United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
December 4, 2024
Lyle W. Cayce
Clerk

No. 24-10304

AMY PICKETT,

Plaintiff—Appellant,

versus

TEXAS TECH UNIVERSITY HEALTH SCIENCES CENTER, (TTUHSC); BARBARA CHERRY, *individually and in her official capacity as Department Chair of Leadership Studies*; MICHAEL EVANS, *individually and in his official capacity as Dean of School of Nursing*,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:20-CV-232

Before SMITH, STEWART, and DUNCAN, *Circuit Judges*.

PER CURIAM:*

After being dismissed from an academic program at Texas Tech University Health Sciences Center ("Texas Tech"), Amy Pickett sued Texas Tech and two officials under the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act ("RA"), and 42 U.S.C.

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

Pickett appeals the summary judgment dismissing her remaining failure-to-accommodate, disability discrimination, and § 1983 claims.

II.

We review Rule 12(b)(6) dismissals and summary judgments *de novo*. *Bridges v. Empire Scaffold, L.L.C.*, 875 F.3d 222, 225 (5th Cir. 2017); *Meador v. Apple Inc.*, 911 F.3d 260, 264 (5th Cir. 2018).[1]

III.

As noted, Pickett raises several claims for the first time on appeal. But "[i]t is a bedrock principle of appellate review that claims raised for the first time on appeal will not be considered." *Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Ctrs., Inc.*, 200 F.3d 307, 316–17 (5th Cir. 2000).

We turn to the September 2021 dismissal of Pickett's § 1983 claim sounding in procedural due process. Pickett asserted a protected interest in continued enrollment in the DNP/FNP program. *See Klingler v. Univ. of S. Miss., USM*, 612 F. App'x 222, 227 (5th Circ. 2015) (unpublished) (explaining that procedural or substantive due process claims require deprivation of a protected interest). But continued enrollment in that program is not a protected interest. *Barnes v. Symeonides*, 44 F.3d 1005, 1995 WL 10518, at *2 (5th Cir. Jan 3, 1995) (unpublished) ("Education—particularly post-graduate or professional education—is not a right afforded either explicit or implicit protection under the Constitution."). The district court therefore did not err. Nor did it err in dismissing Pickett's other § 1983

[1] Some of Pickett's claims warrant only plain error review because she failed to object to the magistrate's report and the district court did not independently review the record. *See Alexander v. Verizon Wireless Servs., L.L.C.*, 875 F.3d 243, 248 (5th Cir. 2017). We would affirm the district court's judgement under either plain error or *de novo* review, however, so the standard of review is immaterial.

copies of PowerPoint presentations, as opposed to the PowerPoint slides themselves. The district court correctly rejected that claim. The record shows that Pickett received all lecture notes, just not in her preferred format. *See E.E.O.C. v. Agro Distrib., LLC*, 555 F.3d 462, 471 (5th Cir. 2009) ("The ADA provides a right to reasonable accommodation, not to the employee's preferred accommodation.").[2]

AFFIRMED.

[2] We also reject Pickett's argument that the district court abused its discretion by refusing to consider new evidence that Pickett forwarded in objecting to the magistrate judge's findings and recommendations. *See Freeman v. County of Bexar* 142 F.3d 848, 852 (5th Cir. 1998) ("Litigants may not . . . use the magistrate judge as a mere sounding-board for the sufficiency of the evidence.").

The judgment entered provides that Appellant pay to Appellees the costs on appeal. A bill of cost form is available on the court's website www.ca5.uscourts.gov.

Sincerely,

LYLE W. CAYCE, Clerk

Melissa Mattingly

By: _____
Melissa V. Mattingly, Deputy Clerk

Enclosure(s)

Ms. Kirstin Erickson
Ms. Amy Pickett

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

AMY PICKETT,

Plaintiff,

v.

TEXAS TECH UNIVERSITY HEALTH SCIENCES CENTER, et al.,

Defendants.

No. 5:20-CV-232-H-BQ

ORDER

Before the Court are the Findings, Conclusions, and Recommendation (FCR) of United States Magistrate Judge D. Gordon Bryant (Dkt. No. 89), the "objections" filed by the pro se plaintiff, Amy Pickett. (Dkt. Nos. 92–96),[1] the response filed by the defendants (Dkt. No. 97), and the plaintiff's second set of objections (Dkt. No. 98).[2] Because Pickett has failed to specifically object to any portion of the FCR, or otherwise show any error in the magistrate judge's thorough FCR, the Court overrules the plaintiff's objections, adopts the FCR, and grants the defendants' motion for summary judgment (Dkt. No. 82). In light of that ruling, the Court denies the defendants' motion for judgment on the pleadings as moot (Dkt. No. 58), and it grants Pickett's motion to seal her response and attachments (Dkt. No. 63).

