**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**
**WESTERN DIVISION**

**PATRICIA WHITE** **PLAINTIFF**

**v.** **CIVIL ACTION NO. 5:21-CV-71-KS-RHWR**

**BLAKE PICKERING, individually and in his official capacity as Lincoln County Tax Assessor/Collector** **DEFENDANT**

# MEMORANDUM OPINION AND ORDER

This cause comes before the Court on Defendant's Motion to Dismiss and for Qualified Immunity [23]. Plaintiff has responded, and Defendant filed a reply. [27], [28]. Having considered the parties' submissions and the relevant legal authorities, and otherwise being fully advised in the premises, the Court finds the motion is well taken and will be granted.

## I. BACKGROUND

This case arises out of Plaintiff Patricia White's employment as a deputy tax assessor for Lincoln County and her allegations that she was subject to sexual harassment by Defendant Blake Pickering, who serves as Lincoln County's tax assessor. She also claims that she was unlawfully terminated and has suffered emotional distress.

Plaintiff filed her original Complaint [1] on August 18, 2021, bringing claims against Lincoln County, Mississippi and Blake Pickering, in his individual and official capacities. Plaintiff's original Complaint contains sixty paragraphs of facts and the following causes of action: Count I was a claim for sex discrimination/sexual harassment under Title VII; Count II was a Title VII claim for retaliation; Count III was a § 1983 claim for a Fourteenth Amendment violation based on sexual harassment and retaliation; and Count IV was a state law claim for tortious interference.

On September 17, 2021, Plaintiff filed an Amended Complaint [4] against the same two defendants and included the same sixty factual allegations and the same causes of action except two counts were added: Count V for the tort of outrage/intentional infliction of emotional distress and Count VI for wrongful termination. On November 8, 2021, Defendants filed an Answer and Affirmative Defenses [11] along with a Motion to Dismiss [12], arguing, *inter alia*, that Plaintiff had failed to state a claim under Title VII and Section 1983. After the Court entered an Order setting the briefing schedule on the motion [14], Plaintiff filed her Second Amended Complaint, which contains substantial differences.[1]

In the Second Amended Complaint [15], Plaintiff dropped Lincoln County as a party, added numerous factual allegations,[2] and dropped the Title VII claims. Plaintiff now pursues the following causes of action: Count 1—Section 1983 claim for a Fourteenth Amendment violation based on sexual harassment and retaliation; Count II—Tort of Outrage/Intentional Infliction of Emotional Distress; and Count III—Wrongful Termination. Counts II and III are both state common law claims. The Second Amended Complaint provides numerous background facts, as well as the following relevant facts in support of her claim for sexual harassment[3]:

On June 17, 2013, Plaintiff was hired as a Deputy Tax Assessor for the office of the Lincoln County Tax Assessor/Collector. [15] at ¶ 6. In January 2016, Blake Pickering was

[1] Even though there appeared to be no opposition to the further amendment, the Court held a telephone conference to clarify that the parties agreed that the Second Amended Complaint was the operative pleading. The Court entered an Order to that effect on December 16, 2021. [22]. The Court also denied without prejudice all pending motions to dismiss and allowed the parties to essentially start over, given the confusion over whom the defendants were and what claims were being addressed. *See id.*

[2] Paragraphs 25-35 in the statement of facts were all new allegations. Defendant emphasizes that neither Plaintiff's EEOC charge nor the prior two Complaints contain any of these allegations. However, such prior omissions are irrelevant as there is no longer a Title VII claim and the sole issue at present is whether the facts as now pled state a claim for discrimination under Section 1983.

[3] There are also numerous alleged facts relating to the Defendant's hiring and alleged preferential treatment of a black female deputy tax assessor. *See* [15] at ¶¶ 8-23. These allegations have not been mentioned beyond this footnote, as they neither appear relevant to the sexual harassment claim nor do they appear to form the basis for any other constitutional violation under Section 1983, and Plaintiff fails to utilize any of these facts when supporting her arguments that she has stated a claim for actionable sexual harassment.

