556 U.S. at 678.

In determining whether a complaint is sufficient under the standards of *Iqbal* and its predecessor and complementary case, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), it may be appropriate to "begin [the] analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 680. This can be crucial, as no such allegations count toward the plaintiff's goal of reaching plausibility of relief. To reiterate, such allegations include "bare assertions," formulaic recitation of the elements, and "conclusory" or "bold" allegations. *Id*. at 681. The question is whether the remaining allegations—factual allegations, *i.e.*, allegations of factual matter—plausibly suggest an entitlement to relief. *Id*. If not, the pleading fails to meet the standard of Federal Rule of Civil Procedure 8 and thus must be dismissed pursuant to Rule 12(b)(6). *Id*. at 683.

On a Rule 12(b)(6) motion to dismiss, "[t]he moving party has the burden of proving that no claim exists." *Total Benefits Plan. Agency, Inc. v. Anthem Blue Cross and Blue Shield,* 552 F.3d 430, 433 (6th Cir.2008). That is not to say that the movant has some *evidentiary* burden; as should be clear from the discussion above, evidence (as opposed to *allegations* as construed in light of any allowable matters outside the pleadings) is not involved on a Rule 12(b)(6) motion. The movant's burden, rather, is a burden of *explanation*; since the movant is the one seeking dismissal, it is the one that bears the burden of explaining—with whatever degree of

thoroughness is required under the circumstances—why dismissal is appropriate for failure to state a claim.

THE INDIVIDUAL DEFENDANTS' PRIMARY ARGUMENT

The Individual Defendants primarily seek to meet their burden by explaining that the very nature of the claim asserted against them is such that the claim is not one upon which relief can be granted. In other words, the Individual Defendants argue primarily that the claim Plaintiff asserts against them is one that as a matter of law cannot validly be asserted against them.

More specifically, the Individual Defendants first assert that "an employee may sue a public employer under both Title VII and § 1983 only when the § 1983 violation rests on a claim of infringement of rights guaranteed by the Constitution." (Doc. No. 57-1 at 8). To support this assertion, they cite *Grano v. Dep't of Dev., City of Columbus*, 637 F.2d 1073 (6th Cir. 1980), and *Day v. Wayne Cty. Bd. of Auditors*, 749 F.2d 1199, 1204 (6th Cir. 1984) ("It would be anomalous to hold that when the only unlawful employment practice consists of the violation of a right created by Title VII, the plaintiff can by-pass all of the administrative processes of Title VII and go directly into court under § 1983.").

They next assert, relatedly, that "Title VII provides the exclusive remedy when a Section 1983 cause of action is *based on violations of* Title VII." (Doc. No. 57-1, at 7) (emphasis added).[8] Not

[8] The undersigned is chagrined that the Individual Defendants state that "'Title VII is the preemptive and exclusive remedy

surprisingly, the Individual Defendants then assert that Plaintiff's claims against them are based only on violations of Title VII. They argue that "[t]he Complaint does not once suggest, let alone allege a violation of a right protected by the Constitution [but rather] "[a]t best . . . paints a picture of the alleged discrimination [Plaintiff] suffered, in violation of Title VII." (Doc. No. 57-1 at 8). Ergo, the Individual Defendants argue, Plaintiffs claims are cognizable only under Title VII, meaning that Plaintiff has not stated a valid claim against them under Section 1983. (*Id.* at 9).

PLAINTIFF'S RESPONSE

In response, Plaintiff cites *Grano v. Department of Development City of Columbus*, 637 F.2d 1073 (6th Cir. 1980). There the Sixth Circuit noted that "[a]

