UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

KIMBERLY A. HIVELY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO.: 3:14-cv-01791-RL-CAN
	)	
IVY TECH COMMUNITY COLLEGE,	)	
	)	
Defendant.	)	

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

I. Introduction

Plaintiff filed a two-count Complaint alleging that she was "[d]enied fulltime employment and promotions based on sexual orientation" in violation of Title VII and Section 1981. [DE 1]. Ivy Tech then moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6). [DE 8 & 9]. Ivy Tech's motion was premised on the fact that neither of the identified laws recognize sexual orientation as a protected class. Plaintiff then filed a response and this is Ivy Tech's reply to it. [DE 12]. It is now clear that the dismissal of Plaintiff's Complaint is warranted and this case can be brought to an end.

II. Plaintiff's Complaint Fails to State a Claim

As noted above, Plaintiff contends that she was not hired and/or promoted as a result of her sexual orientation in violation of Title VII and Section 1981. In turn, Ivy Tech asked the Court to dismiss these claims as they are simply not cognizable. Plaintiff's response, while emphatic, cannot avoid controlling black letter law.

A. "Only Race Discrimination Claims" are Recognized Under Section 1981

Plaintiff seems to concede her claim under Section 1981 as she does nothing to address Ivy Tech's arguments in her response brief. This is not surprising as it is crystal clear that "only race discrimination claims may be brought under [Section 1981]" and "sexual orientation based claims are not cognizable under § 1981." *Perez v. Norwegian-American Hosp., Inc.*, 93 Fed. Appx. 910, 913 n.1 (7th Cir. 2004); *Divers v. Metro. Jewish Health Sys.*, 2009 U.S. Dist. LEXIS 2312, n.5 (E.D.N.Y. Jan. 14, 2009); *see also Bratton v. Roadway Package Sys.*, 77 F.3d 168, 177 (7th Cir. 1996). Plaintiff's claim under Section 1981 is frivolous and must be dismissed.

B. Sexual Orientation Discrimination is "Not, Under Any Circumstances, Proscribed by Title VII"

Unlike the Section 1981 claim, Plaintiff does discuss the Title VII claim in her response. Specifically, Plaintiff notes that there are "changing attitudes" toward sexual orientation and argues that "the law is not ripe because of a continuously changing climate toward gay rights." [DE 12, p. 1]. While perceptions regarding sexual orientation may well be changing, there is no need to analyze "attitudes" or the "climate" to resolve Plaintiff's Title VII claim. This is true because "the Seventh Circuit has unequivocally held that this type of discrimination is not, under any circumstances, proscribed by Title VII." *Wright v. Porters Restoration, Inc.*, 2010 U.S. Dist. LEXIS 62614, *12 (N.D. Ind. June 22, 2010) (citing *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701 (7th Cir. 2000)) (emphasis added); *Hamzah v. Woodmans Food Mkt.*, 2014 U.S. Dist. LEXIS 38183 (W.D. Wis. Mar. 24, 2014) (dismissing a purported sexual orientation discrimination claim with prejudice). The Seventh Circuit has also held that "to the extent [plaintiff] seeks to have this court judicially amend Title VII to provide for such a cause of action, we decline to do so." *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002). In fact, "[i]t is wholly inappropriate, as well as constituting a clear violation of the

separation of powers, for this court, or any other federal court, to fashion causes of action out of whole cloth, regardless of any perceived public policy benefit." *Id*. (emphasis added). Sexual orientation is not a class protected by Title VII and, as a result, Plaintiff's Title VII claim should be dismissed.[1]

III. Plaintiff's "Request . . . to Amend the Initial Complaint" is Futile

Likely seeing the handwriting on the wall, Plaintiff's response shifts the focus away from the two claims actually found in the Complaint to "regulations that govern both the State and City" in which Ivy Tech operates. [DE 12, p. 1]. In doing so, she references "Indiana's own constitution," a local ordinance, and an employee handbook. [DE 12, p. 1-2]. These references then culminate in the last line of Plaintiff's response in which she "request[s] permission to amend the initial complaint to include the state and local rules and [Ivy Tech's] employment policy." [DE 12, p. 3 (emphasis added)].[2]

To the extent Plaintiff is seeking to amend her complaint, Magistrate Judge Cosbey recently articulated the applicable standard as follows:

[1] Ivy Tech also notes that there have been several unsuccessful attempts to pass the Employment Non-Discrimination Act ("ENDA"). The explicit purpose of passing ENDA would be to prohibit employment discrimination on the basis of sexual orientation. (http://en.wikipedia.org/wiki/Employment_Non-Discrimination_Act). Of course, if Title VII already contained such a prohibition, there would be no point to such legislation. *See Johnson v. Shinseki*, 2013 U.S. Dist. LEXIS 67561 (E.D. Mo. May 13, 2013) ("Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation" and "because plaintiff is plainly making a Title VII claim on the basis of her sexual orientation, a characteristic not protected by Title VII, plaintiffs complaint must be dismissed").

