United States District Court
Southern District of Texas
Houston Division

JOAN R.M. BULLOCK, Plaintiff, v. THE BOARD OF REGENTS OF TEXAS SOUTHERN UNIVERSITY, *et al.*, Defendants.	Case 4:22-cv-3223

DEFENDANTS' MOTION TO DISMISS AND MOTION FOR MORE DEFINITE STATEMENT

When Texas Southern University hired Joan Bullock to serve as dean of its Thurgood Marshall Law School, it did not grant her tenure. That single fact, established through judicially noticeable public records, disposes of this case.

Bullock has sued defendants who aren't amenable to suit; they are immune from Bullock's claims because of their status as entities and agents of the State of Texas. She seeks remedies prohibited by the law; the Court can't award her money damages. And her claims turn on a fact that she cannot establish; they depend on her having been granted tenure—which she wasn't.

The Court lacks jurisdiction over most of the claims in Bullock's complaint. The rest of the complaint does not state a claim upon which relief can be granted. The Court should dismiss or, in the alternative, order her to replead with a more definite statement that might establish jurisdiction.

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Background

Roughly two years ago, TSU's Board of Regents approved Bullock's hiring and appointment as Thurgood's dean. It did not, however, award her tenure when it did so. *See* Exh. A. Under the Board's policies and the Faculty Manual it promulgated, only the Board can confer tenure upon a professor. *See* Exh. B at § 4.9 ("Tenure is not automatic and can be conferred only by the Board of Regents."). Bullock does not allege that it has delegated that power.

During the two years Bullock served as dean, student performance on the Texas Bar Exam declined, Thurgood's students revolted against her leadership to the extent that TSU's president and interim provost had to have meetings with student-body leaders to address their concerns over Bullock's performance, and Thurgood's faculty issued a vote of no-confidence in Bullock's leadership. Dkt. 24 at 8, 11. Moreover, the one class Bullock taught at Thurgood, a 1L tort course, went so poorly that an additional faculty member had to be brought in to assist her. *Id.* at 11.

TSU terminated Bullock on June 15, 2022. Dkt. 1 ¶ 4.24. Bullock demanded the protections of the processes reserved for the review of employment actions taken against tenured professors. *Id.* ¶¶ 4.23, 4.35, 4.37. TSU has not given them to her.

Three months later, Bullock sued. Dkt. 1. She named as defendants the TSU's Board of Regents; every non-student Regent; and three university officials, the vice president for human resources, the interim provost, and the

president. *Id.* ¶¶ 3.2–3.10. She asserts in three claims, never differentiating among the Defendants, that:

- **Due process:** The Defendants, acting under color of law, *see* 42 U.S.C. § 1983, violated her fundamental rights[1] and her right to due process by depriving her of her property interest in continued employment. *Id.* ¶¶ 5.1–5.8.

- **Breach of contract:** The Defendants violated a contract with her. *Id.* ¶¶ 5.9–5.15.

- **First Amendment retaliation:** She was fired because she made protected speech on matters of public concern. *Id.* ¶¶ 5.16–5.19.

She seeks three remedies. First, she seeks an order directing TSU to put her through the process that applies to tenured professors against whom it seeks to take an adverse employment action. *Id.* at ¶ 9.2. Second, she seeks an order reinstating her to "her former position as a tenured professor of law at TSU," though she does not specify whether this is in addition to or in place of the hearing she requests. *Id.* at ¶ 9.3. Third, as an alternative to that injunctive relief, she seeks money damages. *Id.* at ¶ 9.6. She also seeks an order reinstating her to Thurgood's faculty pending final judgment. *Id.* at § 6.

Issues for the Court

1. **Sovereign immunity:** Does sovereign immunity preclude subject-matter jurisdiction over Bullock's breach of contract claim and her due-process claims against most of the Defendants?

[1] Often said to be protected by the "substantive" component of the Fourteenth Amendment's Due Process Clause," many scholars (and at least one Supreme Court justice) now suggest that these rights are actually protected by that amendment's Privileges and Immunities Clause. That battle need not be waged here as Bullock names both as bases for the right's protection. Dkt. 1 at § 5.A.

2. **Qualified immunity:** Does qualified immunity preclude Bullock's First Amendment and due-process claims?