elected as the new Tax Assessor for Lincoln County. [15] at ¶ 8. Plaintiff claims that in January 2020, she "became aware of the fact that Mr. Pickering regularly locked himself in his office and viewed pornographic internet websites on his work computer and this "often this occurred while Mr. Pickering was in the building with female employees." [15] at ¶ 24. On March 26, 2020, another clerk, Ms. Easly, brought it to Plaintiff's attention that "Defendant's computer in his office was regularly used to view pornography," and Ms. Easly showed Plaintiff the internet history on the computer that contained the names of what appear to be pornographic cites. [15] at ¶¶ 25-26.[4]

Plaintiff alleges that she "was present in the office several times when Mr. Pickering locked himself in his office to watch pornography. This occurred almost daily, but at least occurred three days a week until Plaintiff's last day of work." [15] at ¶ 27. The office was quiet, such that Plaintiff could hear when the Defendant was in his office watching pornography, and she further alleges that during each time she "would hear Mr. Pickering masturbating in his office and would hear his belt buckle hit his desk as he pulled his pants back up when finished." [15] at ¶¶ 28-31. Defendant had a corner office, which made what was on his monitor viewable from the street, so each time Defendant locked himself in his office to watch pornography, Plaintiff would hear him lowering his blinds so the public could not see into his office. [15] at ¶¶ 32-33. Plaintiff also alleges that one of her job duties was to clean Defendant's office once a week. [15] at ¶ 33.[5] Defendant kept a roll of paper towels in or on his desk, and Plaintiff claims that when she was cleaning his she "would regularly notice the trash can was full of paper towels that Mr. Pickering had ejaculated on." [15] at ¶¶ 32, 34.

[4] The pleading contains the names of the sites, but the Court sees no reason to repeat such salacious names here.
[5] The pleading contains a numbering error, as there are two Paragraphs 32 and 33.

Plaintiff alleges she discussed Defendant's viewing pornography in the office during office hours with three people. She states that she spoke with unofficial Office Manager Lance Ramshur on March 27, 2020; Collection Office Manager Chris Smith in April 2020; Nancy Falvey, whose husband, Doug Falvey, is the Supervisor of District 5, on April 28, 2020; and Reverend Jerry Wilson, who is/was Supervisor of District 1 and President of the Board of Supervisors, on May 15, 2020. [15] at ¶ 36, 39, 41, 42. On August 28, 2020, while assisting Information Technologist Rhyan Tranum with maintaining firewalls on the office computers, Plaintiff showed Mr. Tranum the Defendant's office computer browser history with evidence of pornographic websites dating back to March 26, 2020. [15] at ¶¶ 44-46. Mr. Tranum later informed Plaintiff that he had blocked the office computers from the top 100 pornographic websites, and he could block them from more if needed. [15] at ¶ 47. In early September 2020, Chancery Clerk McGehee raised the matter of Mr. Pickering's viewing of online pornography during work hours at a meeting of the Board of Supervisors. [15] at ¶ 48.[6]

Beginning at Paragraph 50 of the pleading, Plaintiff alleges facts relating to Defendant's refusal to give Plaintiff time off without adequate justification and relating to her making a personal telephone calls on October 21, 2020 to resolve an urgent financial situation, which resulted in Defendant's texting her to stay off the phone with non-work-related phone calls. [15] at ¶¶ 50-55. On the night of October 21, 2020, Defendant called Plaintiff's husband and told him to tell Plaintiff not to come to work anymore, but Plaintiff's husband refused and informed Defendant that he was aware that Defendant was viewing pornography during work hours and that the information was eventually going to become public. [15] at ¶¶ 58-61. On October 22,

[6] Plaintiff also alleges, "During that meeting, Board Attorney Bob Allen stated that Mr. Pickering's behavior was not a violation of policy because there was nothing that addressed it in the employee handbook." [15] at ¶ 49.

2020, when Plaintiff arrived at work, she was told by a co-worker that her employment was terminated. [15] at ¶ 62.[7]

**II. DISCUSSION**

Defendant argues for dismissal of the claims on several different grounds. First, Defendant argues that the Section 1983 claim for sexual harassment and retaliation must be dismissed because the allegations of the Second Amended Complaint are not sufficient to state a claim for actionable sexual harassment and because a retaliation claim, based on complaints of sexual harassment, is not recognized under the Fourteenth Amendment. Defendant also moves to dismiss the Section 1983 claims based on qualified immunity. Defendant further argues that Plaintiff has failed to state a claim against the Defendant in his official capacity. Finally, Defendant seeks to dismiss the two state law claims on various grounds. Because the Court finds that Plaintiff has failed to state a Section 1983 claim for sexual harassment and retaliation, the other grounds are moot. Also, because the federal claims are due to be dismissed, the Court will not address Defendant's arguments on the state law claims.

