IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS, VICTORIA DIVISION

TONI MAREK	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 6:14-CV-00055
	§	
PHI THETA KAPPA HONOR SOCIETY AND EXECUTIVE DIRECTOR DR. ROD RISLEY,	§	
	§	
Defendants.	§	

DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS, OR ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants Phi Theta Kappa *d/b/a* Phi Theta Kappa Honor Society and Dr. Rod Risley move to dismiss Toni Marek's sole claim—employment discrimination under Title VII—for failure to state a claim upon which relief can be granted[1] or, alternatively, for summary judgment under Federal Rule of Civil Procedure 56 ("**Motion**"). Marek has failed to plead and cannot show as a matter of law that: (1) she was an employee as defined by Title VII; (2) either Defendant was her employer as defined by Title VII; and/or (3) Risley has any individual liability to her under Title VII.

I. INTRODUCTION

1. Plaintiff's sole claim in her Employment Discrimination Complaint [Dkt. 1] ("**Complaint**") is under Title VII. However, she does not and cannot demonstrate her ability to bring this claim. Only "employees" can bring a Title VII claim, and only "employers" can be defendants to such a claim. *See* 42 U.S.C. § 2000e-2(a)(1), (f). Thus, the relationship between the plaintiff and defendant in a Title VII action must be one of employment.

[1] Defendants reserve their right to answer or otherwise respond to the Complaint should the Court deny this Motion, including the assertion of defenses and/or affirmative defenses to Marek's claim.

2. Plaintiff Toni Marek ("**Marek**") has never been an employee of either Phi Theta Kappa *d/b/a* Phi Theta Kappa Honor Society ("**PTK**") or Dr. Rod Risley ("**Risley**") (collectively, "**Defendants**"). Her Complaint [Dkt. 1] makes no contrary allegation. Instead, she was a student at Victoria College and a member its chapter of PTK, which is an academic honor society comprised of 1287 chapters at two-year colleges around the world. (*See* Declaration of Dr. Rod Risley at ¶3, which is attached and fully incorporated into this Motion as Exhibit "A.") Marek's conclusory allegation that PTK "terminated [her] employment" does not satisfy the pleading standard described by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). (*See* Compl. at ¶9.) Thus, her Complaint fails to state a claim upon which relief may be granted.

3. Moreover, she cannot demonstrate standing to bring a Title VII claim as a matter of law. She was not an employee of either Defendant and cannot show an unlawful employment action by either Defendant as a matter of law. She also cannot show that Risley is an employer as defined by Title VII or has any individual liability. Thus, Marek's sole claim should be dismissed with prejudice and/or summary judgment should be granted in favor of Defendants.

II. DISCUSSION

A. The Legal Standard for a Rule 12(b)(6) Motion.

4. Under Federal Rule of Civil Procedure 12(b)(6), this Court may grant a motion to dismiss if the Complaint "fail[s] to state a claim upon which relief may be granted." FED. R. CIV. P. 12(b)(6). In analyzing this Motion, the Court must be guided by the Supreme Court's opinions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). These cases govern the pleading standard "in all civil actions and proceedings in the United States District Courts." *Iqbal*, 556 U.S. at 684.

5. To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain sufficient factual allegations which, accepted as true, "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (*quoting Twombly*, 550 U.S. at 570.) To be plausible on its face, a complaint must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Dismissal is appropriate if the "allegations [are not] enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact.)" *Twombly*, 550 U.S. at 555. This showing requires more than "labels and conclusions" or a "formulaic recitation of the elements of a cause." *Id.* A court must analyze whether the non-conclusory factual allegations, if taken as true, set forth facts sufficient to allege each element of the claim and establish a plausible claim for relief. *Iqbal*, 556 U.S. at 679.

6. In ruling on this Motion, the Court must consider only the allegations in the Complaint, documents attached to the Motion that are referenced in the Complaint and central to the claims, and documents in the public record of which the Court can take judicial notice. *See Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004); *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 640 n. 2 (5th Cir. 2005). Dismissal is proper if a successful affirmative defense appears. *Hall v. Hodgkins*, 305 F. App'x 224, 227-28 (5th Cir. 2008).

