

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

CHRISTINE DAILY, f/k/a ALLAN :
DALRYMPLE, :

Plaintiff, :

: CIVIL ACTION FILE
: NO: 1:17-CV-04645-CAP-JFK
:

TECHNICAL COLLEGE SYSTEM :
OF GEORGIA; GWINNETT :
TECHNICAL COLLEGE; GLEN :
CANNON, DEBBIE GARARDO, :
DR. VICTORIA SEALS, STEVE :
MOYERS, JAMES SASS, PHIL :
KLEIN AND JOHN OR JANE :
DOE (ALL INDIVIDUALLY AND :
IN THEIR REPRESENTATIVE :
CAPACITIES FOR AND ON :
BEHALF OF GWINNETT :
TECHNICAL COLLEGE), :

Defendants. :

**DEFENDANTS’ PARTIAL MOTION TO DISMISS
PLAINTIFF’S FIRST AMENDED COMPLAINT**

COME NOW the above named Defendants, by and through their attorney of record, the Attorney General of the State of Georgia, and, in accordance with Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure, hereby file this Partial Motion to Dismiss Plaintiff’s First Amended Complaint. For the reasons explained in Defendants’ Brief in Support of their Partial Motion to Dismiss, filed

contemporaneously herewith, Defendants seek dismissal of the following claims found in Plaintiff's First Amended Complaint filed on May 30, 2018 [Doc. 34]:

- (1) A claim for a violation of Plaintiff's equal protection rights under the Constitution of the State of Georgia (§ 64, Count I);
- (2) a federal civil rights claim pursuant to 42 U.S.C. § 1981 and § 1983 for sex discrimination (Count II);
- (3) a state law claim for breach of contract for which Plaintiff purports to seek tort damages (Count III);
- (4) a state law tort claim for intentional infliction of emotional distress, including punitive damages (Count IV); and
- (5) a state law tort claim against the Technical College System of Georgia for negligent retention (Count V).

Furthermore, Defendants seek dismissal of Gwinnett Technical College as a Defendant because it is not a proper Defendant to this action. Defendants also seek dismissal of all of Plaintiff's § 1983 claims against TCSG and the Individual Defendants named in their official capacity because they are immune from such claims. Additionally, Plaintiff purports to assert her Title VII claim (Count I) against the Individual Defendants, but such claim is improper and must be dismissed.

Local Rule 7.1.D Certification:

By signature below, counsel certifies that the foregoing pleading was prepared in Times New Roman, 14 point font in compliance with Local Rule 5.1B.

s/Courtney C. Poole

COURTNEY C. POOLE 560587

Assistant Attorney General

Attorney for Defendants

Department of Law, State of Georgia

40 Capitol Square, S. W.

Atlanta, Georgia 30334-1300

Telephone: (404) 656-3384

Email: cpoole@law.ga.gov

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

CHRISTINE DAILY, f/k/a ALLAN *
DALRYMPLE, *

Plaintiff, *

CIVIL ACTION FILE *
NO: 1:17-CV-04645-CAP-JFK *

TECHNICAL COLLEGE SYSTEM *
OF GEORGIA; GWINNETT *
TECHNICAL COLLEGE; GLEN *
CANNON, DEBBIE GARARDO, *
DR. VICTORIA SEALS, STEVE *
MOYERS, JAMES SASS, PHIL *
KLEIN AND JOHN OR JANE *
DOE (ALL INDIVIDUALLY AND *
IN THEIR REPRESENTATIVE *
CAPACITIES FOR AND ON *
BEHALF OF GWINNETT *
TECHNICAL COLLEGE), *

Defendants. *

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2018, I electronically filed the foregoing
DEFENDANTS' MOTION FOR PARTIAL JUDGMENT ON THE
PLEADINGS with the Clerk of Court using the CM/ECF system which will
automatically send e-mail notification of such filing to the following attorney of
record:

W. Phillip McCurdy
LAW OFFICES OF W. PHILLIP McCURDY, LLC
4046 Wetherburn Way, Suite 7
Peachtree Corners, GA 30092
phil@phillipmccurdy.com

I further certify that on June 13, 2018, I have mailed by United States Postal Service a copy of **DEFENDANTS' MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS** and its corresponding Notice of Electronic Filing to the following Non-CM/ECF participant:

Emily S. Brenner
Brenner Law Group, LLC
750 Hammond Drive
Building 15, Suite 300
Atlanta, GA 30328

