IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-15-324-C
	)	
1. SOUTHEASTERN OKLAHOMA STATE UNIVERSITY, and	)	
	)	
2. THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA	)	
	)	
Defendants.	)	

DEFENDANTS SOUTHEASTERN OKLAHOMA STATE UNIVERSITY AND THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA'S REPLY TO PLAINTIFF/INTERVENOR'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF/INTERVENOR'S COMPLAINT IN PART

Defendants, Southeastern Oklahoma State University, ("SEOSU"), and The Regional University System of Oklahoma ("RUSO"), (collectively "University Defendants" or "the State"), and pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) and LCvR7.1(i), submit the following Reply brief to Intervenor's Response to Defendants' Motion asking this Court for an order dismissing Plaintiff/Intervenor's Complaint [Doc. No. 24] in part. In further support of their Motion, Defendants offer the following:

ARGUMENT AND AUTHORITY

I. INTERVENOR'S COMPLAINT LACKS SUFFICIENT SUPPORTING FACTUAL AVERMENTS TO MAINTAIN THE TITLE VII HOSTILE WORK ENVIRONMENT CLAIM.

Despite Intervenor's prodigious use of lengthy, single-spaced footnotes in the 24-page Response brief, (as well as Intervenor's attachment of three exhibits thereto), the fact remains that Intervenor's actual Complaint itself offers little in the way of factual allegations tending to show a plausible claim for hostile work environment based on gender. Intervenor's Response completely ignores Defendants' citation to the United States Supreme Court's *Meritor Sav. Bank* decision and the six-part framework for making a hostile work environment case. Intervenor also wholly omits any refutation of Defendants' notation of the Tenth Circuit's *Etsitty* decision and the explicit statement regarding protected classes under Title VII. As to the restroom or wardrobe points, it is not even alleged that Intervenor was consistently told that certain restrooms should be used, or that a certain dress code should be followed. The Complaint's paucity of actual factual averments showing continual, severe, and pervasive hostility toward Intervenor in her workplace suggests that such a claim lacks the plausibility required by Rule 8, *Twombly*, and *Iqbal*.

Further, Intervenor's exhibits to the Response actually support this view as well. As an initial matter regarding Intervenor's exhibits, and as set forth in Defendants' Motion to Dismiss, fn. 1, the Court may take judicial notice of the EEOC materials without converting Defendants' motion into one for summary judgment. Intervenor's Response offers three (3) new exhibits, each of which in their own way indicate not only that the Complaint is deficient,

but that Intervenor will not plausibly uncover facts in Discovery tending to show a viable hostile work environment claim based on animus toward gender expression or transgender individuals. Dismissal under Rule 12(b)(6) is appropriate.

a. Exhibit A

This exhibit purports to be a four (4) page complaint or request for investigation made by Intervenor to the U.S. Department of Education. The document is dated August 31, 2010, three years after Intervenor alleges the transition from presentation as a male to a female, and three years after the University's health plan allegedly excluded transgender individuals. This exhibit makes no mention of transgender issues at all. The thrust of this document is that University officials expressed animosity and dismissiveness toward Native Americans (of which group Intervenor claims to be a member). The document offers nothing in the way of allegations of hostility in the workplace toward transgender individuals generally, or Intervenor in particular due to anything related to transgender status.

b. Exhibit B

This exhibit purports to be a seven (7) page complaint letter from Intervenor to the EEOC Office in Oklahoma City. The document is conspicuously undated, but references a charge number [564-2011-00849] suggesting at least that this document was written after the July 6, 2011 EEOC Charge of the same number (See discussion of Exhibit C, below), which is as much as four (4) years after the allegedly offensive treatment began. This is also after Intervenor's tenure application was denied. This document begins with a nearly identical recitation of the allegations in Exhibit A, then further suggests that discrimination against

Intervenor is based not only on animus toward Native Americans, but Intervenor's gender, too. The document's reference to two deserving female candidates awarded tenure in Intervenor's department is followed by Intervenor's contentions that the three candidates' records are "equivalent," and therefore tenure should have been awarded to all three of them. Essentially, the letter invites the EEOC or any reviewing court to sit as an academic super-review committee, second-guessing the academic determinations made by University Defendants' personnel. This exhibit lacks any factual allegation (as contrasted with conclusion-jumping statements) of events or actions demonstrating animus toward transgender individuals.

c. Exhibit C

This exhibit purports to be a two (2) page charge of discrimination submitted by Intervenor to the EEOC. The document is dated July 6, 2011, some three or four years after the hostile work environment allegedly began. The document states Intervenor alleges workplace discrimination based on gender, religion, and Intervenor's status as a Native American. This document cites to several alleged isolated slights over a four year period. Notably, nothing relating to Intervenor's transgender status (as opposed to Native American heritage, for example) is alleged to have occurred within a 300-day window prior to the July 6, 2011 charge itself (that is, post-September 9, 2010). Defendants submit that even if the facts alleged in this exhibit were taken as true, they do not even collectively state a claim for the type of severe and pervasive workplace animus toward transgender persons necessary to make a plausible claim for hostile work environment.