7. If the Court considers extrinsic evidence attached to the Motion but neither referenced in the Complaint, nor central to the claims, nor within the public record, then the Court may in its discretion treat the motion as one for summary judgment under Rule 56. FED. R. CIV. P. 12(d). Summary judgment is proper when the evidence shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986).

B. Complaint Does Not Allege or Show Marek as Employee under Title VII.

8. To meet Title VII's definition of an employee, Marek must allege and show that she was "an individual employed by an employer." *See* 42 U.S.C. § 2000e(f). The Supreme Court has held that the "employment relationship is most readily demonstrated by the individual's appearance on the employer's payroll." *See Walters v. Metropolitan Educ. Enters*., 519 U.S. 202, 207 (1997); *see also Juino v. Livingston Parish Fire Dist*., 717 F.3d 432, 439 (5th Cir. 2013) (adopting the threshold remuneration test). Remuneration consists of direct remuneration (such as salary or wage) and significant indirect benefits that are not incidental to the services performed (such as job-related benefits). *See Juino*, 717 F.3d at 437-38 (volunteer is not an employee unless she receives benefits which are sufficient to be deemed compensation).

9. Marek's Complaint [Dkt. 1] does not allege facts sufficient to support a claim that she was an employee of either Defendant under Title VII. She does not allege that she was paid salary or wages by either Defendant or that she received any benefits that were not incidental to her services or were significant enough to equate to compensation. (*See* Compl.) Thus, the Complaint [Dkt. 1] does not contain allegations sufficient to raise her right to relief under Title VII beyond a speculative level, even if all of assertions are taken as true. Her sole claim should therefore be dismissed for failure to state a claim upon which relief may be granted. *See Iqbal*, 192 S.Ct. at 679; *Twombly*, 550 U.S. at 555; *see also* FED. R. CIV. P. 12(b)(6).

C. Complaint Does Not Allege or Show Risley was Employer under Title VII.

10. Marek's Complaint [Dkt. 1] does not allege facts sufficient to show that Risley was her employer under Title VII. *See* 42 U.S.C. § 2000e(b). She does not allege that Risley personally engaged in any industry affecting interstate commerce or has ever employed fifteen or more employees. *See id.* Moreover, even if Marek had been employed by PTK, which she was

not, and Risley had been her supervisor at PTK, which he was not, this would not be sufficient to allege individual liability under Title VII. *See* ¶ 17, below.

C. Complaint Does Not Allege/Show Unlawful Employment Practice under Title VII.

11. To allege a violation of Title VII, Marek must allege facts sufficient to show an unlawful employment practice by either Defendant based on her race, color, religion, sex, or national origin. *See* 42 U.S.C. § 2000e-2(a). To show an unlawful employment practice under Title VII, Marek must allege that either Defendant did any of the following because of her protected status: (1) failed or refused to hire her for employment; (2) discharged her from employment; or (3) discriminated against her with respect to her compensation, terms, conditions, or privileges of employment. *See id.*

12. Marek's Complaint [Dkt. 1] does not allege facts sufficient to show that either PTK or Risley committed any unlawful employment practice against her in violation of Title VII. The Complaint [Dkt. 1] does not allege the either PTK or Risley did any of the following because of any protected status: (1) failed or refused to hire her for employment; (2) discharged her from employment; or (3) discriminated against her with respect to her compensation, terms, conditions, or privileges of employment. *See* 42 U.S.C. § 2000e-2(a).