This 13th day of June, 2018.

s/ Courtney C. Poole

COURTNEY C. POOLE 560587
Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
Telephone: (404) 656-3384
Facsimile: (404) 657-9932
E-Mail: cpoole@law.ga.gov

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

CHRISTINE DAILY, f/k/a ALLAN :
DALRYMPLE, :

Plaintiff, :

: CIVIL ACTION FILE
: NO: 1:17-CV-04645-CAP-JFK

TECHNICAL COLLEGE SYSTEM :
OF GEORGIA; GWINNETT :
TECHNICAL COLLEGE; GLEN :
CANNON, DEBBIE GARARDO, :
DR. VICTORIA SEALS, STEVE :
MOYERS, JAMES SASS, PHIL :
KLEIN AND JOHN OR JANE :
DOE (ALL INDIVIDUALLY AND :
IN THEIR REPRESENTATIVE :
CAPACITIES FOR AND ON :
BEHALF OF GWINNETT :
TECHNICAL COLLEGE), :

Defendants. :

**BRIEF IN SUPPORT OF DEFENDANTS' PARTIAL MOTION TO
DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT**

COME NOW the above named Defendants, by and through their attorney of record, the Attorney General of the State of Georgia, and file this Brief in Support of their Partial Motion to Dismiss Plaintiff's First Amended Complaint, and show this Court as follows:

I. INTRODUCTION¹

Plaintiff Christine Daily is a transgender woman who contends that she was unlawfully discriminated against on the basis of sex when she was terminated from her employment with GTC. On November 20, 2017, Daily filed her original Complaint against the Technical College System of Georgia (“TCSG”), its member unit known as Gwinnett Technical College (“GTC”), and several individual TCSG employees or officials who work or worked at GTC. (Complaint, “Compl.”, Doc. 1). Defendants timely filed their Answer and Defenses and subsequently filed a Motion for Partial Judgment on the Pleadings. (Doc. Nos. 12, 22.) In lieu of a substantive response to Defendants’ motion, Daily filed a Motion for Leave to Amend her Complaint, to which Defendants consented. Daily’s First Amended Complaint (Doc. No. 34) was docketed on May 30, 2018, and Defendants hereby submit for the Court’s consideration their Partial Motion to Dismiss the First Amended Complaint.²

¹ Because the Court is required to accept all alleged facts as true for purposes of ruling on a Rule 12(b)(6) motion to dismiss, the facts recited herein are taken from Daily’s First Amended Complaint. *See Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000). In filing this motion, Defendants make no admissions as to any of Plaintiff’s allegations.

² Defendants have also filed contemporaneously herewith their Answer and Defenses to Plaintiff’s First Amended Complaint. Defendants do not waive any defenses not raised herein; Defendants hereby explicitly preserve any and all defenses available to them.

In her Amended Complaint (“Am. Compl.”), Daily brought both federal and state law claims. Specifically, she brought a federal Title VII claim for sex discrimination (Count I); a vaguely pleaded state law claim for sex discrimination and/or violation of equal protection under the Georgia Constitution (Count I); a federal civil rights claim pursuant to 42 U.S.C. § 1981 and § 1983 for sex discrimination (Count II); a state law claim for breach of contract for which Plaintiff purports to seek tort damages (Count III); a state law claim for intentional infliction of emotional distress, including punitive damages (Count IV); a state law claim for negligent retention, ratification, and conscious decision/deliberate indifference (Count V); and a generalized claim for damages and attorney’s fees under 42 U.S.C. §§ 1983, 1988, and 2000-e.³ (Am. Compl., ¶¶ 60-83). For the reasons set forth below, Counts III, IV, and V are due to be dismissed in their entirety. Defendants also request dismissal of Count I to the extent it asserts claims under the Constitution of the State of Georgia and Count II to the extent it asserts claims under 42 U.S.C. § 1981. Additionally, all named Defendants, as state actors or entities acting in their official capacities, are immune from suits brought

³ It is unclear whether Paragraph 83 of Plaintiff’s Amended Complaint, seeking compensatory damages and attorney’s fees under 42 U.S.C. §§ 1983, 1988, and 2000-e, is meant to be read as part of Count V, which appears only to allege a state law claim for negligent retention. For purposes of this motion, Defendants assume that Count V is a state law claim for negligent retention and that Paragraph 83 refers more generally to Plaintiff’s claim that she is entitled to compensatory damages and attorney’s fees under federal law.

pursuant to § 1983. Gwinnet Technical College is due to be dismissed because it is not a proper Defendant to this action. Finally, to the extent Plaintiff purports to assert her Title VII claim against the individually named defendants, such a claim is improper and must be dismissed.