[2] As an aside, Plaintiff has not included a "signed proposed amendment as an attachment" in accordance with N.D. Ind. L.R. 15-1(a) and the apparent combination of Plaintiff's response brief with a motion for leave to amend may be improper. *See generally*, N.D. Ind. L.R. 7-1(a) (motions may generally not be combined); *Mickelson v. Mickelson*, 577 Fed. Appx. 613 (7th Cir. 2014) ("district courts may require pro se litigants to comply strictly with local rules").

> "[T]he decision to grant or deny a motion to file an amended pleading is a matter purely within the sound discretion of the district court." *Soltys v. Costello*, 520 F.3d 737, 743 (7th Cir. 2008) (alteration in original) (citation omitted). "The court 'should freely give leave when justice so requires.'" *Id*. (quoting Fed. R. Civ. P. 15(a)(2)); *see Foman v. Davis*, 371 U.S 178, 182 (1962). "Although the rule reflects a liberal attitude towards the amendment of pleadings, courts in their sound discretion may deny a proposed amendment if the moving party has unduly delayed in filing the motion, if the opposing party would suffer undue prejudice, or if the pleading is futile." *Soltys*, 520 F.3d at 743; *see Foman*, 371 U.S. at 182.

USI Ins. Servs., LLC v. Ryan, 2014 U.S. Dist. LEXIS 145826 (N.D. Ind. Oct. 10, 2014) (denying leave to amend in part).

Assuming the federal claims in Plaintiff's original Complaint are dismissed for the reasons set forth above, the proposed amendment would be futile. Specifically, the Court would have no jurisdiction over the proposed amendment "to include the state and local rules and [an] employment policy" as these would be purely state law claims and diversity is lacking. *See* Ind. Code §21-22-2-2 ("Ivy Tech Community College of Indiana" is a "state educational institution"); DE 1 (identifying Plaintiff's address as being in South Bend, Indiana). Denying leave to amend in such circumstances is clearly proper. *Braun v. Gonzales*, 2013 U.S. Dist. LEXIS 85544, 3-4 (E.D. Pa. June 17, 2013) (denying *pro se* motion to amend as "amendment would be futile because it is apparent that this case concerns matters of state law and that there is no basis for diversity jurisdiction"); *Hernandez v. Milano Rest.*, 2012 U.S. Dist. LEXIS 106878 (E.D. Cal. July 31, 2012) (as there was no cognizable federal claim and diversity jurisdiction did not exist, the complaint was "dismissed without leave to amend"); *Williams v. Jones*, 2012 U.S. Dist. LEXIS 49940 (M.D. Fla. Apr. 10, 2012) ("the proposed amended complaint does not establish either diversity or federal question jurisdiction, and as such, would be futile"); *Le Blanc v. Cleveland*, 248 F.3d 95 (2d Cir. 2001) (finding no other basis for jurisdiction over state law claim, "district court concluded that . . . an amendment would be futile because diversity could not be established").

Finally, while Congress may have "validly abrogated the States' Eleventh Amendment immunity with respect to Title VII disparate treatment claims," it has not done so in regard to other federal claims. *Nanda v. Bd. of Trs. of the Univ. of Ill.*, 303 F.3d 817 (7th Cir. 2002). Thus, if Plaintiff's Title VII claim is dismissed, and she goes back to the drawing to try to articulate some other federal claim, Ivy Tech – as an arm of the state – is almost certainly immune under the Eleventh Amendment. *McCullough v. IPFW Univ.*, 2013 U.S. Dist. LEXIS 20224 (N.D. Ind. Feb. 11, 2013) (denying motion to amend complaint as state university was immune from various federal claims). Plaintiff's effort to amend her Complaint is futile for this independent reason as well.

IV. Conclusion

The two claims in Plaintiff Complaint are not cognizable and must be dismissed. Moreover, Plaintiff's request to amend her Complaint is futile and should be denied. As such, Ivy Tech respectfully requests that Plaintiff's claims be dismissed with prejudice and without leave to amend.

Respectfully submitted,

BARNES & THORNBURG LLP

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing document has been served this 21st day of November, 2014, by depositing a copy of the same in the United States mail, first-class postage prepaid and properly addressed to the following *pro se* plaintiff:

Ms. Kimberly Hively
1112 S. 25th Street
South Bend, IN 46615

s/Jason T. Clagg
Jason T. Clagg