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

CHRISTINE DAILY, Plaintiff, v. 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.	CIVIL ACTION FILE NO. 1:17-CV-4645-CAP-JFK

NON-FINAL REPORT AND RECOMMENDATION

The above-styled case is before the Court on a partial motion [Doc. 36] to dismiss filed by the Attorney General of the State of Georgia on behalf of the above-named Defendants (collectively, "Defendants"). Plaintiff Christine Daily, formerly known as Allan Dalrymple ("Plaintiff" or "Daily"), filed her original complaint [Doc. 1 – Complaint] in this case on November 20, 2017, and amended the complaint on May 30, 2018 [Doc. 34 – First Amended Complaint ("Am. Compl.")]. Plaintiff alleges

discrimination based upon sex (or gender) in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e, *et seq.*, as well as violation of 42 U.S.C. §§ 1981 and 1983, as amended by the Civil Rights Act of 1991, and violation of Georgia state law. [Am. Compl.].

I. Factual Background & Procedural History

On a motion to dismiss under Rule 12(b)(6), the complaint's factual allegations are assumed true and construed in the light most favorable to the plaintiff. Hardy v. Regions Mortg., Inc., 449 F.3d 1357, 1359 (11th Cir. 2006); M.T.V. v. DeKalb County Sch. Dist., 446 F.3d 1153, 1156 (11th Cir. 2006). "However, conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." Oxford Asset Mgmt., Ltd. v. Jaharis, 297 F.3d 1182, 1188 (11th Cir. 2002) (citations omitted). Accordingly, the following factual allegations are drawn from the complaint.

Plaintiff Christine Daily, formerly known as Allan Dalrymple, is a transgendered woman.[1] [Am. Compl. ¶ 4]. Plaintiff's gender identity (female) is different from the sex assigned to her at birth (male). [Am. Compl. ¶ 4].

[1] Plaintiff's name was legally changed by order of the Superior Court of Gwinnett County, dated March 3, 2017. [Am. Compl. ¶ 4, n.1].

Daily is a former employee of Gwinnett Technical College ("GTC"), a unit of the Technical College System of Georgia ("TCSG"). [Am. Compl. ¶ 6]. Daily was first known as, and initially hired by GTC and / or TCSG as, Allan Dalrymple. [Am. Compl. ¶ 19]. Daily was hired in 2006 as an instructor in the Health Sciences Department. [Am. Compl. ¶ 20]. In 2008, Daily was promoted to the position of Program Director of Emergency Medical Services and given responsibility for managing all programs of the department and teaching emergency medical technicians and paramedics. [Am. Compl. ¶ 21]. Daily remained in that position as a salaried employee until she was terminated in November 2016. [Am. Compl. ¶ 22].

Pursuant to the State Board Policies and TCSG Procedures Manual ("the Policies Manual"), disciplinary actions taken against / concerning Plaintiff were governed by the Positive Disciplinary Procedures of TCSG. [Am. Compl. ¶ 22]. During her ten years of employment, Daily had no negative annual or special reviews. [Am. Compl. ¶ 23]. According to Daily, at the time of her termination, she was successfully performing the duties of her position. [Am. Compl. ¶ 24].

Daily alleges that she had "a contentious relationship with a co-worker, David Newton, who continuously insulted, debased[,] and otherwise harassed her and others." [Am. Compl. ¶ 25]. In March of 2016, Daily filed a formal complaint with her immediate supervisor, Steven Moyers, Dean of Health Sciences ("Dean Moyers"),

concerning David Newton's ("Newton") behavior towards Daily, other employees, and students. [Am. Compl. ¶ 26].

In early May 2016, Dr. Victoria Seals ("Dr. Seals"), Vice President of Academics, called a meeting with Daily to discuss the complaint she filed regarding Newton. [Am. Compl. ¶ 27]. At the conclusion of that meeting, Daily "informed Dr. Seals that she was transgendered and intended to transition to the female gender." [Am. Compl. ¶ 28]. Dr. Seals directed Daily to inform the Human Resources Department ("HR"). [Am. Compl. ¶ 29].

Shortly thereafter, Debra Gerardo ("Gerardo"), Director of Human Resources, called Daily into her office, "ostensibly to discuss the complaint against Mr. Newton." [Am. Compl. ¶ 30]. At that time, Daily informed Gerardo that she was transgendered and intended to transition to the female gender. [Am. Compl. ¶ 31]. Gerardo advised Daily that she would discuss the "issue" with the attorneys for TCSG and get back with Daily. [Am. Compl. ¶ 32]. A few days later, Gerardo informed Daily that she would be required to provide 24 hours' notice to HR of her change of name and sex and cautioned Daily that she would not be allowed to alternate her identity. [Am. Compl. ¶ 33]. During this meeting, Daily "requested support and guidance in notifying her colleagues and students of her intent to transition." [Am. Compl. ¶ 34].