3. **Lack of standing**: Has Bullock sufficiently alleged that her alleged injuries are traceable to the Defendants?

4. **Conclusive evidence:** Does the conclusive, judicially noticeable evidence establish that Bullock was not granted tenure negate an element of her due-process claims—a property interest in her continued employment?

5. **First Amendment:** Was Bullock's alleged speech made in the capacity of and in furtherance of her official duties as dean?

6. **Lack of privity:** Has Bullock properly alleged the existence of a contract?

Summary of the Argument

Bullock indiscriminately asserts three claims—for breach of contract and violation of her First Amendment and due process rights—against all 13 named Defendants in both their individual and official capacities as officers of TSU.

First, sovereign immunity bars most of Bullock's claims, including her official-capacity breach of contract claim, her official-capacity § 1983 claims for money damages, and her individual-capacity claims for injunctive relief.

Second, Bullock lacks standing to bring her § 1983 claims. Bullock does not allege a single action by 10 of 13 Defendants, much less plausible allegations showing traceability or a causal connection between her alleged constitutional deprivations and each individual Defendant's conduct.

Third, Bullock does not state a viable First Amendment retaliation claim because her alleged speech was not made as a public citizen on a matter of

public concern but rather in furtherance of her official job duties as Thurgood's Dean.

Fourth, Bullock's due-process claims fail because she did not have a recognized property interest (*i.e.*, tenure).

Fifth, Bullock's § 1983 individual-capacity claims additionally fail because the Defendants have qualified immunity. Alternatively, Bullock should be ordered to furnish a more definite statement with allegations that overcome that immunity.

Finally, Bullock's individual-capacity breach-of-contract claim fails due to a lack of contractual privity between Bullock and the Defendants.

Legal Standards

A. Rule 12(b)(1).

The Court must dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1) if it "lacks the statutory or constitutional power to adjudicate the case." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (citing *Home Builders Assn. of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998)). Subject-matter jurisdiction is for the court to decide even if the question hinges on legal or factual determinations. *Id.* (citing *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996)).

B. Rule 12(b)(6).

A complaint should be dismissed if it "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Courts deciding whether a complaint meets that standard generally must accept the factual allegations in the complaint as true. *McCoy v. Ku Ku*, 2018 WL 4220843, at *3 (S.D. Tex.

Sept. 5, 2018) (Hanks, J.) (citing *Harrington v. State Farm Fire & Cas. Co.*, 563 F.3d 141, 147 (5th Cir. 2009)). However, a court may venture outside the complaint to consider matters of which it may take judicial notice. *See Funk v. Stryker Corp.*, 631 F.3d 777, 782–83 (5th Cir. 2011).

A complaint meets the minimum standard to avoid dismissal if it contains sufficient factual allegations, as opposed to legal conclusions, to state a claim for relief that is "plausible on its face," though this can be "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" *Id.* (internal citations omitted). "Facial plausibility" means that the pleaded facts allow a reasonable inference that the defendant is liable for the misconduct alleged. *Montoya v. FedEx Ground Package Sys., Inc.*, 614 F.3d 145, 148 (5th Cir. 2010) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice" to state a claim. *Iqbal*, 556 U.S. at 678. Nor does a claim brought under an invalid legal theory. *Montoya*, 614 F.3d at 148 (citing *Iqbal*, 556 U.S. at 678).

C. Rule 12(e).

A party may move for a more definite statement of a pleading that "is so vague or ambiguous that the party cannot reasonably prepare a response." *Arredondo v. Univ. of Tex. Med. Branch at Galveston*, 2017 WL 3287589, at *2 (S.D. Tex. Aug. 2, 2017) (Hanks, J.). When a complaint is not clear as to the claims and allegations being made against each defendant, a more definite statement is warranted. *See Burr v. JPMorgan Chase Bank, N.A.*, 2012 WL 1059043, at *8 (S.D. Tex. Mar. 28, 2012) (Hanks, J.) (complaint was "not

clear as to the claims and allegations being made against FMNA separate and apart from those being made against JPMorgan"). When a defendant raises qualified immunity, a "court may order . . . a more definite statement under Rule 12(e)" rather than a reply to the answer. *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998).