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for federal employment discrimination falling under Title VII.'" (Id. at 8 (quoting *Delaney v. Potter*, No. 3:06-0065, 2006 WL 2469380, *4 (M.D. Tenn. Aug. 24, 2006) (citing *Brown v. Gen. Serv. Admin.*, 425 U.S. 820 (1976))) (emphasis added). In making this statement, the Individual Defendants unmistakably suggest that the statement has application to the present case. But it absolutely does not. The reference there to "federal employment discrimination" is a reference to *discrimination in federal employment* (which is precisely what was at issue in both *Delaney* and *Brown*), not to *discrimination in violation of federal law*. This is readily apparent from these cases. Counsel is cautioned about making case citations that carry an incorrect implication that they are applicable to the case at hand. The Court expresses these concerns even though it realizes that *Delaney* claimed that the rationale of *Brown* had been applied to—in addition to various cases involving discrimination in federal employment—one case that did not involve discrimination in federal employment (*Great Am. Fed. Sav. & Loan Ass'n v. Novotny,* 442 U.S. 366, 378 (1979)). *See Delaney*, 2006 WL 2469380, *4.

plaintiff who alleges disparate treatment by a state employer is bringing essentially the same claim under Title VII as under §1983. If there is liability under Title VII, there should be liability under § 1983." *Id.* at 1082.

Plaintiff next attacks the Individual Defendants' reliance on *Delaney (Potter*), on the grounds that it cites a case *Ethnic Employees of Library of Congress v. Boorstin* ["*EELC*"], 751 F.2d 1415 (D.C. Cir. 1985), which (according to Plaintiff) actually helps Plaintiff. In particular, Plaintiff notes that EELC stated that "[n]othing in that history even remotely suggests that Congress intended to prevent federal employees from suing their employers for constitutional violations against which Title VII provides no protection at all." *EELC* at 1415. Plaintiff implies that under *EELC*, she should be able to sue the Individual Defendants under Section 1983 for constitutional violations because "Title VII contains no provision for actions against individual actors and therefore employee victims no provision to sue those tortfeasors." (Doc. No. 60 at 8). *Accord*, *id.* at 9 ("[S]ince Title VII provides no remedy to the victim for relief from the discriminatory actions of individuals that have subjected her to conditions, that have altered the terms, conditions, and privileges of her employment, 'Congress did not intend for Title VII to displace claims she may have against individual defendants.'" (quoting *EELC*, 751 F.2d at 1415)).[9]

Plaintiff next attacks the Individual Defendants' reliance on *Day*. She notes that *Day* states, *inter alia*, that "'[w]here an employee establishes

[9] The Court is compelled to opine that counsel for Plaintiffs need to do a better job in terms of formatting case citations.

employer conduct which violates both Title VII and rights derived from another source—the Constitution or a federal statute—which existed at the time of the enactment of Title VII, the claim based on the other source is independent of the Title VII claim, and the plaintiff may seek the remedies provided by § 1983 in addition to those created by Title VII.'" (*Id.* at 8-9 (quoting *Day*, 749 F.2d at 1205)).[10]

Plaintiff next cites *Vega v. Hempstead Union Free School District*, 801 F.3d 72, 75 (2d Cir. 2015), in further support of her above-referenced assertion to the effect that "a complaint that alleged discrimination is actionable under § 1983" against individual defendants. (*Id.* at 9-10 (quoting *Vega*, 801 F.2d at 75)). Plaintiff then recites at length allegations of the complaint indicating that the Individual Defendants "perpetrated a hostile work environment, then used it to retaliate against Plaintiff [, which] makes them liable to Plaintiff. (*Id.* at 10-12). She concludes that such allegations are sufficient to plausibly suggest a right to relief under Section 1983.

ANALYSIS

The instant question is whether Plaintiff's Section 1983 claims against the Individual Defendants are barred on the grounds that the claims are based on violations of Title VII. This question can be subdivided into two questions: (a) is a Section 1983 claim against an individual defendant

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[10] Relatedly, the Court is compelled to note that here, Plaintiff strangely makes a sort of citation to *Grano* that suggests incorrectly that the quotation here is to *Grano* rather than *Day*.

necessarily barred[11] on the grounds that it alleges discrimination based on violations of Title VII?; and if so (b) does that mean *Plaintiff's* Section 1983 claims against the Individual Defendants are barred? The Court takes up each of these questions in turn.