II. STANDARD OF REVIEW

On motions to dismiss for failure to state a claim, plaintiffs are not entitled to the benefit of legal conclusions and other conclusory allegations in the complaint. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-50 (2009) (explaining that “[a]lthough . . . [courts] must take all of the factual allegations in the complaint as true, [courts] ‘are not bound to accept as true a legal conclusion couched as a factual allegation’”) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). “[W]here the well-pleaded facts do not permit the court 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.’” *Id.* at 1950.

The Complaint at issue herein fails to set forth facts that establish a “show[ing] – that the pleader is entitled to relief” with regard to Counts III through V. *Id.* Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that plaintiffs provide more “than a blanket assertion, of entitlement to relief;” it requires instead a “showing” of factual allegations. *Bell Atlantic*, 550 U.S. at 555-56 n.3; *see also*

ADA v. Cigna Corp., 605 F.3d 1283, 1289-90 (11th Cir. 2010). Additionally, “[a] complaint is [] subject to dismissal under Rule 12(b)(6) when its allegations – on their face – show that an affirmative defense bars recovery on the claim.” *Marsh v. Butler Cnty., Alabama*, 268 F. 3d 1014, 1022 (11th Cir. 2001) (*en banc*) (citing *Quiller v. Barclays American/Credit, Inc.*, 727 F. 2d 1067, 1069 (11th Cir. 1984) *vacated on petition for rehearing, reinstated by* 764 F. 2d 1400 (11th Cir. 1985)).

Here, as explained below, Daily’s state law claims are barred by Eleventh Amendment immunity and state sovereign immunity as preserved in the Georgia Constitution and the Georgia Tort Claims Act (“GTCA”). Daily’s tort claims are also subject to dismissal because Daily failed to comply with the *ante litem* notice requirements of the GTCA. Daily’s claims under 42 U.S.C. § 1981 are subject to dismissal because § 1981 cannot support a claim of sex discrimination. Daily’s § 1983 claims are subject to dismissal because the Defendants, as state actors, are entitled to Eleventh Amendment immunity. Gwinnett Technical College should be dismissed because it is not an entity capable of being sued. Finally, Daily’s Title VII claims against the individually named defendants are due to be dismissed because Title VII claims are only proper against an employer, not individuals.

III. ARGUMENT AND CITATION OF AUTHORITY

A. Plaintiff's state law claims are barred by Eleventh Amendment immunity and sovereign immunity.

The Eleventh Amendment bars suit against a state or its agencies, departments or officials, absent a waiver by the state, when monetary recovery would be paid from state funds. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985); *see also Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 100-101 (1984). The U. S. Supreme Court has construed the Eleventh Amendment as a jurisdictional bar extending to federal suits against a non-consenting state “by her own citizens as well as citizens of another state.” *Port Authority Trans-Hudson v. Feeney*, 495 U.S. 299, 304 (1990). Additionally, the Georgia Constitution specifically preserves the State’s sovereign immunity from suit unless that immunity is waived by an Act of the Georgia General Assembly, and only on the limited terms and conditions set forth in such an Act. GA. CONST. art. I, § II, para. IX (e). Further, the Georgia Constitution provides that “[n]o waiver of sovereign immunity shall be construed as a waiver of any immunity provided to the state or its departments, agencies, officers, or employees by the United States Constitution.” GA. CONST. art. I, §II, para. IX (f).

The Georgia Tort Claims Act (“GTCA”) provides a limited waiver of the State of Georgia’s sovereign immunity for actions alleging torts committed by state

officers or employees; however, sovereign immunity has not been waived for breach of contract or tort actions brought against the State in federal court.

Specifically, O.C.G.A. § 50-21-23(b) provides: “The state waives its sovereign immunity only to the extent and in the manner provided in [the GTCA] and only with respect to actions brought in the courts of the State of Georgia. The state does not waive any immunity with respect to actions brought in the courts of the United States.” Similarly, O.C.G.A. § 50-21-28 provides that all tort actions against state government entities “shall be brought in the state or superior court of the county wherein the loss occurred....”