Argument and Authority

A. Sovereign immunity bars most of Bullock's claims.

As a threshold matter, TSU—that is, the Board of Regents—is entitled to sovereign immunity on all of Bullock's claims asserted in this lawsuit. *See Weeks v. Tex. A&M Univ.*, 2018 WL 1033254, at *5 (S.D. Tex. Feb. 21, 2018) (Hanks, J.) ("Under Texas law, state universities are agencies of the state and enjoy sovereign immunity. . . .") (internal citation omitted). Moreover, because "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office" and, therefore, "is no different from a suit against the State itself," the individuals sued in their official capacities are immune to the same extent as TSU. *See Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 (1989).

Sovereign immunity also precludes jurisdiction over the Board of Regents regardless of the relief sought, whether injunctive or monetary. In *Doe v. Harrell*, the Fifth Circuit held that the University of Texas Board of Regents was immune from all claims, including those under § 1983, because the narrow *Ex parte Young* exception for prospective relief does not apply "in suits against States and their agencies, which are barred regardless of the relief sought." 841 Fed. Appx. 663, 668–69 (5th Cir. 2021) (quoting *P.R.*

Aqueduct & Sewer Auth. v. Metcalf Eddy, Inc., 506 U.S. 139, 146 (1993)). Similarly, in *Owens v. Board of Regents of Texas Southern University*, the Court held that TSU's Board of Regents was an improper party to a suit for prospective or injunctive relief because it plainly does not qualify as "an individual person sued in her official capacity" to which the *Ex parte Young* exception applies. 953 F. Supp. 781, 792 (S.D. Tex. 1996) (Atlas, J.).

1. Bullock's contract claims are barred by sovereign immunity.

Bullock's breach-of-contract claim is barred by sovereign immunity. The State has not generally waived its sovereign immunity from suits on contracts. *See Gen. Servs. Commn. v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 595–96 (Tex. 2001) (Texas "retains sovereign immunity from suit in breach-of-contract cases against the State but provides an administrative process to resolve those claims") (citing Tex. Govt. Code ch. 2260). And to the extent it has waived that immunity, it has done so only to allow claimants against it to pursue an administrative hearing. Tex. Govt. Code § 2260.001–.108. This Court and its sister federal courts in Texas frequently recognize state universities' immunity from such suits. *See, e.g., Bisong v. Univ. of Houston*, 2006 WL 2414410, at *3 (S.D. Tex. Aug. 18, 2006) (Lake, J.); *Hiers v. Bd. of Regents of the Univ. of N. Tex. System*, 2022 WL 748502, at *29 (E.D. Tex. Mar. 11, 2002); *Moon v. Midwestern State Univ.*, 2004 WL 2254196 (N.D. Tex. Oct. 6, 2004). The Court is without subject matter jurisdiction over Bullock's official-capacity breach-of-contract claims and should dismiss.

2. Bullock's official-capacity claims for money damages and individual-capacity claims for injunctive relief are both barred by sovereign immunity.

Every official-capacity Defendant is immune from Bullock's claims for money damages. Federal courts lack jurisdiction over suits against a state for money damages unless the state has waived its immunity or Congress has clearly abrogated it. *See McCoy*, 2018 WL 4220843, at *2 (citing *NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 393–94 (5th Cir. 2015)). As the Court has repeatedly recognized, "Texas has not waived sovereign immunity for § 1983 monetary claims against TSU or its employees in their official capacities." *Jackson v. Texas S. Univ.*, 997 F. Supp. 2d 613, 624 (S.D. Tex. 2014); *Manley v. Texas S. Univ.*, 107 F. Supp. 3d 712, 719 (S.D. Tex. 2015).

The injunctive relief Bullock seeks against the Defendants in their individual capacities is also barred by sovereign immunity. Bullock requests that she be "grant[ed] . . . a due process hearing on the merits of her termination to which she is entitled" and "reinstate[d] . . . in her former position as a tenured professor of law at TSU". Dkt. 1 ¶¶ 9.2, 9.3. Because the injunctive relief Bullock seeks, including reinstatement, would operate against TSU (the State) and not the Individual Defendants, it barred by sovereign immunity. *See, e.g.*, *Yul Chu v. Miss. State Univ.*, 901 F. Supp. 2d 761, 773 (N.D. Miss. 2012).