**A. Legal Standard**

The Federal Rules of Civil Procedure require that each claim in a complaint include a "short and plain statement . . . showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Each claim must include enough factual allegations "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Defendant first moves for dismissal, arguing that Plaintiff has failed to state a claim under Federal Rule of Civil Procedure 12(b)(6).

[7] There are additional allegations relating to Covid-19 procedures that form the bases of Plaintiff's state law wrongful termination claim, but such facts are not relevant to the present analysis. [15] at ¶¶ 63-75.

Such a motion allows a party to move for dismissal of an action when the complaint fails to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). When considering a motion to dismiss under Rule 12(b)(6), the Court must accept as true all well-pleaded facts in plaintiff's complaint and view those facts in the light most favorable to the plaintiff. *Bowlby v. City of Aberdeen*, 681 F.3d 215, 219 (5th Cir. 2012). The Court may consider "the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint." *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010).

The Court must then determine whether the complaint states a claim for relief that is plausible on its face. "A claim has facial plausibility when the plaintiff pleads factual content that allows the [C]ourt to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "But where the well- pleaded facts do not permit the [C]ourt to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

In *Iqbal*, the Supreme Court established a two-step approach for assessing the sufficiency of a complaint on a Rule 12(b)(6) motion. First, the Court should identify and disregard conclusory allegations, for they are "not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 664. Second, the Court "consider[s] the factual allegations in [the complaint] to determine if they plausibly suggest an entitlement to relief." *Id.* "This standard 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary claims or elements.'" *Morgan v. Hubert*, 335 Fed. App'x 466, 470 (5th Cir. 2009) (citation omitted). This

evaluation will "be a context-specific task that requires the reviewing [C]ourt to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. Thus, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id*. at 678 (quoting *Twombly*, 550 U.S. at 570).

**B. Analysis**

**1. Claim of Sexual Harassment Under 42 U.S.C. § 1983**

**a. Applicable law**

To state a viable claim under Section 1983, "a plaintiff must (1) allege a violation of rights secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law." *Leffall v. Dallas Indep. Sch. Dist*., 28 F.3d 521, 525 (5th Cir. 1994). Here, because Defendant was the County tax collector, there appears to be no dispute that he acted under color of state law. Plaintiff alleges Defendant violated her rights under the Fourteenth Amendment. "[S]exual harassment in public employment violate[s] the Equal Protection Clause of the Fourteenth Amendment" and is therefore actionable under § 1983. *Southard v. Tex. Bd. of Criminal Justice*, 114 F.3d 539, 550 (5th Cir. 1997). Section 1983 for discrimination and Title VII are "parallel causes of action." *Cervantez v. Bexar County Civil Serv. Comm'n*, 99 F.3d 730, 734 (5th Cir. 1996). Accordingly, the "inquiry into intentional discrimination is essentially the same for individual actions brought under sections 1981 and 1983, and Title VII." *Wallace v. Tex. Tech Univ*., 80 F.3d 1042, 1047 (5th Cir. 1996) (citing *Briggs v. Anderson*, 796 F.2d 1009, 1019–21 (8th Cir. 1986)).

Title VII prohibits "discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Sexual harassment can be a

form of discrimination based on sex and can arise from the creation of a hostile work environment. *See Wyatt v. Hunt Plywood Co., Inc*., 297 F.3d 405, 409 (5th Cir. 2002); *EEOC v. Boh Bros. Const. Co*., 731 F.3d 444, 452 (5th Cir. 2013) (quoting *Vance v. Ball State*, 570 U.S. 421, 452 (2013) (Thomas, J., concurring) ("The creation of a hostile work environment through harassment . . . is a form of proscribed discrimination."). Here, Plaintiff brings a hostile work environment claim.

