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' REPLY TO PLAINTIFF'S RESPONSE TO RULE 12(b)(6) MOTION TO DISMISS, OR ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT

Phi Theta Kappa *d/b/a* Phi Theta Kappa Honor Society and Dr. Rod Risley file this Reply ("**Reply**") to Plaintiff Toni Marek's Response ("**Response**") [Dkt. 7] to their Motion to Dismiss or alternatively, Motion for Summary Judgment ("**Motion**") [Dkt. 4], as follows:

Procedural Background.

1. Plaintiff's sole claim in her Complaint [Dkt. 1] ("**Complaint**") is under Title VII. Because Defendants did not employ Plaintiff, they moved to dismiss her claim on several bases. *See* Motion [Dkt. 4]. The Court ordered Plaintiff to "address each issue raised" in the Motion and "present evidence to support her assertion that she was an employee of Defendants." *See* Order dated January 5, 2015 [Dkt. 6] ("**Order**"). Plaintiff responded to the Motion, but did not present any evidence of employment by either Defendant or any admissible[1] and dispositive evidence on any point. *See* Response [Dkt. 7]. Because of this failure and the reasons given in the Motion and this Reply, the Motion should be granted.

[1] The Federal Rules of Civil Procedure permit a party to object to summary-judgment evidence cited by an opposing party if it is not "presented in a form that would be admissible in evidence." *See* Fed. R. Civ. P. 56(c). Defendants object to Marek's exhibits (B-I) to her Response because they are in a form admissible in evidence as required by Rule 56. *See id.* Please note that the Response does not attach an Exhibit A. *See* Response [Dkt. 7].

2. As discussed more fully in the Motion [Dkt. 4], Plaintiff has not and cannot demonstrate that she is permitted to bring a claim under Title VII because she was never in an employment relationship with either Phi Theta Kappa *d/b/a* Phi Theta Kappa Honor Society ("**PTK**") or Dr. Rod Risley ("**Risley**") (collectively, "**Defendants**"). *See* 42 U.S.C. § 2000e-2(a)(1), (f); *see also* 42 U.S.C. § 2000e(b); *Grant v. Lone Star Co.*, 21 F.3d 649, 652 (5th Cir.), *cert. denied,* 513 U.S. 1015 (1994).

Plaintiff's Response to the Motion.

3. Marek appears to argue in her Response that she meets the common-law definition of an "employee" as outlined in the Equal Employment Opportunity Commission's ("**EEOC**") Compliance Manual ("**EEOC Manual**") because Defendants gave her some instruction on her duties and obligations as a student-member of one of PTK's chapters and/or as an International Officer ("**IO**") elected by the student-member body of PTK's chapters attending its annual convention. *See* Response [Dkt. 7]. This argument is not persuasive.

Fifth's Circuit's "Threshold Remuneration" Test.

4. The Fifth Circuit has adopted the "threshold-remuneration" test for determining whether an individual is an employee or volunteer under Title VII. *See Juino v. Livingston Parish Fire Dist.*, 717 F.3d 432, 439 (5th Cir. 2013); *see also Walters v. Metropolitan Educ. Enters.*, 519 U.S. 202, 207 (1997). This test involves a two-step inquiry: before embarking on the common-law agency test, a would-be Title VII plaintiff must first show that he or she received remuneration from the would-be employer. *See Juino*, 717 F.3d at 439. Remuneration can be shown by: (1) wages; (2) salary; or (3) indirect benefits that are not merely incidental to the services performed (*i.e.*, job-related benefits). *Id.*

Marek is Not an Employee under the "Threshold Remuneration Test."

5. Marek has not pleaded or proved that she received any wages, salary, or job-related benefits from either Defendant. *See* Motion, Ex. A; *see also* Response [Dkt. 7]. Because she has not satisfied either the pleading or proof requirements under the threshold-remuneration test, the Court should refrain from analyzing her status under the common-law agency test she discusses in her Response. *See Juino*, 717 F.3d at 439. Instead, the Court should simply dismiss her claim. *See id.*

Marek is Not an Employee under the Common-Law Agency Test.