B. Bullock has not alleged facts demonstrating that she has standing.

Bullock lacks standing to bring her claims. To invoke jurisdiction, Bullock must satisfy the tripartite test for Article III standing: (1) an injury in fact (2) fairly traceable to each defendant's conduct (3) that's likely redressable

by a favorable decision. *See E.T. v. Paxton*, 41 F.4th 709, 714 (5th Cir. 2022) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

Here, Bullock does not allege a single action by 10 of 13 Defendants—including all nine of the Regents and the TSU's President—in relation to either of her § 1983 claims, much less plausible allegations showing a causal connection between her alleged constitutional deprivations and each individual Defendant's conduct. *See id.; see also*, *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (claimed injuries in fact must be "fairly traceable to the actions of the defendant."). Instead, Bullock generally alleges that "on information and belief, each of these Defendants approved, facilitated, and/or voted for Bullock's firing." Dkt. 1 ¶¶ 3.7, 3.10. Bullock also alleges, in shotgun fashion, that "***Defendants*** denied Bullock due process," "***Defendants*** deprived Bullock of a property interest and liberty interest," "***Defendants*** terminated Bullock," and "***Defendants'*** decision to terminate Bullock and strip her of tenure was arbitrary and capricious". Dkt. 1 ¶¶ 5.4–5.6 (emphases added).

These allegations are insufficient to establish each Defendant's personal involvement or wrongful conduct causally connected to a constitutional deprivation. *See Jackson*, 997 F. Supp. 2d at 639 (*Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009), "requires Plaintiff to plead that each Individual Defendant through the official's own individual actions, has violated the Constitution.") (internal citations omitted). *See also U.S. Tech. Corp. v. Miss. Dept. of Envtl. Quality*, 2016 WL 4098609, at *6 (S.D. Miss. July 28, 2016) ("Liability under § 1983 may not be conferred to an individual defendant by general allegations . . . because proof of an individual defendant's personal involvement in the

alleged wrong is a prerequisite to liability on a claim for damages under 42 U.S.C. § 1983."); *Surtain v. Stanley*, 2015 WL 10012999, at *5 (E.D. Tex. Dec. 16, 2015) ("Plaintiff's allegations do not demonstrate personal involvement by any of these Defendants nor wrongful conduct causally connected to a constitutional deprivation."); *Cooper v. City of Woodville*, 2007 WL 781435, at *3 (E.D. Tex. Mar. 12, 2007) (for a § 1983 claim against an individual defendant, "[p]laintiffs are required to allege specific facts, not just general allegations").

Owens v. Board of Regents of Texas Southern University is instructive. That plaintiff sought the same relief as Bullock, reinstatement with tenure. 953 F. Supp. at 786. The court dismissed the plaintiff's § 1983 due-process claims against all of the university official defendants except the president and chair of the Board of Regents. *Id.* at 792. The other individual defendants, including the provost, were "not necessary parties to this action, because Plaintiff's surviving claims are for injunctive relief against the Board of Regents and the University president. Therefore, they are dismissed as Defendant from this lawsuit." *Id.* at 791.

C. Bullock has not stated a First Amendment retaliation claim.

The Fifth Circuit "has long employed a four-prong test to determine whether the speech of public employees is entitled to constitutional protection. [Plaintiffs] must establish that: (1) they suffered an adverse employment decision; (2) their speech involved a matter of public concern; (3) their interest in speaking outweighed the governmental defendant's interest in promoting efficiency; and (4) the protected speech motivated the

defendant's conduct." *Howell v. Town of Ball*, 827 F.3d 515, 522–23 (5th Cir. 2016) (citing *Lukan v. N. Forest Indep. Sch. Dist.*, 183 F.3d 342, 346 (5th Cir. 1999)). Bullock cannot satisfy the second prong because she was not speaking as a private citizen on a matter of public concern. Instead, her alleged speech was in furtherance of her official job duties as Thurgood's dean. Nor does Bullock allege facts plausibly showing that her alleged speech motivated the purported retaliation as required under the fourth prong. Bullock's individual-capacity claim additionally fails because she does not allege the requisite "personal involvement" of the individual Defendants, who nevertheless have qualified immunity.