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[1] Pickett filed the same response or objection to the FCR five times, each with a different set of attachments. *See generally* Dkt. Nos. 92–96. Given that each filing is the same, though with different attachments, the Court construes them as a single "set of objections" to the FCR.

[2] Pickett's second set of objections was filed more than 14 days after FCR and, therefore, is considered late. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2). The Court need not consider late objections to an FCR. *Butler v. Arenivaz*, No. 5:20-CV-143-H, 2021 WL 2457187, at *1 n.1 (N.D. Tex. June 16, 2021) (citing *Scott v. Alford*, No. 94-40486, 1995 WL 450216, at *2 (5th Cir. July 6, 1995)). Nevertheless, the Court finds that consideration of Pickett's late objections is in the interest of justice.

Dkt. No. 64. The defendants' replied. Dkt. No. 74. Several months later, the defendants moved for summary judgment on Pickett's ADA, RA, and substantive due process claims. Dkt. No. 82. Pickett did not respond.

Judge Bryant issued an FCR recommending that the Court grant the defendants' motion for summary judgment, deny as moot the defendants' motion for judgment on the pleadings, and grant Pickett's motion to seal her response and attachments. Dkt. No. 89 at 2. Pickett timely filed her "objections," including a number of exhibits purporting to establish the factual veracity of her claims. Dkt. Nos. 92–96. The defendants responded to Pickett's objections. Dkt. No. 97. Pickett also replied to the defendants' response. Dkt. No. 98.[3] The FCR is now ripe and before the Court.

2. Standard of Review

A party who seeks to object to any part of a magistrate judge's FCR must file specific written objections within 14 days after being served with a copy. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2). When a party timely objects, a magistrate judge's FCR regarding a dispositive matter is reviewed de novo. Fed. R. Civ. P. 72(b)(3). The district court may then accept, reject, or modify the recommendations or findings, in whole or in part. *See id.* Objections to the FCR must be specific; they must "put the district court on notice of the urged error." *Williams v. K&B Equip. Co.*, 724 F.2d 508, 511 (5th Cir. 1984). "[A]n objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found." *Thompson v. Bumpas*, No. 4:22-cv-0640-P, 2022 WL 17585271, at *1 (N.D. Tex. Dec. 12, 2022) (citing *United States v.*

[3] *See supra* note 2.

that the Court "need not consider." *Battle*, 834 F.2d at 421. Further, given that Judge Bryant's determination of the facts was permissible under Federal Rule of Civil Procedure 56, the Court determines that Judge Bryant did not err, clearly or otherwise.

Additionally, the Court notes that it need not consider the extra evidence supplied by Pickett in her various filings related to the FCR. A court weighs four factors when determining whether to consider evidence supplied in an objection to a FCR:

> (1) the moving party's reasons for not originally submitting the evidence; (2) the importance of the omitted evidence to the moving party's case; (3) whether the evidence was previously available to the non-moving party when it responded to the summary judgment motion; and (4) the likelihood of unfair prejudice to the non-moving party if the evidence is accepted.

Performance Autoplex II Ltd. v. Mid-Continent Cas. Co., 322 F.3d 847, 862 (5th Cir. 2003). Here, the plaintiff has not justified her late submission of evidence. Much of the evidence supplied by the plaintiff was already in the record. *See* Dkt. No. 97 at 10; *see also* Dkt. Nos. 82-3; 82-4. The evidence supplied by Pickett was all previously available to her. Further, as noted in their response, admitting this evidence would prejudice the defendants. *See* Dkt. No. 97 at 13.

In short, the Court concludes that it does not need to consider the untimely evidence supplied by Pickett. Litigants may not use a magistrate judge as a sounding board for the sufficiency of the evidence. *Freeman v. County of Bexar*, 142 F.3d 848, 852 (5th Cir. 1998). And even had the Court considered the plaintiff's new evidence, it would not transform Pickett's generalized and conclusory objections into specific ones or otherwise show error. Therefore, the Court's conclusion in this Order would have been the same.