Relying on out-of-circuit cases mentioned above, Plaintiff essentially asserts that the answer to the first question is no. That is, she cites *EELC* and *Vega* for the proposition that a Section 1983 claim is never precluded based on the possibility of relief under Title VII—precisely because there is no right to relief against individual defendants under Title VII. The Court does not begrudge Plaintiff for such reliance, but ultimately it gets her nowhere because binding Sixth Circuit authority precludes her assertion. "[W]e have held that plaintiffs cannot use § 1983 to enforce purely statutory claims under Title VII . . . ." *Bullington v. Bedford Cty., Tennessee*, 905 F.3d 467, 471 (6th Cir. 2018) (*quoting Day*, 749 F.2d at 1204 ("Though the issue is not without doubt, we believe Title VII provides the exclusive remedy when the only § 1983 cause of action is based on a violation of Title VII.")).[12] It is clear that *Bullington* serves as

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[11] The Individual Defendants use the term "preempted." The Court, not convinced that a Title VII-based bar to Section 1983 claims is due to what technically fits the definition of "preemption," uses the more general term "barred."

[12] Plaintiff's reliance on *Grano* is to no avail. In relevant part, Grano stated as follows:

> The problem is that the district court made contradictory findings. It found that the defendants violated Title VII, but then found that the defendants had not intentionally discriminated against the plaintiff. A

a clear endorsement of the continuing and uncontroversial viability of *Day*, especially given *Bullington*'s quotation of the Third Circuit's relatively recent observation that "every circuit to consider this exact question has held that, while a plaintiff may use § 1983 as a vehicle for vindicating rights independently conferred by the Constitution, Title VII and ADA statutory rights cannot be vindicated through § 1983." *Id.* (quoting *Williams v. Pa. Human Relations Comm'n*, 870 F.3d 294, 300 (3d

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> plaintiff who alleges disparate treatment by a state employer is bringing essentially the same claim under Title VII as under s 1983. If there is liability under Title VII, there should be liability under s 1983. Similarly, if there was no discriminatory intent, there cannot be liability under either Title VII, on a disparate treatment theory, or s 1983.

Grano, 637 F.2d 1073 1081–82. But there is no indication in *Grano* that either the district court or the Sixth Circuit even considered the possibility that at least in some circumstances, a Section 1983 claim could not proceed together with a claim under Title VII. Instead, the two courts apparently assumed that the two kinds of claims could proceed together; perhaps this was because the plaintiff in *Grano* (unlike Plaintiff in the present case) apparently alleged violations not only of Title VII but also of the Fourteenth Amendment—a circumstance that, as discussed below, can make all the difference in whether *both* kinds of claims are cognizable in a particular case. In *Grano*, the Sixth Circuit (operating under this assumption) merely noted that if there was liability under Title VII, then there should be liability under Section 1983. *Day*, decided after *Grano*, addressed the issue that *Grano* did not: whether a plaintiff can use § 1983 to enforce *purely statutory claims* under Title VII. So the Court here follows the on-point, and more recent, pronouncements from *Day* and *Bullington* rather than *Grano*.

Cir. 2017) (internal quotation marks omitted)).[13]

Surprisingly, the Individual Defendants do not cite *Day* on this point, and they do not cite *Bullington* at all. But having found this authority on its own, the Court is constrained to find that it is the law of the Sixth Circuit and thus to follow it as binding precedent. This means that if Plaintiff is attempting to (as *Bullington* puts it) "use § 1983 to enforce purely statutory claims under Title VII"—or (as *Day* puts it) assert a "§ 1983 cause of action [that] is based on a violation of Title VII"—the attempt fails

The question, then, becomes whether this is actually what Plaintiff is attempting to do. Detrimental though it was to Plaintiff on the first issue, *Bullington* throws Plaintiff a lifeline on the second issue. As background, the Court notes that in *Bullington*, the plaintiff brought claims under the Americans with Disabilities Act ("ADA"), rather than claims under Title VII. The plaintiff also brought claims under Section 1983, which the defendants claimed (via a motion to dismiss) were barred because they were based on violations of the ADA. After noting (as the Court has discussed above) that *Day* holds that Title VII provides the exclusive remedy when the only § 1983 cause of action is based on a violation of *Title VII*, and that other circuits