1. The standard: matters of public concern vs. employment responsibilities.

A public employer has an interest "in regulating the speech of its employees that differ[s] significantly from" any interest in regulating "the speech of the citizenry in general." *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). Thus, while public employees may not "be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest," *id.*, a public employee who "speaks pursuant to employment responsibilities" is generally not entitled to "First Amendment protection." *Garcetti v. Ceballos*, 547 U.S. 410, 424–25 (2006). As the Supreme Court put it:

> When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a

> similar degree of scrutiny. To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.

Id. at 423. *See also Connick v. Myers*, 461 U.S. 138, 147 (1983) ("absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior").

Consistent with this authority, the Fifth Circuit has set forth three elements for determining whether speech is protected such that it could give rise to a First Amendment retaliation claim. First, the speech must be made as a citizen, not in furtherance of official job duties. Second, the speech must be on a matter of public concern. Third, the employee's interest in speaking must outweigh the government's interest in the efficient provision of public services. *See, e.g.*, *Hardesty v. Cochran*, 621 Fed. Appx. 771, 775 (5th Cir. 2015); *see also Howell v. Town of Ball*, 827 F.3d 515, 523 (5th Cir. 2016) ("the First Amendment does not protect speech made in furtherance of a public employee's official duties, regardless of whether that speech addresses a matter of public concern."). Whether the speech is protected is a question of law. *Connick*, 461 U.S. at 148 n.7.

2. Bullock's speech was in furtherance of her official job duties.

The Court need not consider the public-concern or balancing elements, because Bullock's claim founders on the first element. As she admits in her complaint, her speech was related to her duties as Thurgood's dean.

Bullock alleges that she spoke on matters concerning Thurgood's internal administration, including matters related to its accreditation. She alleges that

she made this speech internally to her direct supervisors, TSU's provost and president. *See* Dkt. 1 ¶ 4.29 ("Bullock reported concerns regarding decisions taken by TSU which have the potential to affect the Law School's ability to remain accredited."), ¶ 5.17 (Bullock "reported matters of public concern, including matters which potentially impact the Law School's ability to remain accredited, including to the Provost and President of TSU"). She concedes that her duties as dean necessarily involved Thurgood's accreditation and ABA compliance. *See* Dkt. 1 ¶ 4.12 ("At the time of Bullock's arrival at TSU, multiple compliance issues demanded immediate remediation."), ¶ 4.14 ("Under Bullock's leadership, the Law School returned to full ABA compliance before the expiration of the one-year deadline."), ¶ 4.19 (Bullock "advocated continuously regarding the steps the Law School needs to take to keep its accreditation and to ensure Thurgood Law's success."). Every iota of this speech—internal reports on matters concerning the operation and accreditation of the law school that Bullock had been appointed to lead—is in furtherance of Bullock's job duties. Her speech is not protected, and she has therefore not stated a First Amendment retaliation claim. The Court should dismiss.

3. Holdings in similar cases support the conclusion that Bullock's speech was not protected.

The Court would not be alone in determining that speech like Bullock's is not protected. It would be joining the reasoning set forth by the Supreme Court, the Fifth Circuit, even another bench of the Court in a case that also involved TSU.

The Supreme Court. The plaintiff in *Garcetti* was a deputy district attorney who recommended in a memorandum that a pending criminal case be dismissed because of purported governmental misconduct. 547 U.S. at 413–15. Even as it acknowledged that "[e]xposing governmental inefficiency and misconduct is a matter of considerable significance," *id.* at 425, the Supreme Court held that the memorandum was prepared as part of the employee's official duties and was therefore not protected speech. *Id.* at 424. It rejected "the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties," holding that "a constitutional cause of action" did not lurk "behind every statement a public employee makes in the course of doing his or her job." *Id.* at 426.

