

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

MARILYN MCCLAIN GOFF,)	
)	
Plaintiff,)	Case No. 08-CV-71-TCK-FHM
vs.)	
)	On Removal from Case No.
SHEREE L. HUKILL, individually and)	CJ-2008-31, District Court of
DR. JOE A. WILEY, individually and)	Rogers County, State of Oklahoma
ROGERS STATE UNIVERSITY BOARD)	
OF REGENTS,)	
)	
Defendants.)	

**REPLY TO PLAINTIFF’S RESPONSE AND
OBJECTION TO DEFENDANTS’ MOTION TO DISMISS**

Defendants, the State of Oklahoma, *ex rel.*, the Board of Regents of the University of Oklahoma (hereinafter, the “University”) (incorrectly designated by Plaintiff as “Rogers State University Board of Regents”), Sheree L. Hukill (“Hukill”), individually, and Dr. Joe A. Wiley (“Dr. Wiley”), individually, (collectively “Defendants”), offer the following Reply Brief in opposition to Plaintiff’s Response and Objection to Defendants’ Motion to Dismiss (“Plaintiff’s Response”) [Doc. No. 14]. In further support of their Motion to Dismiss [Doc. No. 13], Defendants offer the following arguments and authorities.

ARGUMENTS AND AUTHORITIES

I. Dismissal Based on Insufficiency of Service of Process. (Fed.R.Civ.P. 12(b)(5))

Plaintiff improperly served on all Defendants the original Petition *after* it had been superseded by the Amended Petition¹, and at the time Defendants filed their Motion to Dismiss on February 21, 2008, Plaintiff had failed to even attempt service of the Complaint on any

¹ The Amended Petition filed by Plaintiff in Rogers County on January 17, 2008, is the pleading subject to Defendants’ present Motion to Dismiss and will hereinafter be referred to as the “Complaint.”

Defendant (admitted by Plaintiff in her Response brief at p. 5). It was not until March 14, 2008, almost a week after Plaintiff filed her Response to the Motion to Dismiss, that Plaintiff had Alias Summons issued. *See* Alias Summons [Doc. No. 15]. Despite the fact that Section I of the Motion to Dismiss clearly explained how to properly effect service on the University and the individual Defendants, Plaintiff caused Alias Summons to issue with the incorrect service information on the face of the summons. Furthermore, Plaintiff has not even attempted to serve the Complaint with the Alias Summons on any Defendant. As such, dismissal for insufficient service of process is both justified and warranted.

A. Plaintiff failed to properly serve the University with the Complaint.

Plaintiff argues service of the superceded, original Petition is good enough to save her Complaint from dismissal. Even if Plaintiff's original Petition had not been superceded by another pleading prior to service, process was insufficient, as it was performed on the wrong person at the wrong address. Because the University is part of the Oklahoma state government, Plaintiff's state court summons and pleading had to be served on the University as follows:

(B)y delivering a copy of the summons and of the petition to the officer or individual designated by specific statute; however, if there is no statute, then upon the chief executive officer or a clerk, secretary, or other official whose duty it is to maintain the official records of the organization.

12 Okla. Stat. § 2004 (C)(1)(c)(5) (emphasis added). There is no specific statute designating a service agent for the University, so the Secretary of the Board of Regents of the University of Oklahoma, whose official duty it is to maintain the records of the University, is the proper individual to accept service on behalf of the University. That the Secretary of the Board of Regents has the official duty to maintain the records of the University, and thus accept service, is further established through the following:

(1) The state educational institution located at Norman and known as the University of Oklahoma shall continue at the same location and its official name shall be the University of Oklahoma. 70 Okla. Stat. § 3301.

(2) The Board of Regents of the University of Oklahoma shall retain full power to govern the personnel, curriculum and facilities of the University of Oklahoma. 63 Okla. Stat. § 3203(E).

(3) The government of the University of Oklahoma shall be vested in a Board of Regents consisting of seven members to be appointed by the Governor by and with the advice and consent of the Senate. Const. Art. 13, § 8.

(4) The Board of Regents provided for by Section 8, Article XIII, Oklahoma Constitution, shall constitute a body corporate by the name of Regents of the University of Oklahoma and shall be the government of the University of Oklahoma, Cameron University, and Rogers State University. 70 Okla. Stat. § 3302(a)(emphasis added).