Gerardo instructed Daily to prepare a suggested timeline for the transition, to provide it to Gerardo and Dr. Seals, and to wait for instructions. [Am. Compl. ¶ 35]. Daily prepared a proposed timeline and presented it as instructed but did not receive guidance. [Am. Compl. ¶ 36]. In late May or early June of 2016 (approximately one month after first meeting with Dr. Seals and disclosing her intention), Daily informed Dean Moyers that she was transgendered and would be transitioning to the female gender. [Am. Compl. ¶ 38].

In late summer of 2016, Daily requested that Dr. Seals respond to the proposed timeline. [Am. Compl. ¶ 39]. Dr. Seals informed Daily that the timeline would not be acceptable as it would "disrupt the education process." [Am. Compl. ¶ 40]. Daily was told that she should wait until after the Christmas break. [Am. Compl. ¶ 40]. Dr. Seals told Daily that if she was planning on coming to the college dressed as a woman, it would have to wait until after the Winter break, that Daily was not to tell anyone that she was transgendered, and that she was not to identify herself as having been Allan Dalrymple or previously presenting as male to any new students or hires. [Am. Compl. ¶ 41].

In late August 2016, Dr. Seals called Daily into a meeting with newly appointed Interim Dean, Jim Sass ("Interim Dean Sass"), along with Newton and Michael Johnson ("Johnson"), the only other full-time faculty member in the division. [Am.

Compl. ¶ 42]. Dr. Seals told them that they needed to "work together as a team" for the benefit of the education process. [Am. Compl. ¶ 43].

Following the meeting, Newton angrily confronted Daily in her office. [Am. Compl. ¶ 44]. Daily reported the confrontation to Sass, who instructed Daily to accompany him to Newton's office to air their grievances. [Am. Compl. ¶¶ 44, 45]. The following day, Daily was asked by HR to meet with Gerardo and Dr. Seals, at which time Daily was informed that she was to take a 24-hour "Decision Making Leave." [Am. Compl. ¶ 46]. A "Decision Making Leave" is the third tier of a five-tier disciplinary process.[2] [Am. Compl. ¶ 47].

Upon information and belief, after the meeting with Dr. Seals and Gerardo, someone at GTC (identified as John or Jane Doe within Plaintiff's Amended Complaint) told Daily's colleagues that she was transgendered and would be transitioning to the female gender. [Am. Compl. ¶ 49].

In late October 2016, Phil Klein, the new Dean ("Dean Klein"), instructed Daily to remove her files from the Google drive account no later than October 31, 2016, and Daily complied.[3] [Am. Compl. ¶ 52]. The following week, Gerardo called Daily into

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[2] Daily alleges that, contrary to established policy, she was never provided the first or second tiers of the disciplinary process. [Am. Compl. ¶ 48].

[3] For the preceding two years, the members of Daily's department utilized a Google Drive "share file" account to exchange files and work remotely. [Am. Compl.

her office to ask about the Google drive account and removal of Daily's files. [Am. Compl. ¶ 53]. Daily reported that she had removed her files and provided all of the login and password information to Newton as instructed. [Am. Compl. ¶ 53].

On November 7, 2016, while on annual leave, Daily received a call that she should report to HR at 4:00 p.m. that day. [Am. Compl. ¶ 54]. Daily attended a meeting with Gerardo and Klein and was informed that she was being terminated for "unprofessional conduct and insubordination." [Am. Compl. ¶ 55]. Daily was provided a termination letter, told to turn over all of her identification and keys, and escorted off of the property. [Am. Compl. ¶ 55].

Daily alleges that she was discriminated against in her employment and termination based upon her sex, namely, "because she is transgendered and varied from expected sexual and gender norms" and because she "wanted to outwardly transition to her female identity[.]" [Am. Comp. ¶¶ 57–58].

On November 20, 2017, Plaintiff commenced this civil action with the filing of her original Complaint. [Doc. 1]. On April 20, 2018, Defendants moved [Doc. 22] for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, and Plaintiff was subsequently permitted to amend the complaint. [Docs.

¶ 50]. The Google drive account was not the property of GTC. [Am. Compl. ¶ 51].

30, 32, and 33]. Defendants' Rule 12(c) motion was rendered moot by Plaintiff's First Amended Complaint. [Doc. 33].