The Fifth Circuit. The plaintiff in *Gibson v. Kilpatrick*, a town's police chief, reported to outside law-enforcement agencies the town mayor's misuse of municipal funds. 773 F.3d 661, 664–65 (5th Cir. 2014). The Fifth Circuit conclude that this was not protected by the First Amendment because the evidence did not clarify whether he made the reports as a private citizen or as part of his ordinary duties as police chief. *Id.* at 671. The Fifth Circuit disagreed that an employee speaks as a citizen whenever public corruption is involved, relying on *Garcetti*'s express holding that "the exposure of governmental inefficiency and misconduct must be enforced through other laws and constitutional provisions than the First Amendment when dealing with public employees speaking pursuant to their official duties." *Id.*

This Court. Bullock's allegations in many ways parallel those of the plaintiff in *Jackson v. Texas Southern University*—which were dismissed for failure to state a claim. 997 F. Supp. 2d 613, 639 (S.D. Tex. 2014). That

plaintiff, a professor who actually had tenure, complained to TSU's Board of Regents about the College of Pharmacy's operation, the credentials and competence of its faculty and administrators, and the risk that it would lose accreditation. *Id.* at 638. The Court held that her speech was not protected; it was a report to the supervisory board regarding the performance of the unit where she worked and therefore related to her employment, not "a matter of public concern." *Id.* (citing *Dorsett v. Bd. of Trs. for State Coll. & Univs.*, 940 F.2d 121, 123–25 (5th Cir. 1991)).

Bullock's purported speech is no different than that in *Garcetti*, *Gibson*, and *Jackson*, none of which were protected. Indeed, the speech that she alleges was protected is almost identical to the speech—a TSU professor complaining about her school's operation, staff, and threatened accreditation—this Court in *Jackson* found was unprotected. There is no principled basis for distinguishing Bullock's claims from those. Just as in those cases, the speech here is not protected, and the Court should dismiss.

4. Bullock doesn't allege facts plausibly showing that her speech motivated the purported retaliation.

Nor does Bullock allege facts supporting the final element of a First Amendment retaliation claim, that the speech motivated the purported retaliatory action. *See Jackson*, 997 F. Supp. 2d at 639 (citing *Beattie v. Madison Cnty. Sch. Dist.*, 254 F.3d 595, 600 (5th Cir. 2001)). She does not allege, for example, when the speech allegedly occurred—a necessary fact to plausibly suggest a causal nexus to the alleged retaliatory act. *Id.* (citing *Barkley v. Singing River Elec. Power Assn.*, 433 Fed. Appx. 254, 260 (5th Cir. 2011)). Even if Bullock could allege each Defendant knew of her allegedly

protected speech, "[a]n employer's knowledge of a plaintiff's participation in a protected activity, without more, is insufficient to show a *causal connection* between the plaintiff's participation in the activity and the adverse employment action." *Id.* (citing *Houston v. EBI Cos.*, 53 F.3d 1281 (5th Cir. 1995) (emphasis in original)). Because the Complaint "lacks facts to support a plausible First Amendment retaliation claim against any of the Individual Defendants, those claims should be dismissed." *Id.* (citing *Charles v. Cockrell*, 202 Fed. Appx. 48 (5th Cir. 2006)).

5. Defendants have qualified immunity from Bullock's First Amendment retaliation claim.

Bullock's First Amendment retaliation claim additionally fails against Defendants in their individual capacities because they have qualified immunity. Qualified immunity is not merely an affirmative defense, but also "a limited entitlement not to stand trial or face the other burdens of litigation," including discovery. *Iqbal*, 556 U.S. at 672 (quotations omitted). Qualified immunity guards officials from civil liability "so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wilkerson v. Univ. of N. Tex.*, 878 F.3d 147, 155 (5th Cir. 2017) (quoting *Mullenix v. Luna*, 577 U.S. 7, 11 (2015)).

To overcome this immunity, a plaintiff must show both (1) that the official violated a statutory or constitutional right and (2) that the right was "clearly established" at the time of the challenged conduct. *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). A right is "clearly established" when it is sufficiently clear that every reasonable official would have

understood that what he is doing violates that right, and either controlling authority or a robust consensus of persuasive authority defines the contours of the right in question with a high degree of particularity. *See id.* (internal quotations omitted). This standard "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986)). This accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued. *Id.* (quotations omitted).

In *Noyola v. Texas Department of Human Resources*, the Fifth Circuit analyzed qualified immunity in First Amendment retaliation cases:

> One consequence of case-by-case balancing is its implication for the qualified immunity of public officials whose actions are alleged to have violated an employee's first amendment rights. **There will rarely be a basis for *a priori* judgment that the termination or discipline of a public employee violated "clearly established" constitutional rights**.