To establish a claim for hostile work environment, Plaintiff must show: (1) she belongs to a protected group; (2) she was subject to unwelcome sexual harassment; (3) the harassment was based on sex, i.e., that but for the fact of her sex, the plaintiff would not have been the object of harassment; (4) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) the employer knew or should have known and failed to take prompt remedial action. *Watts v. Kroger* Co., 170 F.3d 505, 509 (5th Cir. 1999); *Jones v. Flagship Int'l*, 793 F.2d 714, 719–720 (5th Cir. 1986). When the alleged harasser is a supervisor with immediate or higher authority over the plaintiff, the plaintiff need only meet the first four elements of the test. *Watts,* 170 F.3d at 509. Again, because Section 1983 and Title VII are parallel causes of action, the elements to be proven do not differ. *See Whiting v. Jackson St. Univ*., 616 F.2d 116, 121 (5th Cir. 1980).

**b. Arguments and analysis**

The question here is simply whether Plaintiff's allegations regarding Defendant's behavior, when taken as true, state a claim for actionable sexual harassment. Defendant contends that the allegations of the Second Amended Complaint do not rise to the level of a hostile work environment because the conduct was not severe or pervasive and that none of it was directed at Plaintiff.

Plaintiff complains she was harassed because Defendant was, allegedly, watching pornography and masturbating behind his closed office door. As Defendant points out, there are no allegations that any alleged pornographic material was sent to the Plaintiff; that she actually saw any pornography; or that Defendant talked to Plaintiff in any inappropriate manner. [24] at p. 3. There is no allegation that Defendant commented on the pornography or masturbation to Plaintiff or anyone. While Defendant's conduct may be objectively offensive, Plaintiff claims to have only heard these things occurring while Defendant was alone in his office. There is no allegation that Plaintiff and Defendant interacted in any way that was remotely sexual or premised on Plaintiff's being a woman. As Defendant further points out, anyone could have been in the office as this alleged activity was taking place and heard the same thing, and nothing in the allegations suggests that it took place specifically because Plaintiff was present or that he engaged in such activity because Plaintiff was a woman.

In her response, Plaintiff claims that she has sufficiently alleged that the conduct was severe or pervasive. She reiterates her allegations that "on an almost daily basis for approximately ten months, Mrs. White was subjected to having to listen to Mr. Pickering masturbate in his office, and then would later have to clean up the paper towels that he had ejaculated on." [27] at p. 1. Plaintiff argues that the harassment was so pervasive that it altered the terms and conditions of her employment, but the Court does not find any allegations that show how Defendant's conduct altered the terms and conditions of her employment. Her only complaint to others related solely to the viewing of pornography and that it made her uncomfortable. [15] at ¶¶ 36-38. She fails to make any arguments or point to any allegations that would show that Defendant's actions were directed at her specifically or that his actions affected her work in any tangible way.

Plaintiff's brief argument seems to misapprehend the meaning of the third element of a hostile work environment claim, which is that the harassment must be based on "sex." In such context, the word "sex" refers to a person's "protected characteristic" against which discrimination is prohibited —i.e., race, color, religion, *sex*, or national origin, not the nature of the alleged harassment. While the Defendant's alleged conduct certainly involves activity of a clear "sexual" nature, engaging in an activity that is sexual is not the same as discriminating against someone because of that someone's sex, i.e., gender. *See Butler v. Ysleta Indep. Sch. Dist*., 161 F.3d 263, 268 (5th Cir. 1998) (noting "sexual harassment is discrimination based on sex, not merely workplace behavior with sexual overtones"). While it is true that if Defendant's conduct occurred almost every day, as Plaintiff alleges, it could certainly be deemed pervasive, the Fifth Circuit noted in the *Boh Brothers* case that harassment severe or pervasive enough to create a hostile environment could still be excluded from Title VII coverage "because it was not discriminatory on the basis of sex." 731 F.3d at 453.[8] Here, there are no allegations that even imply that Defendant's alleged harassment was motivated by Plaintiff's sex, i.e., because she was a female.[9]

In *Taylor v. Hinds County Department of Human Services*, the plaintiff alleged that while she worked at the Mississippi Department of Human Services ("MDHS"), she "experienced, observed, and heard sexually harassing remarks and actions by [the MDHS director] who created a hostile and offensive work environment." No. 3:12-CV-729-HTW-LRA, 2013 WL 5406485, at

[8] The case was addressing "same-sex" discrimination, but the premise is the same—the discrimination must be based on the plaintiff's sex. The court also noted the converse is true—that " harassment that is indisputably discriminatory might not be serious enough to make out either a quid pro quo or hostile environment claim." *Boh Bros.,* 731 F.3d at 453.