Federal case law is clear that states may waive their sovereign immunity on certain limited terms and conditions while preserving their sovereign immunity in all other respects. One of the instances in which federal courts have consistently held that a state’s sovereign immunity has been preserved is when a state entity or its officials are sued in federal court and the state has not consented to be sued in federal court on those claims. The U.S. Supreme Court has recognized and enforced this concept in *Smith v. Reeves*, 178 U.S. 436, 445 (1900), *Chandler v. Dix*, 194 U.S. 590 (1904), and *Great N. Life Ins. Co. v. Read*, 322 U.S. 47 (1944).

District Court and Eleventh Circuit rulings in Georgia likewise hold that the State has not waived its sovereign immunity from suit on state law claims brought

in federal court. For example, in *Manning v. Ellis*, the District Court for the Middle District of Georgia held that the “State defendants” were entitled to a dismissal of the state law claims asserted against them for three separate reasons, one of which was “the legislature of the State of Georgia clearly has not waived Georgia’s sovereign immunity for tort actions brought in the courts of the United States.” Case No. 7:05-cv-90(RLH), 2006 U.S. Dist. LEXIS 51426, at *10 (M.D. Ga., July 27, 2006). Similarly, in *Alyshah v. State of Georgia*, Case No. 1:06-cv-0930-TWT, 2006 U.S. Dist. LEXIS 66550 (N.D. Ga., Sept. 1, 2006), *aff’d* at 239 Fed. Appx. 473, 2007 U.S. App. LEXIS 8357 (April 11, 2007) and *Alyshah v. State of Georgia*, Case No. 1:06-cv-0928-TWT, 2006 U.S. Dist. LEXIS 66546 (N.D. Ga., Sept. 1, 2006), *aff’d* at 230 Fed. Appx. 949, 2007 U.S. App. LEXIS 18581 (2007), the District Court for the Northern District of Georgia held that state law claims were “barred by sovereign immunity as well as the Eleventh Amendment,” because “[t]he GTCA [Georgia Tort Claims Act] specifically preserves the State’s sovereign immunity from suit for tort claims filed in federal courts. *See* O.C.G.A. § 50-21-23(b). The State has similarly preserved its Eleventh Amendment immunity.” *Alyshah*, 2006 U.S. Dist. LEXIS 66550, at *4-5; and 2006 U.S. Dist. LEXIS 66546, *11-12.

With respect to her state law claim for breach of contract (Count III), such a claim is also barred by sovereign immunity and Eleventh Amendment immunity. The State of Georgia has only waived its sovereign immunity for claims of breach of *written* contracts. O.C.G.A. § 50-21-1(a). Here, Daily was not party to any written contract with TCSG. Thus, to the extent she attempts to state a claim for breach of an unwritten or oral contract, her claim is due to be dismissed.

Further, even if Daily had a written contract, which Defendant expressly denies, the Eleventh Circuit has held that “Georgia has not waived its Eleventh Amendment immunity from suit in federal court for breach of contract claims.” *Barnes v. Zaccari* 669 F.3d 1295, 1308 (11th Cir. 2012). Accordingly, the *Barnes* Court reversed the District Court’s grant of summary judgment and remanded the case with instructions to dismiss the breach of contract claim for want of jurisdiction. Daily’s breach of contract claim is likewise subject to dismissal for lack of jurisdiction.

*B. State officers or employees acting within the course and scope of their official duties or employment are immune from suit in tort.*⁴

⁴ For the reasons stated herein Defendants are immune from Daily’s claim or claims under the State Constitution, as well. (*See* Am. Compl., ¶¶ 62-64.) This is because Georgia does not have a state law equivalent of § 1983, which provides a cause of action against state actors for certain violations of federal statutes or constitutional provisions. *See, e.g., Davis v. Standifer*, 275 Ga. App. 769, 621 S.E.2d 852 (2005); *Draper v. Reynolds*, 278 Ga. App. 401, 621 S.E.2d 852 (2005). Thus, “[e]ven where the plaintiff alleges a state constitutional violation, if the ‘underlying conduct complained of is tortious’ and occurred within the scope of

Under the GTCA, “[a] state officer or employee who commits a tort while acting within the scope of his or her official duties or employment is not subject to lawsuit or liability therefor.” O.C.G.A. § 50-21-25(a). This code section requires that a plaintiff “name as a party defendant only the state government entity for which the state officer or employee was acting and shall not name the state officer or employee individually.” O.C.G.A. § 50-21-25(b). Further, if an employee is sued for a tort committed while acting within the scope of employment, “the state government entity for which the state officer or employee was acting must be substituted as the party defendant.” O.C.G.A. § 50-21-25(b).