II. INTERVENOR FAILED TO EXHAUST ADMINISTRATIVE REMEDIES AS TO ANY "HOSTILE WORK ENVIRONMENT" CLAIM, AND ANY SUCH CLAIM WOULD NOW BE UNTIMELY.

"Hostile work environment" not specified

Intervenor never complained to the University Defendants about a hostile work environment. Intervenor also did not make that claim to the EEOC. As Exhibits A, B, and C to Intervenor's Response brief make clear, the allegations presented to the Department of Education and EEOC were apparently based on sex, religion, Native American status, and retaliation. The Court may infer from Plaintiff's Complaint [Doc. No. 1] filed herein that the United States also took the position that Intervenor had not pursued a claim of "hostile work environment," since Plaintiff's Complaint presents no such claim. Intervenor's Response brief contends that the University Defendants mistakenly argue Intervenor should have complained about each and every incident constituting a hostile work environment. But what Intervenor fails to appreciate is that such a complaint was never made, and that is the issue with regard to exhaustion. One of the purposes of the policy requiring exhaustion of remedies is to give entities like the University a chance to identify and correct mistakes as they occur. Intervenor's failure to complain about alleged wardrobe restrictions, restroom assignments, or verbal misgendering deprived the University of the chance to address and change problems along the way.

Further, failure to exhaust remedies is not a mere formality to bringing suit under Title VII; it is a jurisdictional bar. "Exhaustion of administrative remedies is a 'jurisdictional prerequisite' to suit under Title VII." *Jones v. Runyon*, 91 F.3d 1398, 1399 (10th Cir.1996).

Intervenor cites *Anderson v. Clovis Mun. Schs.* for the proposition that the EEOC charge need not actually invoke the phrase "hostile work environment" in order to have administratively exhausted such a claim sufficiently to include it in the present lawsuit. However, the *Anderson* case is significantly factually divergent from the present case. In Anderson's EEOC charge, the plaintiff therein apparently "stated that '[b]eginning in February 2005 and continuing on a continuous basis I have been subjected to adverse terms and conditions unlike my peers.'" *Anderson v. Clovis Mun. Sch.*, 265 F. App'x 699, 706 (10th Cir. 2008). In the present case, Intervenor's EEOC charge makes no mention of a "continuing" or "continuous" environment of transgender discrimination. Further, going back 300 days prior to the charge, nothing before September 9, 2010 would be actionable. From the face of the charge, (Exhibit C to Intervenor's Response), the factual assertions after that date appear to either deal squarely with academic determinations or alleged retaliation - not a "hostile work environment."

Intervenor's Response does not dispute that timely exhaustion is a jurisdictional prerequisite. But rather than pursuing the alleged claims of discrimination based on sex, religion, or Native American status, or the claim of retaliation, Intervenor now invites this Court to read something additional into the EEOC charge that even the EEOC and Department of Education's Office of Civil Rights (DOE) apparently did not find. Tellingly, neither the Plaintiff's Complaint (based explicitly on the EEOC charge and subsequent investigation) nor the DOE correspondence (attached as Exhibit 1 to Defendants' Amended Motion to Dismiss) included any references to a claim for hostile work environment. Intervenor simply did not allege continuing or pervasive harassment, and certainly failed to timely exhaust administrative

remedies relative to a charge of hostile work environment. That failure deprives this and any other Court of jurisdiction to hear such a charge. Dismissal under Rule 12(b)(1) is appropriate.

"Hostile work environment" charge not timely made

Intervenor's Response cites to the case of *National Railroad Passenger Corp. v. Morgan,* 536 U.S. 101, 117, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) for the proposition that as long as any of the alleged bad acts took place within the limitations period then all of any alleged bad acts, no matter how temporally distant, may be considered or compensable under the rubric of "hostile work environment." Intervenor's Response then cites to the three attached exhibits for the proposition that the Complaint "plainly paint[s] a picture of a workplace permeated with hostility because of sex." [Doc. No. 31, p. 15]. However, as discussed above, the exhibits do not show that at all. In fact, the allegations contained in those exhibits relate more to academic disagreements or allegations of animus directed at Native American culture and individuals. The exhibits do not offer facts supportive of a claim of hostile work environment toward transgender individuals. If anything, Intervenor's exhibits demonstrate that there was not a continuing, severe, and pervasive atmosphere of discrimination toward transgender identification or persons.