846 F.2d 1021, 1025 (5th Cir. 1988) (emphasis added). "[W]here the area of law is as 'abstruse' and 'complicated' as First Amendment jurisprudence, that right cannot be clearly established for the purposes of qualified analysis." *Morgan v. Swanson*, 755 F.3d 757, 761 (5th Cir. 2011). Officials, such as the school personnel in *Morgan*, are given particularly broad discretion because they have "difficult" and "vitally important" jobs. *Id.* at 760. Accordingly, they "are rarely denied immunity from liability arising out of First-Amendment disputes." *Id.*

No clear constitutional infringement exists here. As detailed above, Bullock's internal speech to her superiors concerning matters admittedly within her official duties as dean was not constitutionally protected. Even if it were not, it would not have been clear to an objectively reasonable official that Bullock, the dean of a public law school, would have been speaking on a matter of public concern as a *private* citizen when she expressed concerns on matters relating to that law school's internal operations—especially its accreditation status. *See Jackson*, 997 F. Supp. 2d at 639 (citing *Dorsett*, 940 F.2d at 123–25). All authority holds that Bullock's claims should be dismissed as a matter of law on qualified immunity grounds.

D. Bullock's due-process claims should be dismissed, or, alternatively, limited to certain Defendants in their official capacities only.

Judicially noticeable facts conclusively establish that Bullock was not granted tenure. Without tenure, Bullock cannot recover on her due-process claims, which require her to have a property interest in her continued employment. More, Bullock does not plausibly allege that most of the Defendants were personally involved in the alleged deprivation of that interest. And even more, most of the Defendants enjoy qualified immunity and sovereign immunity—not to mention that they are extraneous to the relief Bullock seeks.

1. Because she was not granted tenure, Bullock did not have a recognized property interest.

Bullock's due-process claims—both her claim that she was denied a process and her claim that a fundamental right was violated—require her to show she had a cognizable property interest in her continued employment,

and the process she was afforded was insufficient to protect that interest. *See Garcia v. Reeves Cnty.*, 32 F.3d 200, 202–03 (5th Cir. 1994); *Moulton v. City of Beaumont*, 991 F.2d 227, 230 (5th Cir. 1993).

Here, because TSU never awarded Bullock tenure, she has no identifiable property interest in her continued employment. Under TSU's Faculty Manual, tenure can be granted only by the Board of Regents and only through the published procedures. Exh. B at § 4.9. Conferring tenure would have required several steps:

- First, the Law School's faculty reviews Bullock's credentials.
- Second, the Law School's faculty recommends her appointment.
- Third, the Law School's interim dean forwards that recommendation to TSU's provost.
- Fourth, the provost forwards that recommendation to TSU's president.
- Fifth, the president requests that the Board of Regents waive the regular tenure process.
- Finally, the Board awards Bullock tenure. *Id.* at §§ 4.2, 4.9.

That process did not happen.

Whatever tenure status Bullock alleges she received outside of TSU's policies is generally considered invalid. As one bench of the Court put it, *See, e.g.*, " the legitimacy of a claim to tenure acquired outside [a university's published] procedures is vitiated because there is no basis for mutuality." *LaVerne v. Univ. of Tex. Sys.*, 611 F. Supp. 66, 69 (S.D. Tex. 1985). And as another bench of the Court observed in *Owens*, a plaintiff "is clearly not

entitled to tenure" under TSU's Faculty Manual if "the Board of Regents took no affirmative action conferring tenure upon her, as explicitly required by the [] manual's written policy."). 953 F. Supp. at 787 n.7.

TSU never awarded Bullock tenure. Without tenure, Bullock cannot demonstrate a protected property interest. Without a protected property interest, Bullock cannot prevail on her due process claims. The due-process claims should be dismissed.

2. Defendants have qualified immunity from Bullock's due process claims.

Bullock's due process claims additionally fail against Defendants in their individual capacities because they have qualified immunity. *Moon v. Midwestern State University* is persuasive here. (N.D. Tex. Feb. 18, 2004). There, Midwestern State, a public university, offered the plaintiff the positions of university president of the university and tenured professor. 2004 WL 575953 at *1. Two years later, the Board of Regents, after determining that they had not properly awarded the plaintiff tenure in accordance with the university's policies and procedures, terminated him. *Id*. at *1, 3. The plaintiff alleged various claims under § 1983 against several university officials in their individual capacities. The court dismissed all of them on account of qualified immunity: "because reasonable minds could have differed as to whether Moon possessed tenure, reasonable minds could have differed as to whether the challenged action was unconstitutional." *Id*. at *4.