6. However, even if Marek had pleaded or presented evidence of remuneration—*which she has not and cannot*—her argument still fails under the common-law agency test discussed in the EEOC Manual. By example only,[2] Defendants show the Court as follows:

- Marek had no contract for services with either Defendant;[3]
- Marek was not paid for performing any particular job by either Defendant;[4]
- Marek did not receive remuneration for any services from either Defendant;[5]
- Marek was not paid wages or salary by either Defendant;[6]
- Marek was not considered an employee for tax purposes by either Defendant;[7]
- Marek was not provided any employment-related benefits by either Defendant;[8]

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[2] It is Marek's burden to assert in her pleadings and prove that she is an employee under Title VII. Additionally, under Fifth Circuit law, this second step of analysis is reached only if she proves remuneration, which she has not. *See Juino v. Livingston Parish Fire Dist.*, 717 F.3d 432, 439 (5th Cir. 2013); *see also Walters v. Metropolitan Educ. Enters.*, 519 U.S. 202, 207 (1997) (stating that "the employment relationship is most readily demonstrated by the individual's appearance on the employer's payroll"). Because she has not met this burden and not pleaded or proved that she received remuneration from either Defendant, the Court should not analyze the parties' relationship under the common-law agency test. In the unlikely event that the Court reaches this second-step analysis, Defendants offer the sworn Declaration of Dr. Rod Risley, attached as Exhibit "A" to the Motion, and the sworn Declaration of Saralyn Quinn ("**Quinn Decl.**"), attached and incorporated into this Reply as Exhibit "A."

[3] *See* Quinn Decl. at ¶8.

[4] *See* Quinn Decl. at ¶¶s 7-8; *see also* Risley Decl. at ¶¶s 7, 9 (attached to Motion as Exhibit A).

[5] *See id.*

[6] *See id.*

[7] *See* Quinn Decl. at ¶9.

[8] *See id.*

- Marek was not covered by PTK's workers' compensation policy;[9]
- Marek's service for PTK was not required for employment with PTK;[10]
- Service as an IO does not regularly lead to employment with PTK;[11]
- Marek's term as an IO was one year[12] and was not renewable;[13]
- Neither Defendant had any right to assign Marek any work other than her duties as a PTK IO;[14]
- Marek was primarily engaged in her own studies at Victoria College; her service as IO was only one aspect of her educational experience;[15] and
- Defendants did not believe they were creating an employment relationship with Marek.[16]

Indeed, the EEOC itself determined that no employment relationship existed between Marek and either Defendant (presumably under its standards as outlined in the EEOC manual). *See* Complaint [Dkt. 1] at Doc. 1-1, p. 2 of 2 (finding "No Employee/Employer relationship").

7. Even if the Court considers Marek's exhibits and arguments under the common-law agency test—*which it should not under the threshold-remuneration test*—and even if these exhibits were in a form admissible into evidence—*which they are not*—the outcome is unchanged. Exhibits B-D are excerpts from PTK's governing documents and do not prove anything regarding Marek's service specifically (and do not show employment of IOs generally).[17] *See* Response [Dkt. 7]. Exhibits E-I are correspondence and receipts showing

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[9] *See id.*

[10] *See* Quinn Decl. at ¶10.

[11] *See id.*

[12] Though Marek can be a member of the Victoria College chapter of PTK for life, her service as an IO was one year and was not renewable. *See id.*

[13] *See id.*

[14] *See* Quinn Decl. at ¶8.

[15] *See* Quinn Decl. at ¶4.

[16] *See* Quinn Decl. at ¶8.

[17] *See* Response at Ex. B (excerpts from PTK's Constitution): C (PTK's professional guidelines for serving as an IO); and D (PTK's honor code for IOs).

PTK's guidelines for reimbursing travel expenses for IOs for their travel to and from PTK's meetings and training (which reimbursement was incident to their service as IOs).[18] *See id.*

8. In addition to her exhibits, Marek baldly asserts in the Response—*without offering any pleadings or proof*—that both Defendants "addressed and referred to her as an employee." However, none of the exhibits to the Response support this statement, and none address her as an "employee" of either Defendant. *See* Response [Dkt. 7].[19] Marek also states without support in the Response that Defendants "supplied and promised compensation" in exchange for her services. *See* Response at p. 4. This representation is also not supported by any evidence and should be disregarded by the Court.