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[13] The fact that the Individual Defendants cannot be held liable under Title VII does not change this reality. *Bullington* was decided in the context of claims against individual defendants who likewise could not be held liable under Title VII; *Day* was not, but it does not suggest that the difference in context would mandate a different rule. Moreover, the statement from *Williams* prominently quoted in *Bullington* was made specifically in the context of claims against individual defendants. *See Williams,* 870 F.3d at 297.

likewise have held that *ADA* rights cannot be vindicated through Section 1983, the court in *Bullington* turned to the latter issue, *i.e.*, whether "plaintiffs can use § 1983 to enforce the ADA," an issue the Sixth Circuit had "not previously decided." *Id.* at 471. The court found that it could avoid that issue altogether because plaintiff actually was not seeking to use Section 1983 to enforce the *ADA*; rather, she was seeking to use Section 1983 to enforce *constitutional rights:*

> Nevertheless, we do not need to reach a conclusion on this issue because Bullington's § 1983 claims allege *constitutional* violations, not violations of the ADA itself. Bullington pleaded "that Defendant Cooper violated her *federal constitutional rights secured by the 14th amendment* to be free from discrimination and retaliation as a result of her illness/disability." R. 28 (Second Am. Compl. ¶ 14) (Page ID #90) (emphasis added). She has also alleged "that Bedford County is liable for the violation of [Bullington's] *federal constitutional rights* pursuant to 42 U.S.C. § 1983 in failing to provide proper supervision and training to prevent this type of unlawful, discriminatory abuse." *Id.* ¶ 15 (Page ID ***472** #90) (emphasis added). Thus, Bullington's § 1983 disability discrimination claims are being brought pursuant to the Fourteenth Amendment's Equal Protection Clause, not the ADA. Therefore, the real issue is whether Bullington can pursue her separate but

> parallel Fourteenth Amendment claims for disability discrimination.
>
> Several circuits, including our own, have allowed constitutional claims to be brought under § 1983, even where the plaintiff's constitutional claims run parallel to claims brought under analogous statutes.

Id. at 471-72 (brackets in original). The Court went on to hold in essence that constitutional claims could be brought under Section 1983 irrespective of whether they ran parallel to a claim brought under the ADA. *Id.* at 472-476. In short, *Bullington* indicates that a plaintiff properly may bring a Section 1983 claim in addition to an ADA claim, even if both claims are based on the same underlying allegations of discrimination, provided that the plaintiff alleges a violation of federal constitutional rights that is separate from the alleged violations of the plaintiff's statutory rights under the ADA. What's more, *Bullington* indicates that a plaintiff in this situation does not have to do very much to adequately allege a violation of her federal constitutional rights; it suffices merely to incant something to the effect that the defendants have violated her "federal constitutional rights secured by the 14th amendment to be free from discrimination and retaliation as a result of her [protected class]."[14]

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[14] As discussed further below, Section 1983 allows for claims based on a violation of federal *law*—as distinguished from a violation of the (federal) *Constitution*. So a Section 1983 claim could be brought, together with a Title VII claim, based on an alleged violation of a federal law other than Title VII, even absent any alleged violation of the Constitution. *See*, e.g., *Day*, 749 F.2d at 1205 ("Where an employee establishes employer conduct which violates both Title VII and rights derived from

This is not a high bar to clear for a plaintiff seeking to bring claims against state actors under both Section 1983 and the ADA. And the Court has little trouble concluding that this low bar likewise exists in the case of federal anti-discrimination laws other than the ADA, including Title VII.

And yet, low though the bar may be, Plaintiff here nevertheless fails to clear it. In the First Amended Complaint (and, for that matter, the original complaint), Plaintiff makes absolutely no reference to any constitutional violation, or for that matter any violation of federal law other than Title VII. Instead, Plaintiff essentially notes (by quoting Section 1983 in full) that a Section 1983 claim can be premised upon a violations of federal *laws* and not just the Constitution, and then alleges only a violation of federal laws:

> 42 U.S.C. § 1983 provides that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

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another source—the Constitution *or a federal statute*—which existed at the time of the enactment of Title VII, the claim based on the other source is independent of the Title VII claim, and the plaintiff may seek the remedies provided by § 1983 in addition to those created by Title VII." (emphasis added)). But as noted below, here Plaintiff does not base her Section 1983 claim on an alleged violation of federal law other than Title VII, just as she does not bring her Section 1983 claim based on an alleged violation of the Constitution.