E. Amendment of Complaint Futile; Judgment Should be Granted as a Matter of Law.

13. Moreover, Marek's Complaint [Dkt. 1] should be dismissed with prejudice because any amendment to cure this failure would be futile.[2] Alternatively, summary judgment for Defendants should be granted on Marek's sole claim (Title VII) because, as a matter of law,

[2] To amend the Complaint to allege that she was an employee of PTK or Risley, or that either PTK or Risley was her employer, Marek would have to certify to the Court that this factual allegation either had evidentiary support or would likely have evidentiary support after a reasonable opportunity for further investigation or discovery. *See* FED. R. CIV. P. 11(b)(3). Given the conclusive evidence given in this Motion, Marek could not make such a pleading in good faith. (*See* Risley Decl.)

she was not an employee of either Defendant, neither Defendant committed any unlawful employment practice against her in violation of Title VII, and Risley is not an employer under Title VII and cannot be held individually liable under Title VII.

14. First, Marek cannot show that she was an employee under Title VII as a matter of law. She was not paid either a salary or wages by PTK or Risley, and did not receive any significant indirect benefits from either PTK or Risley that were not incidental to her services as an IO or a student-member of PTK's chapter at Victoria College. (*See* Risley Decl. at ¶¶s 7, 9.) Thus, she cannot show that she has any right to relief as an "employee" under Title VII, and cannot recover under Title VII as a matter of law.

15. Second, Marek cannot show that either Defendant committed an unlawful employment practice against her in violation of Title VII. *See* 42 U.S.C. § 2000e-2(a). She never applied for employment with either Defendant, nor did either refuse to hire her for employment. (*See* Risley Decl. at ¶¶s 6, 8.) Likewise, neither Defendant discharged her from employment or discriminated against her with respect to her compensation, terms, conditions, or privileges of employment. (*See id.*) She cannot, therefore, show that either Defendant committed any unlawful employment practice against her in violation of Title VII. *See id.*

16. Third, she cannot demonstrate that Risley was an employer under Title VII as a matter of law. He has never been personally engaged in any industry affecting interstate commerce or personally employed fifteen or more employees. (*See* Risley Decl. at ¶¶s 8-9.)

17. Moreover, even if Marek had been employed by Risley or PTK—which she was not—Risley cannot be individually liable under Title VII as a matter of law. *See Grant v. Lone Star Co.*, 21 F.3d 649, 652 (5th Cir.) ("Only 'employers,' not individuals acting in their individual capacity who do not otherwise meet the definition of 'employers,' can be liable under

title VII"), *cert. denied*, 513 U.S. 1015 (1994); *see also Ackel v. Nat'l Communications, Inc.*, 339 F.3d 376, 382 n.1 (5th Cir. 2003); *Smith v. Amedisys, Inc.*, 298 F.3d 434, 448 (5th Cir. 2002). Summary judgment is thus appropriate for Risley in his individual capacity.

18. Because of these indisputable facts, the Court should grant summary judgment in favor of PTK and Risley on Marek's Title VII claim.

III. CONCLUSION

19. For the reasons set forth in this Motion, Defendants Phi Theta Kappa Honor Society and Dr. Rod Risley respectfully request that the Court dismiss Plaintiff Toni Marek's sole claim in her Complaint—Title VII discrimination—with prejudice under Rule 12(b)(6) for failure to state a claim upon which relief may be granted, or, alternatively, grant summary judgment in their favor and grant them such other and further relief to which they may show themselves justly entitled.

Respectfully submitted,

Jackson Lewis, P.C.

/s/ Pamela B. Linberg

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ATTORNEY-IN-CHARGE FOR DEFENDANTS PHI THETA KAPPA *D/B/A* PHI THETA KAPPA HONOR SOCIETY AND DR. ROD RISLEY

CERTIFICATE OF SERVICE

I certify that I filed the *Defendants' Rule 12(B) (6) Motion to Dismiss, or Alternatively, Motion for Summary Judgment* in accordance with the protocols for e-filing in the United States District Court for the Southern District of Texas, Victoria Division, on December 23, 2014, and as such, it has been served on Toni Marek, *Plaintiff Pro Se*. I further certify that on December 23, 2014, I also mailed a courtesy copy of this Motion to Ms. Marek by United States Certified Mail, Return Receipt Requested, to her address of record at [redacted]

/s/ Pamela B. Linberg
Pamela B. Linberg