[9] Defendant raises this argument strongly in his reply brief, but because it was raised in the reply brief, the Court will not address the argument in depth, as Plaintiff has not had an opportunity to respond. *See Dixon v. Toyota Motor Credit Corp*., 794 F.3d 507, 508 (5th Cir. 2015); *Jones v. Cain*, 600 F.3d 527, 541 (5th Cir. 2010). The Court mentions it only briefly because, again, it appears that Plaintiff asserts that it is axiomatic that if a person engages in conduct of a "sexual" nature, it is "sexual harassment," and that is simply not the case.

*1 (S.D. Miss. Sept. 25, 2013). The plaintiff claimed she saw the director order a female co-worker inside a file room and lock himself in the room with the co-worker. *See id.* at *2. The plaintiff alleged that the co-worker later stated that the director sexually harassed her and forced her in his lap, asking "What do you want Santa Claus to get you for Christmas?" *Id.* The plaintiff also alleged that she observed "future sexual harassment" by the director and that she was ultimately terminated in retaliation for helping with a sexual harassment investigation. *Id.*

In ruling on a motion to dismiss, the court found that, while the plaintiff was a member of a protected class (women), she failed to plead facts showing she was a victim of unwelcome or uninvited sexual harassment. *See id.* at *4. Although the plaintiff claimed that she witnessed other employees being subjected to sexual harassment—she did not state that anyone directly harassed her. *Id*. The plaintiff did not provide the court with the content of any sexually harassing remarks that were made to her. *Id*. Further, the court found the plaintiff never asserted that the director made sexually harassing or inappropriate remarks directly to her. *Id.* The court dismissed the claim because the plaintiff failed to allege facts that demonstrated that she suffered sexual harassment based on a hostile work environment. *See id.*

Here, as in the *Taylor* case, the Court finds that Plaintiff's allegations do not state a claim for sexual harassment based on hostile work environment. While the Court finds that Defendant's conduct, if true, is distasteful and reprehensible, particularly in the workplace, the Second Amended Complaint does not allege that any of Defendant's conduct was directed at Plaintiff. There are no allegations that Plaintiff was made to view any pornography or view Defendant engaged in any untoward conduct. Defendant's conduct was never discussed with Plaintiff or even discussed in front of Plaintiff. Plaintiff and Defendant are not alleged to have had any interactions that were of a sexual nature or of a derogatory nature toward women that

would support the necessary element that she was the intended victim of any unwelcome sexual harassment.

Because Plaintiff has failed to properly state a claim for sexual harassment, via hostile work environment, under Section 1983, particularly after three attempts, dismissal is appropriate. *Heath v. Elaasar Heath v. Elaasar*, 763 Fed. Appx. 351 (5th Cir. 2019). Finding no constitutional violation, the Court need not address Defendant's qualified immunity or official capacity claim arguments.

**2. Claim of Retaliation Under 42 U.S.C. § 1983**

As this Court has stated, although in the context of a Title VII retaliation claim:

> The prohibition of retaliation protects employees who use informal methods to voice their complaints, as well as those who file formal charges. Such informal means include "making complaints to management, writing critical letters to customers, *protesting against discrimination* by industry or by society in general, and expressing support of co-workers who have filed formal charges." However, an employee's statement cannot be deemed to be *in opposition to an unlawful employment practice* unless it refers to and opposes a specific practice of the employer.

*Alack v. Beau Rivage Resorts, Inc*., 286 F. Supp. 2d 771, 774 (S.D. Miss. 2003) (emphasis added). In other words, the very nature of retaliation is taking an adverse employment action against one who is engaged in protected activity, i.e., opposing an *unlawful* employment practice, which in this case is the complaining of alleged sexual harassment. However, the only activity complained of was Defendant's watching pornography.[10] Because the Court has found that Plaintiff's Second Amended Complaint fails to sufficiently allege that Plaintiff was subject to sexual harassment, even when taking the allegations of watching pornography together with the allegations of masturbating behind closed doors, Plaintiff's reports/complaints to three people solely about Defendant's watching pornography cannot be protected activity. Again, while

Defendant's action may be remarkably distasteful, Plaintiff was not opposing an "unlawful employment practice."