Defendants Cannon, Gerardo, Seals, Moyers, Sass, and Klein (the “Individual Defendants”) were, at all relevant times, state officers or employees acting within the scope of their official duties or employment by TCSG, a state governmental entity. Thus, under O.C.G.A. § 50-21-25(a), any state tort claims based on acts or omissions by said Individual Defendants cannot be brought against them and must instead be filed against TCSG, the state government entity for which they were acting.

The Georgia Supreme Court and the Court of Appeals have consistently invoked O.C.G.A. § 50-21-25(a) to dismiss cases when state officers or employees

the state employee’s official duties, the employee is protected by official immunity under the GTCA.” *Davis*, 275 Ga. App. at 772 (citation omitted).

are sued individually for alleged torts occurring within the scope of their official duties or employment. In *Riddle v. Ashe*, 269 Ga. 65 (1998), the Georgia Supreme Court found the GTCA's employee immunity provision to be constitutional and reversed the trial court for failing to grant the defendant state employee's motion to dismiss. *Id.* at 65-67. There is a three-part test for determining the legal issue of whether a defendant is entitled to immunity under the GTCA: (1) whether the GTCA applies to the action; (2) whether the defendant is a state employee; and, if so, (3) whether the defendant's actions were committed within the scope of his employment. *Hardin v. Phillips*, 249 Ga. App. 541, 543 (2001). The defendants in *Hardin* were entitled to immunity under the GTCA because: (1) the cause of action arose after the GTCA's effective date; (2) the defendants were state employees; and, (3) the defendants were acting within the scope of their official duties or employment. *Id.* at 543-45. In the *Riddle* case, the Georgia Supreme Court noted that the General Assembly had stated the following legislative policy underlying § 50-21-25(a):

The proper functioning of state government requires that state officers and employees be free to act and to make decisions, in good faith, without fear of exposing themselves to lawsuits and without fear of the loss of their personal assets. Consequently, it is declared to be the public policy of this state that state officers and employees shall not be subject to lawsuit or liability arising from the performance or nonperformance of their official duties or functions.

Riddle, 269 Ga. at 66 (quoting O.G.C.A. § 50-21-21(b)).

Moreover, the Georgia Supreme Court has held that state officers or employees acting within the scope of their official duties or employment are immune from suit under § 50-21-25, even when they are accused of acting with malice and violating the policies and procedures of their state offices or employers. *See Ridley v. Johns*, 274 Ga. 241, 243 (2001). In a long line of cases, this rule has been consistently applied to bar state tort claims on grounds of “state officer or employee immunity” when the state officer or employee is accused of having engaged in misconduct or malice. *See, e.g., Tootle v. Cartee*, 280 Ga. App. 428, 431 (2006); *Davis v. Standifer*, 275 Ga. App. 769, 771 (2005); *Hardin*, 249 Ga. App. at 545. Thus, even where it may be alleged that a state officer or employee was more than just negligent, i.e., even when state officers or employees are accused of having acted recklessly, or with malice, or with willful intent, state officers and employees are not stripped of their immunity under the GTCA.

Additionally, while O.C.G.A. § 50-21-25(b) of the GTCA contemplates substitution of the state government employer for the individually named state officer or employee when a plaintiff improperly names an individual state officer or employee as a defendant, substitution of TCSG for its officers or employees in the present action is unnecessary because TCSG already is a named defendant in this

case. Moreover, even if TCSG were not already a party to this case, substitution of TCSG instead of the individual defendants would be futile here, not only because of Eleventh Amendment and sovereign immunity as discussed above, but also for the reasons discussed below.