> laws, shall be liable to the party injured in an action at law suit in equity, or other proper proceeding for redress." Plaintiff asserts that Defendants Brown and Gonga as illustrated in the foregoing have engaged in conspiratorial behavior that has caused her to be deprived of rights to which she is entitled under *laws of the United States*, including but not limited to retaliation for having reported the violations of her rights.

(Doc. No. 53 at ¶ 107). The only "laws" to which Plaintiff refers in the entire First Amended Complaint is Title VII. Section 1983 refers to the Constitution as something separate from federal "laws," but even if the Constitution could potentially be considered part of the "laws" that Plaintiff refers to here, the First Amended Complaint—outside of the quotation of Section 1983 in paragraph 107 noted above—does not refer at all to the Constitution, let alone to any particular provision of it (such as the Fourteenth Amendment). Thus, Plaintiff has not made even the minimal allegations that would have been sufficient for her to state a claim under Section 1983 that is cognizable separately from a claim under Title VII. In short, the Amended Complaint alleges discrimination in violation of Title VII, and *only* Title VII—and not any other provision of federal law or of the Constitution. And Plaintiff "cannot use § 1983 to enforce purely statutory claims under Title VII . . . ." *Bullington v. Bedford Cty., Tennessee*, 905 F.3d 467, 471 (6th Cir. 2018) (*quoting Day*, 749 F.2d at 1204).

Thus, her Section 1983 claims against the Individual Defendants is barred.[15]

CONCLUSION

Plaintiff's only claims against the Individual Defendants—Section 1983 claims—are barred because they are based solely on violations of Title VII. Accordingly, those claims must be dismissed, with prejudice. An appropriate order will be entered.

/s/ ELI RICHARDSON
UNITED STATES DISTRICT JUDGE

[15] Given the Court's disposition herein, the Court need not address whether the claims against the Individual defendants should be dismissed based on limitations or qualified immunity.

Filed April 25, 2023

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

Case No. 3:21-cv-00506
Judge Richardson
Magistrate Judge Holmes

CHINYERE OBGONNA-McGRUDER,

v.

AUSTIN PEAY STATE UNIVERSITY*, et al.*

MEMORANDUM OPINION AND ORDER

Pending before the Court is Plaintiff Chinyere Obgonna-McGruder's motion for leave to amend her complaint. (Docket No. 86.) Defendant Austin Peay State University (the "Defendant" or "APSU") responded in opposition. (Docket No. 87.) Plaintiff subsequently filed a reply. (Docket No. 88.) For the reasons that follow, Plaintiff's Motion (Docket No. 86) is DENIED.

I. BACKGROUND

Familiarity with this case is presumed, the prior history of which was thoroughly recited in the Court's prior order on Plaintiff's first motion to amend (Docket No. 52 at 2-3) and Judge Richardson's memorandum opinion of March 8, 2023. (Docket No. 84.) Only those facts and procedural history necessary to give context to or explanation of the Court's ruling are again recited here.[1]

The specific allegations and circumstances giving rise to Plaintiff's claims are fully recited in Judge Richardson's memorandum opinion. (*Id*. at 2-6.) In a nutshell, Plaintiff asserted in her first amended complaint (Docket No. 53) – without, as Judge Richardson previously noted (Docket No. 84 at 5), clearly breaking out her claims into separate counts – that Defendant APSU violated particular sections of Title VII of the Civil Rights Act of 1964, as amended. She also asserted that the Individual Defendants violated 42 U.S.C. § 1983. (Docket No. 53.)

After an earlier set deadline, the deadline for motions to amend or to add parties was

[1] These facts are taken from the record, and unless otherwise noted, are largely undisputed.

extended to June 3, 2022. (Docket No. 40 at 2.) Plaintiff was granted leave to amend her original complaint to add the Individual Defendants (Docket No. 52), over the objection of Defendant APSU. (Docket No. 50.) Plaintiff's amended complaint was filed on June 30, 2022. (Docket No. 53.) Plaintiff filed a second motion for leave to amend on October 14, 2022 to add an additional claim of retaliation. (Docket No. 67.) The Court denied Plaintiff's second motion for leave to amend, including because of timing and the resulting prejudice to Defendants. (Docket No. 75.)