In addition, Plaintiff pleads her claim for retaliation, along with her sexual harassment claim, under the Fourteenth Amendment. As noted earlier, the sexual harassment claim under Section 1983 comes by way of the Equal Protection Clause of the Fourteenth Amendment. *See Lauderdale v. Tex. Dep't of Criminal Justice, Inst. Div.*, 512 F.3d 157 (5th Cir.2007). Defendant argues that the "right to be free from retaliation for protesting sexual harassment and sex discrimination" "is a right created by Title VII, not the equal protection clause." [24] at p. 8 (citing *Gray v. Lacke*, 885 F.2d 399, 414 (7th Cir. 1989)[11] and *Boyd v. Ill. State Police*, 384 F.3d 888 (7th Cir. 2004)).

The Court agrees with Defendant that Plaintiff cannot state a Section 1983 retaliation claim through the Fourteenth Amendment because the Equal Protection Clause cannot provide the basis for a retaliation claim, as courts, not only in this state but around the country, have found.[12] *See Matthews v. City of West Point, Miss.*, 863 F. Supp. 2d 572, 604 (N.D. Miss. 2012) (explaining that retaliation claims growing out of complaints of employment discrimination have not been recognized under the Equal Protection Clause of the Fourteenth Amendment and citing numerous cases); *see also Robinson v. Jackson Pub. Sch. Dist.*, No. 3:08CV135, 2011 WL

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[10] Plaintiff never claims she reported or complained to anyone about Defendant masturbating in his office.

[11] Plaintiff takes issue with the *Lacke* case, arguing that Defendant has chosen only favorable passages and ignored the quote, "Only when the underlying facts support both a Title VII and a constitutional deprivation claim can a plaintiff maintain an action under § 1983 and bypass the procedural requirements of Title VII." [27] at p. 3 (citing 885 F.2d at 441). Here, however, the Court has found that Plaintiff has not alleged facts that support a Title VII/§ 1983 claim.

[12] As a recent court in this Circuit noted, "While the Fifth Circuit has not addressed the issue, it appears that almost all circuit courts, as well as all district courts within the Fifth Circuit, agree that 'no cause of action exists for retaliation under the Equal Protection Clause of the Fourteenth Amendment.'" *Muslow v. Bd. of Supervisors of Louisiana State Univ. & Agric. & Mech. Coll.*, No. CV 19-11793, 2020 WL 1864876, at *21 (E.D. La. Apr. 14, 2020), *reconsideration denied*, No. CV 19-11793, 2020 WL 4471160 (E.D. La. Aug. 4, 2020), and *on reconsideration in part*, No. CV 19-11793, 2020 WL 4471519 (E.D. La. Aug. 4, 2020). This Court, too, agrees with those sister courts and the majority of Circuit Courts of Appeal.

198127, at *5 (S.D. Miss. Jan. 20, 2011) (citing *Teigen v. Renfrow*, 511 F.3d 1072, 1086 (10th Cir. 2007) ("The mere illegality of a retaliatory action under a separate body of law does not make the resulting classification so illegitimate, irrational, or arbitrary as to violate the Equal Protection Clause"); *Boyd*, 384 F.3d at 898 ("[T]he right to be free from retaliation may be vindicated under the First Amendment or Title VII, but not the equal protection clause."); *Bernheim v. Litt,* 79 F.3d 318, 323 (2d Cir. 1996) ("[W]e know of no court that has recognized a claim under the equal protection clause for retaliation following complaints of racial discrimination."); *Ratlif v. DeKalb County, Ga*., 62 F.3d 338, 340 (11th Cir. 1995) (reversing and holding that "no established right exists under the equal protection clause to be free from retaliation")). Therefore, the Court finds that, as pled, Plaintiff's retaliation claim under equal protection cannot be maintained.