The Cases Cited in the Response Do Not Support Any Employee Status.

9. Marek cites Supreme Court opinions in the Response that do not dictate a contrary result in the matter.[20] *See* Response [Dkt. 7]. Additionally, the caselaw from other federal circuits should be disregarded; these opinions apply the common-law agency test in direct opposition to the Fifth Circuit's instructions in the *Juino* matter.[21]

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[18] *See* Response at Ex. E (email regarding submission of reimbursable expenses); F (email listing guidelines and insurance required for reimbursable travel); G (tipping guidelines for reimbursable travel); H (email requiring Marek to attend planning dinner/dinner with other IOs after PTK paid her travel to the meeting); and I (vehicle rental agreement for reimbursable travel).

[19] Three exhibits contain the word "staff" and copy Marek, but that is only because the communication was sent to all PTK representatives as well as those who qualified to have their travel expenses reimbursed. *See* Response at Exs. E, F, and G; *see also* Quinn Decl. at ¶11.

[20] The *Darden* case, cited by the Fifth Circuit in *Juino*, merely applies the common-law agency test factors (applicable during the second step in a *Juino* analysis) in an ERISA context. *Nationwide Mutual Insurance v. Darden*, 503 U.S. 318 (1992); *see Juino v. Livingston Parish Fire Dist.*, 717 F.3d 432 (5th Cir. 2013). The *Clackamas* case explains that job titles alone are not dispositive of whether a shareholder/director of an organization is an employee for the purposes of determining whether a medical practice had the requisite number of employees for Title VII coverage. *Clackamas Gastroenterology Associates, PC v. Wells*, 538 U.S. 440 (2003). The *Reid* case analyzed whether a non-profit agency's trustee was an employee for purposes of imposing the "work for hire" doctrine under the Copyright Act of 1976. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).

[21] The *Volling* case involved an Illinois district court's holding that that remuneration was only one of many factors to be assessed in making a determination of whether volunteer emergency services provider was an employee under Title VII. *See Volling v. Antioch Rescue Squad*, 2012 U.S. Dist. LEXIS 171623 (N.D. Ill. 2012). This analysis has been has expressly rejected by the Fifth Circuit. *See Juino v. Livingston Parish Fire Dist.*, 717

Marek Offers No Evidence that Dr. Risley Liable Under Title VII.

10. In response to Defendant Risley's assertion that he is not an employer as defined by Title VII, Marek simply offers her subjective opinion that he should be subject to liability (ignoring the well-settled caselaw cited in the Motion explaining that there is no individual liability under Title VII[22] and the evidence in the Motion that he is not an employer under the statute). Her subjective opinion does not overcome her pleadings and proof failures. Dismissal and/or summary judgment is thus appropriate on her Title VII claim against Risley individually.

Marek Does Not Plead or Prove any Unlawful Act under Title VII.

11. The Response simply ignores the pleadings failure highlighted in the Motion that Marek cannot allege or prove that either Defendant committed any unlawful act against her as defined by Title VII. *See* Motion [Dkt. 4]. Dismissal and/or summary judgment of her sole claim against both Defendants is appropriate on this ground alone.

Conclusion and Prayer.

12. For the reasons set forth in the Motion and this Reply, 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 to be justly entitled.

F.3d 432, 439 (5th Cir. 2013). Additionally, the *Volling* case has been modified on appeal, which Marek does not discuss. *See Volling v. Antioch Rescue Squad*, 999 F. Supp. 2d 991, 2013 U.S. Dist. LEXIS 170064 (N.D. Ill. 2013). Similarly the D.C. Circuit court in *Spirides* directed the district court on remand to apply the common-law agency test that was expressly reserved by the *Juino* court for after the plaintiff proves that she received remuneration from a defendant. *See Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979).

[22] *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).

Respectfully submitted,

Jackson Lewis, P.C.

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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' Reply to Plaintiff's Response to 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 February 6, 2015, and as such, it has been served on Toni Marek, *Plaintiff Pro Se*. I further certify that on February 6, 2015, 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