According to the Tenth Circuit, the *Morgan* case does not offer the sort of blindly broad-brushed sweep suggested by Intervenor. While acknowledging the difficulty of isolating a series of discrete events relating directly to a hostile work environment situation, the Tenth Circuit said the following:

> Even so, however, **an employee may not unreasonably delay the filing of a hostile work environment claim.** *Morgan* explains that when analyzing a hostile work environment claim spanning longer than 300 days "[a] court's task is to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether any act falls within the statutory time period." *Id.* at 120, 122 S.Ct. 2061. *Morgan* emphasizes that **there must be a relationship between acts alleged after the beginning of the filing period and the acts alleged before the filing period**: "if an act on day 401 had no *1309 relation to the acts between days 1–100, or for some other reason, such as certain intervening action by the employer, was no longer part of the same hostile environment claim, then the employee cannot recover for the previous acts, at least not by reference to the day 401 act." Id. at 118, 122 S.Ct. 2061. *Morgan* holds that a series of alleged events comprises the same hostile environment where "the pre- and post-limitations period incidents involve[d] **the same type of employment actions, occurred relatively frequently, and were perpetrated by the same managers**." Id. at 120, 122 S.Ct. 2061 (citation to court below omitted).
>
> *Duncan v. Manager, Dep't of Safety, City & Cnty. of Denver*, 397 F.3d 1300, 1308-09 [Emphasis added]

Herein, the events alleged by Intervenor in the EEOC charge to have occurred after September 9, 2010 are not of the type relating to transgender issues or hostility. Not only did Intervenor unreasonably delay, but the academic and allegedly "retaliatory" events occurring within the limitations period bear no relationship in character to the arguably "transgender-related" events in the pre-limitations period. The series of events alleged to have happened before and after September 9, 2010 are not even the same types of employment actions. Intervenor's Title VII hostile work environment claim is fatally flawed and should be dismissed under Rule 12(b)(1).

III. DOCTRINE OF LACHES BARS INTERVENOR'S COMPLAINT

While Intervenor's Response argues that the doctrine of laches "turns on intensive

factual inquiry" making it ill-suited for consideration in a motion to dismiss, the University Defendants have merely adopted the dates alleged by Intervenor's own Complaint. Assuming those dates to be accurate as alleged, no further inquiry is needed, and the delay is self-evident. The question then becomes one of demonstrated harm.

If Intervenor felt subjected to a hostile work environment due to alleged directives about restroom use or dress codes in 2007, the delay in raising those concerns with the University Defendants prevented the University leadership from taking corrective action. Intervenor's Complaint does not allege any objections (written or verbal) were made regarding restroom directives or dress codes. A complaint made at the outset, or even in 2008 or 2009, could have resulted in the University Defendants taking corrective measures, thereby not only eliminating an alleged situation repugnant to Intervenor, but could have also used the event as a moment of candid self-improvement. But no such complaint is alleged to have been made, by Intervenor or anyone else. Intervenor's objection to an "old Supreme Court case" notwithstanding, the rationale in *Lane* remains clear, and undisturbed. Given the length of Intervenor's delay in bringing the present defective hostile work environment claim, as in *Lane*, changes in the agency at issue necessarily make reinstatement impossible. Further, changes in personnel, and the fading of individual and collective memory, work a prejudice upon the University Defendants. Demonstrating precisely what was lost could prove challenging, because a large entity like a University system does not know "what it doesn't know," let alone "what it knew" as many as eight years ago. Intervenor's delay should not be rewarded, and the hostile work environment claim should be dismissed.

CONCLUSION

Count One of Intervenor's Complaint is fatally flawed, and should be dismissed with prejudice now. Intervenor failed to allege proper and timely compliance with Title VII's exhaustion requirements, fails to establish any court's jurisdiction as to the putative hostile work environment claim, and fails to allege sufficient factual averments in compliance with *Twombly* and *Iqbal*. For the reasons set forth previously, Defendants pray this Court will dismiss Count One with prejudice, and for all such other relief as this Court deems appropriate.

Respectfully submitted,

/s/Jeb E. Joseph
DIXIE L. COFFEY, OBA #11876
KINDANNE JONES, OBA #11374
JEB E. JOSEPH, OBA #19137
Assistant Attorneys General
Oklahoma Attorney General's Office
Litigation Division
313 NE 21st Street
Oklahoma City, OK 73105
Telephone: 405.521.3921
Facsimile: 405.521.4518
Email: dixie.coffey@oag.ok.gov
kindanne.jones@oag.ok.gov
jeb.joseph@oag.ok.gov
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of June, 2015, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Allan Townsend Delora Kennebrew Meredith Burrell US Dept of Justice Civil Rights Division-DC 950 Pennsylvania Avenue NW Rm 49258 PHB Washington, DC 20530 Email: allan.townsend@usdoj.gov delora.kennebrew@usdoj.gov meredith.burrell@usdoj.gov *Attorneys for United States of America*	Brittany Novotny 401 N. Hudson Ave Oklahoma City, OK 73102 Email: brittany.novotny@gmail.com *Attorney for Intervenor Plaintiff*
Jillian Weiss Ezra Young Law Office of Jillian T. Weiss, P.C. P.O. Box 642 Tuxedo Park, NY 10987 Email: jtweiss@jtweisslaw.com eyoung@jtweisslaw.com *Attorney for Intervenor Plaintiff*	

/s/ Jeb E. Joseph
Jeb E. Joseph