C. Plaintiff has failed to comply with the ante litem notice requirements of O.C.G.A. § 50-21-26.

Prior to filing suit, a claimant must provide *ante litem* notice to the Risk Management Division (“RMD”) of the Department of Administrative Services (“DOAS”) within 12 months after her loss is or should have been discovered, and she must send a copy to the targeted state government entity. *See* O.C.G.A. § 50-21-26(a)(1) and (2). To that end, O.C.G.A. § 50-21-26(a)(3) provides that “[n]o action against the state under this article shall be commenced and courts shall have no jurisdiction thereof unless and until a written notice of claim has been timely presented to the state as provided in this subsection.” Not only must an *ante litem* notice be given, a copy of the notice and a copy of the receipt reflecting its delivery must be attached as exhibits to the Complaint:

Any complaint filed pursuant to this article must have a copy of the notice of claim presented to the Department of Administrative Services together with the certified mail or statutory overnight delivery receipt or receipt for other delivery attached as exhibits. If failure to attach such exhibits to the complaint is not cured within 30 days after the state raises such issue by motion, then the complaint shall be dismissed without prejudice.

O.C.G.A. § 50-21-26(a)(4) (emphasis added).

In the present case, Plaintiff has not attached the required *ante litem* notice exhibits to her First Amended Complaint. Her civil action is subject to dismissal for this failure, and would be barred even in state or superior court.

D. Plaintiff has not complied with O.C.G.A. § 50-21-35.

Separate and apart from the requirements for giving an *ante litem* notice to the State, the service provisions for tort actions brought against state government entities are set forth in the GTCA at O.C.G.A. § 50-21-35. Specifically, claimants must: (1) cause process to be served upon the chief executive officer of the state government entity involved; and (2) cause process to be served upon the director of the RMD of DOAS. In addition, the claimant must mail a copy of the Complaint to the Attorney General in a specified manner, and attach a certificate to the Complaint that this requirement has been met. O.C.G.A. § 50-21-35.

The Georgia Court of Appeals has confirmed that service of process upon the RMD director of DOAS is necessary to perfect service of process upon state government entities in tort actions. *See Sylvester v. Ga. Dep't of Transp.*, 252 Ga. App 31, 32-33 (2001); *and Green v. Cent. State Hosp.*, 275 Ga. App. 569, 571 (2005). In addition, the Georgia Supreme Court has confirmed that the requirement for mailing the complaint to the Attorney General is mandatory (“The statute

demands that a copy of the complaint be sent to the Attorney General as soon after filing as possible”), though the Court allowed that in some circumstances this requirement may be accomplished by amendment. *See Camp v. Coweta Cnty*, 280 Ga. 199, 203-04 (2006).

In the present case, the requirements of O.C.G.A. § 50-21-35 have not been met. Specifically, there is no evidence that the Director of the RMD of DOAS has been served with process. Nor has a copy of the Complaint been mailed to the Attorney General by certified mail return receipt requested or statutory overnight delivery, with a certificate of fulfillment of this requirement attached to the Complaint.

Georgia appellate courts have repeatedly affirmed the dismissal of cases where a plaintiff seeks to recover for an alleged tort committed by a state officer or employee, yet has failed to properly effect service of process. *Green*, 275 Ga. App. at 571 (affirming dismissal of tort claim against the Department of Corrections based on failure to serve the RMD Director of DOAS); *Sylvester*, 252 Ga. App. at 32-33 (affirming dismissal of re-filed tort action where plaintiff had failed in prior action to serve process upon the director of RMD of DOAS); *Henderson v. Dep’t of Transp.*, 267 Ga. 90, 90-91 (1996) (trial court’s dismissal of action affirmed where there was no service of process on the RMD Director of DOAS and no

mailing of the Complaint to the Attorney General). Thus, the state tort claims asserted herein are subject to dismissal for failure to comply with O.C.G.A. § 50-21-35.⁵

E. 42 U.S.C. § 1981 cannot support Plaintiff's claim of sex discrimination.

In Count II of her Amended Complaint, Daily purports to allege a cause of action for sex discrimination under 42 U.S.C. § 1981. (*See* Am. Compl., ¶¶ 67-68). This Count must be dismissed because §1981 cannot support a claim of sex discrimination. “Section 1981 was enacted to prevent discrimination based on race, not discrimination based on sex.” *Anderson v. Dunbar Armored, Inc.*, 678 F. Supp. 2d 1280, 1305-06, n. 16 (N.D. Ga. 2009) *adopted by* 678 F. Supp. 2d 1280, 1289-90 (N.D. Ga. 2009); *see also Little v. United Techs., Carrier Transicold Div.*, 103 F.3d 956, 961 (11th Cir. 1997) (“[i]t is well-established that section 1981 is concerned with *racial* discrimination in the making and enforcement of contracts”). Because there are no allegations of racial discrimination in Plaintiff’s Complaint, her § 1981 claim must be dismissed.