Similarly, in *Owens*, a professor sued TSU's Board of Regents and various university officials claiming tenure and denial of her procedural and

substantive due process with respect to her termination. 953 F. Supp. at 781. Judge Atlas found for the Court that each of the defendants in their individual capacities were entitled to qualified immunity because the conduct alleged was objectively reasonable because "since there had been no affirmative act by the Board of Regents conferring tenure upon Owens, Defendants had no reason to believe that Owens had been granted or otherwise acquired tenure." *Id*. at 791.

Here, the unconstitutional conduct Bullock alleges was objectively reasonable—or, at least, not objectively unreasonable—for the same reasons as the conduct in *Moon* and *Owens*. Bullock was not awarded tenure in accordance with the TSU's Faculty Manual; it was therefore not unreasonable to believe that Bullock was not due the process reserved for tenured professors. The evaluation of the plaintiff's tenure determination here was as reasonable as those made in *Moon* and *Owens*; just as in those cases one cannot say that all reasonable officials in the Defendants' shoes would have understood their actions—which, again, Bullock fails to allege with sufficient plausibility—clearly violated Bullock's constitutional rights. *See Wilkerson v. Univ. of N. Tex.*, 878 F.3d 147, 155 (5th Cir. 2017) (a right is not "clearly established" absent controlling authority defines the contours of that right). Qualified immunity precludes the individual-capacity § 1983 due-process claims, and they should be dismissed.

E. Bullock's individual-capacity contract claims fail due to lack of privity.

Bullock's contract claim against the individual Defendants fails for lack of privity. *Hiers*, 2022 WL 748502 at *30 (citing *First Bank v. Brumitt*, 519

S.W.3d 95, 102 (Tex. 2017)). "In Texas, 'the general rule is that actions taken by an agent on behalf of the principal do not bind the agent.'" *Id.* (quoting *Norris v. Hous. Auth. of the City of Galveston*, 980 F. Supp. 885, 893 (S.D. Tex. 1997)). "An agent is not liable on a contract made for a disclosed principal unless the agent 'has either expressly or impliedly assumed such liability.'" *Id.* (citing *Mediacomp, Inc. v. Cap. Cities Common., Inc.*, 698 S.W.2d 207, 211 (Tex. App.—Houston [1st Dist.] 1985, no writ)).

Here, Bullock alleges that her purported contract was with TSU. Dkt. 1 at ¶¶ 4.2–4.3. She does not—cannot—allege that she contracted with the individual Defendants, or that one, much less all, of the Defendants assumed individual liability for TSU, a disclosed principal, on her purported contract.

The Court in *Bisong v. University of Houston* granted a similar motion to dismiss because "the allegations only support[ed] the existence of a contract between plaintiff and the University of Houston, not plaintiff and the individual defendants." 2006 WL 2414410 at *3. Because there were "no allegations . . . that establish[ed] a contract between plaintiff and the individual defendants," Judge Lake dismissed the contract claims against the individual university officials. *Id.* Similarly, in *Teitel v. University of Houston Board of Regents*, the Court summarily dismissed a breach of contract claim against University of Houston's Board of Regents and university officials due to the plaintiff's "inability to establish the requisite mutual assent or contractual obligation necessary to prove the existence of a contract . . . between himself and any of the Defendants." 285 F. Supp. 2d 865, 879 (S.D. Tex. 2002).

The same is true here. Because Bullock does not plausibly allege privity of contract between her and any of the Defendants in their individual capacities, she cannot hold them individually liable for breach of contract. The Court should dismiss Bullock's individual-capacity contract claims.

Prayer

The Defendants respectfully request that the Court dismiss Bullock's case with prejudice for lack of subject-matter jurisdiction and failure to state a claim upon which relief can be granted. They further request all other relief to which they may be entitled.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November _, 2022, this opposition was served on all counsel of record by electronic filing.

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