During this interval, the Individual Defendants filed a motion to dismiss on July 15, 2022, asserting that Plaintiff failed to properly assert a constitutional basis for her § 1983 claims. (Docket No. 57.) By memorandum opinion issued on March 8, 2023 (Docket No. 85), Judge Richardson agreed that Plaintiff's first amended complaint did not sufficiently state constitutional violations against the Individual Defendants and granted the motion to dismiss.

Following dismissal of her § 1983 claims against the Individual Defendants, Plaintiff filed the instant motion on March 30, 2023, seeking leave to further amend her first

amended complaint to add language that her § 1983 claims are grounded in the First and Fourteenth Amendments of the United States Constitution and to rejoin the dismissed Individual Defendants. Not surprisingly, Defendant opposes the request, asserting that the proposed amendment will cause undue delay and therefore prejudice to Defendant and that Plaintiff's claims against the Individual Defendants are futile based on a variety of theories. Because the Court finds that there is no sound basis upon which to extend the amendment deadline in this case, it is unnecessary to reach the futility question.[2]

II. LEGAL STANDARD

Although the Sixth Circuit has not directly addressed whether a motion to amend is a dispositive or non-dispositive motion, most district courts in the Sixth Circuit, including this court, consider an order on a motion to amend to be non-dispositive. *See, e.g.*, *Gentry v. The Tenn. Bd. of Jud. Conduct*, No. 3:17-cv-00020, 2017 WL

[2] Although the Court does not delve into the futility of Plaintiff's newly asserted "constitutional claims", to the extent the District Judge construes any part of this order as a determination of futility, the undersigned respectfully requests that this order be treated as a report and recommendation.

2362494, at *1 (M.D. Tenn. May 31, 2017) ("Courts have uniformly held that motions to amend complaints are non-dispositive matters that may be determined by the magistrate judge and reviewed under the clearly erroneous or contrary to law standard of review . . .") (citations omitted); *Chinn v. Jenkins*, No. 3:02-cv-00512, 2017 WL 1177610, at *2 (S.D. Ohio Mar. 31, 2017) (order denying motion to amend is not dispositive); *Young v. Jackson*, No. 12-cv-12751, 2014 WL 4272768, at *1 (E.D. Mich. Aug. 29, 2014) ("A denial of a motion to amend is a non-dispositive order."); *Hira v. New York Life Ins. Co.*, No. 3:12- CV-00373, 2014 WL 2177799, at **1–2 (E.D. Tenn. May 23, 2014) (magistrate judge's order on motion to amend was appropriate and within his authority because motion to amend is nondispositive); *United States v. Hunter*, Nos. 3:06-cr-00061, 3:12-cv-00302, 2013 WL 5820251, at *1 (S.D. Ohio Oct. 29, 2013) (stating that a magistrate judge's orders denying petitioner's motions to amend a petition pursuant to 28 U.S.C. § 2855 were non-dispositive). *See also Elliott v. First Fed. Comm. Bank of Bucyrus*, 821 F. App'x 406, 412–13 (6th Cir. 2020) (referring generally to motion for leave to amend as non-dispositive motion).

Typically, motions for leave to amend are considered under the deferential standard of Federal Rule of Civil Procedure 15(a)(2),[3] which directs that the court "should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Under that standard, the district court has substantial discretion and may deny a motion for leave "based on undue delay, bad faith or dilatory motive or futility of amendment." *Pedreira v. Ky. Baptist Homes for Children*, 579 F.3d 722, 729 (6th Cir. 2009).