⁵ If the state law claims were not barred for the foregoing reasons, they nonetheless would be barred by one or more of the exceptions in the GTCA at O.C.G.A. § 50-21-24, including and not necessarily limited to sub-sections (2) and (7). Should circumstances warrant at a later time, Defendants will file a dispositive motion seeking dismissal or summary adjudication based on the applicable exceptions in O.C.G.A. § 50-21-24 as well as 50-21-30.

F. The Defendants, as state actors, are immune from claims under § 1983.

Also in Count II of her Complaint, Daily asserts violations of federal law by and through 42 U.S.C. §1983. However, the Defendants, as state actors, are immune from Plaintiff's claims under § 1983.⁶ Immunity under the Eleventh Amendment extends not only to the state itself, but also to statewide agencies and state actors. *See Fla. Dep't. of Health & Rehab. Servs. v. Fla. Nursing Home Assoc.*, 450 U.S. 147 (1981). TCSG, as an arm of the state, is entitled to Eleventh Amendment immunity.⁷ *See Saripalli v. Tech. College Sys. of Ga.*, 2013 U.S. Dist. LEXIS 175444, *5-6 (S.D. Ga. 2013). Because the State of Georgia has not waived its immunity for § 1983 claims, any such claims asserted against the College System must be dismissed as a matter of law. *Id.* (dismissing § 1981 and § 1983 claims brought against TCSG pursuant to the Eleventh Amendment and sovereign immunity); *see also Presnell v. Paulding Cnty*, 454 Fed. App'x 763, 766-767 (11th

⁶ Additionally, TCSG is not subject to Plaintiff's § 1983 claims because TCSG is not a "person" within the meaning of 42 U.S.C. §1983. *Will v. Michigan State Dept. of Police*, 491 U.S. 58, 65 (1989). ("[W]e reaffirm today what we had concluded prior to *Monell* and what some have considered implicit in *Quern*: that a State is not a person within the meaning of § 1983").

⁷ GTC is due to be dismissed entirely, as explained more fully herein. Should the Court find that GTC should not be dismissed for the reasons explained in Part III(G), GTC contends that it, too, is entitled to Eleventh Amendment protection as an arm of the state.

Cir. 2011) (“the State of Georgia has not waived its sovereign immunity from suit in federal court”).

Similarly, Daily asserts her § 1983 claims against each of the individually named Defendants in their official capacity. However, “a state official may not be sued in his official capacity unless the state has waived its Eleventh Amendment immunity or Congress has abrogated the state's immunity.” *Melton v. Abston*, 841 F.3d 1207, 1233 (11th Cir. 2016). To the extent they are sued in their official capacity, the Individual Defendants are not subject to any of Plaintiff’s § 1983 claims and ask that they be dismissed.⁸

G. Gwinnett Technical College is not a proper party to this action.

GTC is not a proper Defendant to this action because it is not a legal entity, separate and distinct from the Technical College System of Georgia (“TCSG”), capable of being sued. Rather, GTC is a member institution of TCSG. Similar to state universities which are under the control of the Board of Regents of the University System of Georgia, TCSG is empowered by statute to “exercise state level leadership, management, and operational control over schools, programs, and services....” O.C.G.A. § 20-4-14(b). The Georgia Court of Appeals has

⁸ With respect to claims brought against them in their individual capacity, Defendants do not waive, and hereby explicitly preserve, any arguments they may have as to qualified immunity.

recognized that TCSG exercises control over the technical colleges. *Tech. College Sys. of Ga. v. McGruder*, 326 Ga. App. 469, n.1 (2014).

In *McCafferty v. Medical College of Georgia*, the Georgia Supreme Court ruled that there was no error in dismissing the Medical College of Georgia as a defendant where the Board of Regents had been vested with the power to sue and be sued on behalf of the member institutions. 249 Ga. 62 (1982). Federal courts have repeatedly relied on that opinion to dismiss individual institutions as Defendants where the proper party is the Board of Regents. *See Hicks v. Bd. Of Regents*, Case No. 3:11-cv-94 (CDL), 2013 U.S. Dist. LEXIS 5069, *2 n.1 (M.D. Ga. 2013); *Box v. Fort Valley State Univ.*, Case. No. 5:12-cv-66(MTT), 2012 U.S. Dist. LEXIS 116181 (M.D. Ga. 2012). Here, too, it is proper for the Court to formally dismiss GTC as a named Defendant, because TCSG is the real party in interest. *See Saripalli v. Tech. College Sys. Of Ga.*, Case No. CV412-075, 2013 U.S. Dist. LEXIS 175444 (S.D. Ga. 2013) *adopted by* 2014 U.S. Dist. LEXIS 23170 (S.D. Ga. 2014). Accordingly, Defendants request that GTC be entirely dismissed from this action.