Plaintiff cites to *Colson v. Grohman,* 174 F.3d 498 (5th Cir. 1999), for her proposition that a plaintiff can pursue a Fourteenth Amendment retaliation claim, but it requires the same proof as a First Amendment retaliation claim. [27] at p. 3. Such proposition is taken a bit out of context and the situation in that case is not applicable here. In *Colson*, the plaintiff alleged a direct First Amendment violation, as well as a violation of the Fourteenth Amendment, the latter of which the plaintiff couched as a liberty interest claim because she had alleged that the defendants injured her reputation and deprived her of her First Amendment right to speak out on matters of public concern free from retaliation. 174 F.3d at 505. The Court held that because her First Amendment claim failed, her Fourteenth Amendment claim likewise failed because there can be no liberty interest solely in one's reputation. *Id*. at 514 n.10. Here, Plaintiff has not made a First Amendment claim or couched her pleading as a liberty interest claim, and the Court finds that Plaintiff cannot state a claim for retaliation through the Equal Protection Clause of the

Fourteenth Amendment. Therefore, Plaintiff's claim for retaliation shall be dismissed as well.

**3. Plaintiff's Request for Leave to Amend**

Plaintiff asks, in the alternative, that "if the Court determines Plaintiff can only pursue this claim through the First Amendment, Plaintiff requests the opportunity to amend her Complaint . . . ." [27] at p. 4. Unsurprisingly, Defendant opposes such request, arguing that Plaintiff should not be allowed to amend a third time and that such amendment would be futile. [28] at pp. 6-7. The Court is not inclined to grant Plaintiff leave to amend. Plaintiff chose to bring this action in federal court, knowing there must be federal jurisdiction, so to the extent there was a First Amendment violation, it has existed since day one, but Plaintiff failed to plead her case in that regard. Additionally, Plaintiff did not attach an amended complaint to her response or explain how she would further amend to state a claim. While Rule 15 "evinces a bias in favor of granting leave to amend," a movant is still required to specify the nature of any proposed amendment sought. *Thomas v. Chevron U.S.A., Inc.,* 832 F.3d 586, 590 (5th Cir. 2016). "[A] bare request in an opposition to a motion to dismiss—without any indication of the particular grounds on which amendment is sought—does not constitute a motion within the contemplation of Rule 15(a)." *U.S. ex rel. Willard v. Humana Health Plan of Tex. Inc*., 336 F.3d 375, 387 (5th Cir. 2003) (quoting *Confederate Mem'l Ass'n, Inc. v. Hines*, 995 F.2d 295, 299 (D.C. Cir. 1993)). Plaintiff has already amended twice and has been unable to state a claim and the thought of a First Amendment claim has eluded her until she was faced with a second motion to dismiss. Therefore, the Court denies Plaintiff's request to further amend her pleading.

**4. Exercise of Supplemental Jurisdiction**

As noted, Plaintiff also seeks recovery on state law claims of intentional infliction of emotional distress claim and wrongful termination. The Court has now dismissed all federal

claims and disallowed any further amendment. The general rule in the Fifth Circuit is to decline to exercise jurisdiction over pendent state law claims when all federal claims are dismissed or otherwise eliminated from a case prior to trial. *See Batiste v. Island Recs. Inc*., 179 F.3d 217, 227 (5th Cir. 1999); *see also Carnegie–Mellon University v. Cohill*, 484 U.S. 343, 350 n.7 (1988) (stating that "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine ... will point toward declining to exercise jurisdiction over the remaining state-law claims"). Having considered the factors in 28 U.S.C. § 1367, the Court in its discretion declines to exercise supplemental jurisdiction over these state law claims. Plaintiff may bring such claims, if she so chooses, in an applicable state court forum.

**III. CONCLUSION**

Based on the foregoing, the Court finds that Plaintiff has failed to state a claim for sexual harassment in violation of the Equal Protection Clause, and, as such, there is no constitutional violation under 42 U.S.C. § 1983. The Court also finds that Plaintiff may not maintain a retaliation claim under Equal Protection Clause. Accordingly, Defendant's Motion to Dismiss and for Qualified Immunity [23] is GRANTED. Count I, with the two claims contained therein, is hereby dismissed with prejudice. Having dismissed the only claims that would provide with Court with original jurisdiction, the Court declines to exercise supplemental jurisdiction over the remaining state law claims contained in Counts II and III. Consequently, Counts II and III are dismissed without prejudice. This case is now closed.

SO ORDERED AND ADJUDGED this 8th day of March 2022.

/s/ Keith Starrett
KEITH STARRETT
UNITED STATES DISTRICT JUDGE