(5) The Board of Regents of the University of Oklahoma shall have the supervision, management and control of the University of Oklahoma and all its integral parts, of Cameron University, and of Rogers State University 70 Okla. Stat. § 3305.

(6) The Secretary of the Board on behalf of the University of Oklahoma Board shall keep a record of all transactions of the Board and it shall not be necessary that the Secretary be a member of the Board. 70 Okla. Stat. § 3304.

In contumacious disregard of the statutory roadmap imparted to Plaintiff and outlined above, Plaintiff improperly served the original Petition and caused Alias Summons to issue for – one could only imagine – the purpose of attempting to effect service of her Complaint upon the University. Even if the Alias Summons is someday served as issued, the service defects would

not be cured as the individual and address of service on the Alias Summons are incorrect by statute. As with Plaintiff's only service attempt on the University of the superceded, initial Petition, her Alias Summons was issued not to the Board's Secretary, rather to Dr. Wiley as President of and at the address for Rogers State University in Claremore. *Compare* Alias Summons dated March 14, 2008 [Doc. No. 15] and Plaintiff's Certificate of Service of the original Petition, attached as Exhibit 5 to Defendants' Notice of Removal [Doc. No. 2]. Other than Plaintiff being able to claim the Complaint was actually received by a person at Plaintiff's direction -- a claim which cannot be made at this time -- such service would be of no effect. As admitted by Plaintiff (Response, Doc. No. 14, p. 5, I(A)), no attempt whatsoever has been made to serve the Complaint.

Plaintiff argues that service of the original Petition upon the University was proper because she delivered "a copy of the summons and of the complaint to its chief executive officer" pursuant to Fed. R.Civ. P. 4(j)(2)(emphasis added). The state service statute, however, which governs the service of her state summons and original Petition requires service upon the Secretary for the Board of Regents, as outline above. *See* 12 Okla. Stat. § 2004(C)(1)(c)(5). Further, Plaintiff cites no authority which would hold Dr. Wiley out as the chief executive officer of the University. To the contrary, it is the Board of Regents, of which Dr. Wiley is not a member, that is the corporate body of the University. *See* 70 Okla. Stat. § 3302(a) and (c).

Likewise, Plaintiff's reliance on *Shamblin v. Beasley*, 1998 OK 88, 967 P.2d 1200, to argue that probability of notice is sufficient, is completely unavailing. *Shamblin* was a quiet title action involving allegations of "inadequate pre-sale notice" relating to real property sold at a tax resale and has no application to the case at bar. Under Plaintiff's theory of sufficiency of service, a case would never be dismissed for defective service because the defendant would necessarily

have notice of the action in order for the defendant to be moving for its dismissal. Such an argument is contrary to statute and case law. Plaintiff has the burden of establishing validity of service. *Lasky v. Lunsford*, 76 Fed.Appx. 240, 241-242, 2003 WL 22147619 (citing *Federal Dep. Ins. Corp. v. Oaklawn Apts.*, 959 F.2d 170, 174 (10th Cir. (Okla.) 1992), and she has wholly failed to meet her burden. Plaintiff's Complaint as to the University should, therefore, be dismissed pursuant to Fed.R.Civ.P. 12(b)(5).

B. Plaintiff failed to properly serve the individually named defendants.

As with Plaintiff's service attempt of the now-superseded, initial Petition on the individuals, her new Alias Summons was issued to Hukill and Dr. Wiley at the business address for Rogers State University. *Compare* Alias Summons dated March 14, 2008 [Doc. No. 15], pp. 2-3, and Plaintiff's Certificate of Service of the original Petition, attached as Exhibit 5 to Defendants' Notice of Removal [Doc. No. 2]. As pointed out in Defendants' Motion to Dismiss, service by mail upon these individuals is proper only at their residential addresses. *See* 12 Okla. Stat. § 2004(C)(1)(c)(1) and (C)(2)(a)-(c) and Fed.Civ.R. 4(e)(1) and (2). As is true for the University, Plaintiff has not even attempted -- either prior to or since issuance of the Alias Summons -- to serve the individual Defendants with the Complaint. *See* Response, Doc. No. 14, p. 5. Of course, such service would have no effect if done according to the addresses issued on the Alias Summons. Because of this, and for the reasons discussed in Section I(A), above, the attempted service on each individual Defendant is insufficient, and Plaintiff's Complaint as to Hukill and Dr. Wiley should be dismissed pursuant to Fed.R.Civ.P. 12(b)(5).