H. Title VII claims do not properly lie against individual defendants.

Finally, to the extent Plaintiff purports to assert her Title VII claim of sex discrimination against the Individual Defendants (*see* Am. Compl., ¶ 61, asserting

Title VII claim against “Defendants”), such a claim is improper and due to be dismissed. It is well-established in the Eleventh Circuit “that “[t]he relief granted under Title VII is against the employer, not [against] individual employees whose actions would constitute a violation of the Act.”” *Dearth v. Collins*, 441 F.3d 931, 933 (11th Cir. 2006) (per curiam) (quoting *Hinson v. Clinch Cnty Bd. Of Educ.*, 231 F.3d 821, 827 (11th Cir. 2000)). “Individual capacity suits under Title VII are ... inappropriate.” *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991). “The proper method for a plaintiff to recover under Title VII is by suing the employer, either by naming the supervisory employees as agents of the employer or by naming the employer directly.” *Id.* Here, because Daily has named her employer, TCSG, as a Defendant, her Title VII claims against the Individual Defendants are subject to dismissal as a matter of law.

III. CONCLUSION

For the above and foregoing reasons, Defendants respectfully request that this Court grant their Motion for Partial Judgment on the Pleadings and dismiss Counts III through V, as well as Plaintiff’s § 1981 claim found in Count II. Defendants further request that GTC be dismissed entirely from this action, that any § 1983 claims asserted against TCSG or the Individual Defendants in their

Local Rule 7.1.D Certification:

By signature below, counsel certifies that the foregoing pleading was prepared in Times New Roman, 14 point font in compliance with Local Rule 5.1B.

s/Courtney C. Poole

COURTNEY C. POOLE 560587

Assistant Attorney General

Attorney for Defendants

Department of Law, State of Georgia

40 Capitol Square, S. W.

Atlanta, Georgia 30334-1300

Telephone: (404) 656-3384

Facsimile: (404) 657-9932

Email: cpoole@law.ga.gov

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

CHRISTINE DAILY, f/k/a ALLAN *
DALRYMPLE, *

Plaintiff, *

CIVIL ACTION FILE *
NO: 1:17-CV-04645-CAP-JFK *

TECHNICAL COLLEGE SYSTEM *
OF GEORGIA; GWINNETT *
TECHNICAL COLLEGE; GLEN *
CANNON, DEBBIE GARARDO, *
DR. VICTORIA SEALS, STEVE *
MOYERS, JAMES SASS, PHIL *
KLEIN AND JOHN OR JANE *
DOE (ALL INDIVIDUALLY AND *
IN THEIR REPRESENTATIVE *
CAPACITIES FOR AND ON *
BEHALF OF GWINNETT *
TECHNICAL COLLEGE), *

Defendants. *

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2018, I electronically filed the foregoing
**BRIEF IN SUPPORT OF DEFENDANTS' PARTIAL MOTION TO
DISMISS PLAINTIFF'S AMENDED COMPLAINT** with the Clerk of Court
using the CM/ECF system which will automatically send e-mail notification of
such filing to the following attorney of record:

W. Phillip McCurdy
Law Offices of W. Phillip McCurdy, LLC
4046 Wetherburn Way, Suite 7
Peachtree Corners, GA 30092
phil@phillipmccurdy.com

I further certify that on June 13, 2018, I have mailed by United States Postal Service a copy of **BRIEF IN SUPPORT OF DEFENDANTS' PARTIAL MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT** and its corresponding Notice of Electronic Filing to the following Non-CM/ECF participant:

Emily S. Brenner
Brenner Law Group, LLC
750 Hammond Drive
Building 15, Suite 300
Atlanta, GA 30328

This 13th day of June, 2018.

s/ Courtney C. Poole
COURTNEY C. POOLE 560587
Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
Telephone: (404) 656-3384
Facsimile: (404) 657-9932
E-Mail: cpoole@law.ga.gov