However, when a plaintiff moves to amend the complaint after the deadline established by a scheduling order, the Court's analysis shifts. In that instance, the "plaintiff first must show good cause under Rule 16(b) for failure earlier to seek leave to amend and the district court must evaluate prejudice to the nonmoving party before a court will [even] consider whether amendment is proper under Rule 15(a)." *Com. Benefits Grp., Inc. v. McKesson Corp.*, 326 F. App'x 369, 376 (6th Cir. 2009) (internal quotations omitted) (quoting *Leary v. Daeschner*, 349 F.3d 888, 909 (6th Cir. 2003)). *See also* Fed. R. Civ. P. 16(b)(4) ("A schedule may be modified only for good cause

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[3] Unless otherwise noted, all references to rules are to the Federal Rules of Civil Procedure.

and with the judge's consent."). Further, notwithstanding the language in Rule 15(a)(2) that leave to amend shall be freely granted, "a party must act with due diligence if [she] intends to take advantage of the Rule's liberality." *United States v. Midwest Suspension & Brake*, 49 F.3d 1197, 1202 (6th Cir. 1995) (citing *Troxel Mfg. Co. v. Schwinn Bicycle Co.*, 489 F.2d 968 (6th Cir. 1973)). "The longer the period of an unexplained delay, the less will be required of the nonmoving party in terms of a showing of prejudice." *Phelps v. McClellan*, 30 F.3d 658, 662 (6th Cir. 1994) (quoting *Evans v. Syracuse City Sch. Dist.*, 704 F.2d 44, 47 (2d Cir. 1983)) (internal quotation marks omitted).

"Despite the lenient standard of [Rule] 15(a) with regard to amending the pleadings, a court may deny leave to amend the pleadings after the deadline set in the scheduling order where the moving party has failed to establish good cause." *J.H. by Harris v. Williamson Cty., Tennessee*, No. 3:14-cv-02356, 2017 WL 11476336, at *2 (M.D. Tenn. May 18, 2017) (citing *Leary*, 349 F.3d at 906). The purpose of this requirement, and its heightened standard, is "to ensure that at some point both the parties and the pleadings will be fixed," subject only to

modification upon a showing of good cause. *Leary*, 349 F.3d at 906 (quoting Fed. R. Civ. P. 16(b), Advisory Committee's Note to 1983 Amendment (internal quotation marks omitted)). *See also Leffew v. Ford Motor Co.*, 258 F. App'x 772, 777 (6th Cir. 2007).

To demonstrate good cause, the plaintiff must show that (1) the original deadline could not reasonably have been met despite due diligence and (2) the opposing party will not suffer prejudice by virtue of the amendment. *Leary*, 349 F.3d at 906. Put another way, late-moving litigants must make a threshold showing that "despite their diligence they could not meet the original deadline." *Shane v. Bunzl Distribution USA, Inc.*, 275 F. App'x 535, 536 (6th Cir. 2008) (citing *Leary*, 349 F.2d at 906–07). A movant "does not establish 'good cause' to modify a case schedule to extend the deadline to amend pleadings where [he] was aware of the facts underlying the proposed amendment to [his] pleading but failed, without explanation, to move to amend . . . before the deadline." *Ross v. Am. Red Cross*, 567 F. App'x 296, 306 (6th Cir. 2014). Where a moving party's explanation for delay is simply insufficient or not credible, it is appropriate for the court to deny the motion for leave to amend. *Korn v. Paul Revere Life*

Ins. Co., 382 F. App'x 443, 450 (6th Cir. 2010); *Com. Benefits Grp.*, 326 F. App'x at 376. Only if the movant establishes "good cause" for an extension of the amendment deadline under Rule 16 does the court proceed to the more permissive Rule 15(a)(2) analysis. *Com. Benefits Grp.*, 326 F. App'x at 376.

III. ANALYSIS

Because the deadline to amend has passed, the preliminary question here is whether to amend the scheduling order, not whether to allow Plaintiff to amend the complaint. *J.H.*, 2017 WL 11476336 at *2. Accordingly, Plaintiff must demonstrate "good cause" by showing that, despite her due diligence, she could not have either amended her complaint before the June 3, 2022 deadline or sought an extension of that deadline before it occurred. Plaintiff must make this showing before the Court can reach the question of whether she may amend her complaint under Rule 15(a)(2). *Com. Benefits Grp.*, 326 F. App'x at 376.