II. Dismissal Based on Failure to State a Claim. (Fed.Civ.R. 12(b)(6))

Not only does Plaintiff's Complaint fail to satisfy the pleading requirements of Fed.R.Civ.P. 12(b)(5) and (6), Plaintiff fails to acknowledge the current legal authorities setting

forth such standards. The no set of facts standard, first enunciated in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957) and relied upon by Plaintiff in her Response ([Doc. No. 14], p. 6), has been expressly overruled. Under the new plausibility standard, “a petition must be dismissed where the plaintiff has “not nudged [her] claims across the line from conceivable to plausible.” *Bell Atlantic Corp. v. Twombly*, ---U.S.---, 127 S.Ct. 1955, 1974 (2007); *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177-1178 (10th Cir. 2007). Here, the specific allegations in the Complaint fail to nudge Plaintiff’s claims across the line from conceivable to plausible and do not support a legal claim for relief under any theory.

In her Response, Plaintiff makes an empty attempt at resuscitating the Complaint by presenting additional conclusory allegations. Because such allegations are not part of the pleadings, Defendants would respectfully request the Court to disregard them². *See Hussein*, 2007 WL 3231693, at *2, fn. 2, and *4, fn. 4. The additional conclusory allegations do nothing more than prove Plaintiff could not cure the Complaint’s defects with an opportunity to amend. Given the impossibility of stating a valid claim, Plaintiff’s request to cure the defects in her Complaint should be denied. Plaintiff formally amended once and still failed to identify the necessary facts to clear her pleading hurdles. It is clear Plaintiff cannot state a claim even if given the opportunity. No leave to amend should be given, as another amendment would be futile. *See Bauchman v. West High School*, 132 F.3d 542, 562 (10th Cir. 1997).

A. Plaintiff fails to state a claim for breach of contract. (First Cause of Action)

With regard to the breach of contract claim, Plaintiff’s Response does nothing more than restate the conclusory allegations made in her factually deficient Complaint. Simply alleging a

² The Defendants are contemporaneously filing a Motion to Strike the Exhibits attached to Plaintiff’s Response.

contract existed and that it was breached is not enough to survive a Motion to Dismiss - especially where, as here, Oklahoma is an at-will employment state. Plaintiff has failed to allege, and could not truthfully allege, that she had a written employment contract or that the handbook sufficiently formed an implied contract. The very allegations made by Plaintiff have been made by plaintiffs before and denied as insufficient. See *Bowen v. Income Producing Mgmt.*, 202 F.3d 1282, 1284-1285 (10th Cir. 2000) and *Miner v. Mid-America Door Co.*, 68 P.3d 212, 221-222 (Okla. Civ. App. 2003), examined in detail in the Motion to Dismiss, p. 5. Plaintiff has failed to proffer any “well-pleaded” factual contentions in support of those conclusory allegations. As such, her allegations fail to plausibly support a legal claim for relief, and Plaintiff’s First Cause of Action should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6).

**B. Plaintiff fails to state a Section 1983 claim for 1st Amendment violation.
(Second Cause of Action)**

In response to Defendants’ motion to dismiss her Second Cause of Action, Plaintiff, again, merely restates the conclusory allegations made in her factually deficient Complaint, and cites law with no application to the issues at hand. The Complaint must do more than conclude Defendants violated a statute. It must allege facts supporting such a conclusion. Plaintiff has failed to plausibly allege she was speaking as a citizen on a matter of public concern and, thus, “raise a right to relief above the speculative level.” See *Bell Atl. Corp.*, 127 S.Ct. at 1965. Even if Plaintiff were able to show she was speaking outside her capacity as a State employee, under no circumstances could the “facts” as alleged – or any favorable interpretation thereof – be deemed protected speech. See *Connick v. Myers*, 461 U.S. 138-139 and 146-147, 103 S.Ct. 1684, 1685-86 and 1690 (1983) and *Woodward v. City of Worland*, 977 F.2d 1392, 1403-04 (10th Cir. 1992), examined along with other cases in the Motion to Dismiss, Doc. No. 13, pp. 6-9. From the face of the Complaint it is readily apparent that Plaintiff’s speech involved nothing

more than internal reporting of personnel issues and a claim of poor supervision and/or mismanagement. *See* Amended Petition, attached as Exhibit 4 to Defendants' Notice of Removal [Doc. No. 2], at ¶ 20.