Plaintiff has failed to establish "good cause" because she has not provided the Court with any evidence to show that she could not have moved to amend her

complaint or to enlarge the deadline for amendments before June 3, 2022.[4] To demonstrate "good cause" to support amending the scheduling order, Plaintiff argues that she only "just discovered the deficiency in her pleading" (Docket No. 86-1 at 4) as a result of Judge Richardson's memorandum opinion. However, a review of the circumstances shows that Plaintiff had more than adequate notice to have timelier sought an extension of the amendment deadline, even if not before the deadline.

In response to Plaintiff's original motion to amend in early June of 2022, Defendant plainly stated that "the proposed Amended Complaint does not once suggest, let alone

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[4] Neither party directly addresses "good cause" under Rule 16. Although Plaintiff refers to the good cause standard, she instead argues that she has not acted to delay, in bad faith, or with dilatory motive (Docket No. 86-1), which are all standards under Rule 15(a)(2). Similarly, Defendant argues primarily that Plaintiff's proposed amendments are futile under Rule 15(a)(2). (Docket No. 87.) Regardless, Plaintiff is not relieved of the requirement to demonstrate "good cause," which as discussed below, she has failed to do. Because no good cause is shown, the Court does not reach the parties' arguments for relief under Rule 15(a)(2). Nor would the undersigned be inclined to address the merits of Defendant's futility arguments in the context of a motion to amend because the Sixth Circuit has made clear that any analysis of the futility of proposed amendments is equivalent to that undertaken in consideration of a Rule 12(b)(6) motion, *Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 421 (6th Cir. 2000), which is within the purview of the District Judge.

allege a violation of a right protected by the Constitution." (Docket No. 50.) This language clearly put Plaintiff on notice of the deficiency of her amended pleading. However, rather than request that the Court permit her an opportunity to assert a constitutional basis for her claims against the Individual Defendants, Plaintiff simply glossed over the shortcoming without ever addressing it. (Docket No. 51.) Although a request by Plaintiff to make this additional amendment in June of 2022 would still have been untimely, it would have been only slightly so and would certainly not have resulted in the prejudice caused by the additional delay that has now ensued.

As grounds for their motion to dismiss Plaintiff's first amended complaint in July of 2022, the Individual Defendants again asserted that the complaint failed to allege a constitutional violation. (Docket No. 57-1 at 8-9.) Despite this plain contention – which was raised at a time when the discovery period had not yet expired – Plaintiff still took no action to further amend her complaint.

The onus was on Plaintiff to properly and timely move the Court for permission to amend her complaint in response to Defendant's contentions that the complaint

failed to adequately assert constitutional claims. Plaintiff could easily have moved to extend the amendment deadline in either June or July of 2022. Plaintiff apparently elected instead to wait for confirmation from the Court about the sufficiency (or, in this case, insufficiency) of her first amended complaint. The instant circumstances are ones of Plaintiff's own making and ones from which the Court finds no basis to grant her relief.[5]

Not only has Plaintiff failed to show that the original deadline could not reasonably have been met – or briefly extended – despite due diligence, she has also failed to demonstrate that Defendant would not suffer prejudice by virtue of the late amendment. *Leary*, 349 F.3d at 906. This case is now in its last stages before trial, with the discovery cut-off date having expired and a dispositive motion deadline only weeks away. (Docket No. 83.)

Accordingly, the Court concludes that Plaintiff has not shown good cause and that

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[5] The Court also wonders whether Plaintiff's request for leave to amend is even a proper mechanism by which she can obtain the ultimate relief she seeks, namely, to rejoin the Individual Defendants and proceed with § 1983 claims against them. That outcome is in the nature of relief under Rule 60, which requires a very different showing than the standard under Rule 15(a)(2). While an interesting academic question, the Court declines to further wade into that thicket.

her lack of diligence and resulting prejudice to Defendant weigh against amending the case management order under Rule 16(b) to extend the amendment deadline at this late date. Because the Court finds no good cause for extension of the amendment deadline, the Court does not reach either party's arguments under Rule 15(a)(2).

IV. CONCLUSION

For the foregoing reasons, Plaintiff's motion for leave to amend her complaint (Docket No. 86) is DENIED.

It is SO ORDERED.

/s/ BARBARA D. HOLMES
United States Magistrate Judge