Furthermore, Plaintiff's misstates the law in her Response by claiming "[i]t is not a requirement that Defendants Wiley and Hukill acted outside the scope of their employment to be individually liable under 42 U.S.C. § 1983." [Doc. No. 14], p. 11. As held by the Supreme Court in *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989), however, it is indeed a requirement that an individual be acting outside the scope of his/her employment, because individuals acting in their official capacities are not "persons" subject to liability under Section 1983. Because the Complaint does not allege any facts that would take Hukill or Dr. Wiley outside the scope of their state employment, Plaintiff has failed to state a claim against the individual Defendants under Section 1983. Not only does Plaintiff fail to make those allegations, Plaintiff's Response and the Complaint itself intimate her agreement with the assertion that Hukill and Dr. Wiley were at all times acting within the course and scope of their employment. For these reasons, Plaintiff's Second Cause of Action should be dismissed.

C. Plaintiff fails to state a Section 1983 claim for 14th Amendment violation.
(Third Cause of Action)

Plaintiff has not, cannot, and did not intend to allege Hukill or Dr. Wiley were acting outside the scope of their employment. *See e.g.*, Response Brief, Doc. No. 14, p. 11 (last para.). Plaintiff's failure to so allege is fatal to Plaintiff's Third Cause of Action, since it, too, is based upon Section 1983, which is not cognizable against a state employee acting within the scope of employment. *Will, supra*, 491 U.S. at 71.

Further, Plaintiff's conclusory allegations that she had a protected property right or a right to continued employment is not enough to state a Section 1983 claim for denial of due process.

See Bungler v. University of Okla. Bd. of Regents, 95 F.3d 987, 990-991 (10th Cir. 1996). Because Plaintiff has failed to sufficiently allege a viable property right subject to the protections of procedural due process under the Fourteenth Amendment and that Dr. Wiley and Hukill were acting outside the scope of their employment, she has failed to state a claim under Section 1983. Dr. Wiley and Hukill respectfully request the Court dismiss the Third Cause of Action.

III. Dr. Wiley and Hukill are entitled to qualified immunity on all claims.

As acknowledged by Plaintiff in her Response, in order to defeat the individual Defendants' qualified immunity, she was required to establish that Defendants' actions (1) violated a federal constitutional or statutory right; and (2) that the right violated was clearly established at the time of Defendants' actions. *See* [Doc. No. 14], p. 13. The authorities presented by Defendants and Plaintiff's inability to distinguish them from the matters at issue make it clear that no reasonable person in Dr. Wiley's or Hukill's position would know that Plaintiff's termination would be violative of any law, especially of any Plaintiff's alleged constitutionally protected rights.

Although First Amendment retaliation law might be clearly established, it is not as Plaintiff maintains. Indeed, the speech alleged to have taken place here has never been held to be a matter of public concern afforded First Amendment protections. *See Woodward v. City of Worland*, 977 F.2d 1392, 1403-04 (10th Cir. 1992). As stated in *Bunger*:

The First Amendment does not require public universities to subject internal structural arrangements and administrative procedures to public scrutiny and debate. The definition of what constitutes a matter of public concern must be constrained by 'the common-sense realization that government offices could not function if every employment decision became a constitutional matter.'

Bunger, 95 F.3d at 992 (citation omitted). Likewise, there is no case law holding that under Oklahoma law an at-will employee has a right to procedural due process prior to termination. See Section II(C), above, at pp. 7-8.

Plaintiff's allegations and the arguments in her Response brief go no further than claiming she has constitutional rights and they have been violated. To allow such a pleading scheme would destroy the very premise of qualified immunity and the protections it provides to state officials acting in their administrative capacities. Dr. Wiley and Hukill are entitled to qualified immunity and should be dismissed from this action.

CONCLUSION

The Defendants deny Plaintiff is due the relief she seeks in her remaining Response Propositions VI, VII, and VIII, and request the Court deny such relief. It is clear from Plaintiff's Complaint (one amended) and her Response arguments that amendment would be futile. In light of the foregoing, Defendants respectfully request the Court, pursuant to Fed.R.Civ.P. 12(b)(5) and (6), dismiss Plaintiff's Complaint in its entirety.

Respectfully submitted,

s/ Shawnae E. Robey

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of March, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrant:

Brendan M. McHugh
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s/ Shawnae E. Robey