Plaintiff's First Amended Complaint, filed May 30, 2018, asserts claims against Defendants TCSG, GTC, and the following individuals, in both their individual and official capacities ("in their representative capacities for and on behalf of [GTC]"): GTC President Glen Cannon, Garardo, Dr. Seals, Dean Moyers, Interim Dean Sass, Dean Klein, and John or Jane Doe(s). [Am. Compl. ¶¶ 12–18]. The individuals named by Plaintiff as defendants are current or former officers and / or employees of GTC and / or TCSG. [Am. Compl. ¶¶ 12–18]. Plaintiff's Amended Complaint lists five separate causes of action that are only identified numerically.[4] [Am. Compl.]. Plaintiff alleges causes of action based upon sex-based discrimination under Title VII [Am. Compl. ¶¶ 61–62], 42 U.S.C. § 1983 [Am. Compl. ¶ 66], and the equal protection clause of the Constitution of the State of Georgia [Am. Compl. ¶¶ 63–64] ("Count I"); sex-based discrimination in the making and enforcement of a contract in violation of Sections 1981 and 1983 [Am. Compl. ¶ 68] and the equal protection clause of the Fourteenth Amendment of the U.S. Constitution [Am. Compl. ¶ 69] ("Count II"); breach of

[4] In addition, each count incorporates all of the preceding paragraphs of the complaint, and many counts refer to multiple legal bases for the claim, making it difficult to discern from the Amended Complaint the specific facts Plaintiff contends supports each cause of action. [Am. Compl.].

contract [Am. Compl. ¶¶ 71–73] ("Count III"); intentional infliction of emotional distress ("IIED") [Am. Compl. ¶¶ 76–78] ("Count IV"); and negligent retention of the perpetrator of known unlawful sex-based discrimination and retaliation against Plaintiff [Am. Compl. ¶¶ 80–82] ("Count V").

On June 13, 2018, Defendants simultaneously filed an Answer [Doc. 35] and moved [Docs. 36, 44] for partial dismissal of Plaintiff's Amended Complaint. Defendants' motion seeks dismissal of the following: (1) claim alleging violation of equal protection rights under the Constitution of the State of Georgia [Am. Compl. ¶ 64] (Count I); (2) federal civil rights claim alleging violation of Sections 1981 and 1983 for sex-based discrimination (Count II); (3) state law claim for breach of contract for which Plaintiff purports to seek tort damages (Count III); (4) state law tort claim for IIED, including punitive damages (Count IV); and (5) state law tort claim against TCSG for negligent retention (Count V). [Doc. 36 at 2, ¶¶ (1) – (5)]. With respect to the parties, Defendants contend that GTC is not a proper Defendant, that Section 1983 claims cannot be brought against TCSG and the Individual Defendants named in their official capacities because of immunity, and that Title VII claims cannot be brought against the Individual Defendants. [Doc. 36 at 2].

On July 19, 2018, Plaintiff filed a brief opposing Defendants' motion. [Doc. 41; Doc. 44 at 8–9]. In her opposition brief, Plaintiff did not respond directly to most of the legal arguments raised within Defendants' motion.[5] [Doc. 41; Doc. 44 at 8–9].

This matter, now ripe for disposition by the Court, is before the undersigned upon referral from the District Judge for Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

II. Rule 12(b)(6) Standard

The Federal Rules of Civil Procedure include no requirement that a plaintiff detail the facts upon which the plaintiff bases a claim. Rule 8(a)(2) requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) (as amended 2007). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964–65 (2007) (citations omitted); accord Financial Sec. Assurance, Inc.

[5] Plaintiff states that she "reasserts every paragraph" of her brief opposing Defendants' motion for partial judgment on the pleadings. [Doc. 41 at 1]. The Court finds Plaintiff's strategy inefficient and confusing and notes that, at minimum, incorporating previous legal arguments undermines the filing of her Amended Complaint.

v. Stephens, Inc., 500 F.3d 1272, 1282–83 (11th Cir. 2007) (recognizing that "while notice pleading may not require that the pleader allege a specific fact to cover every element or allege with precision each element of a claim, it is still necessary that a complaint contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory") (citations and internal quotation marks omitted).

"Factual allegations must be enough to raise a right to relief above the speculative level," i.e., they must do more than merely create a "'suspicion [of] a legally cognizable right of action,' on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Twombly, 127 S. Ct. at 1965 (citations omitted; emphasis omitted). "Stated differently, the factual allegations in a complaint must 'possess enough heft' to set forth 'a plausible entitlement to relief[.]'" Financial Sec. Assurance, Inc., 500 F.3d at 1282 (quoting Twombly, 127 S. Ct. at 1966–67). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 129 S. Ct. at 1949 (citation omitted). A plaintiff's complaint will be dismissed if it does not contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

The court's inquiry at this stage of the proceedings focuses on whether the challenged pleadings "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007) (citations and internal quotation marks omitted). A court reviewing a motion to dismiss must keep in mind that a "motion to dismiss for failure to state a claim upon which relief can be granted merely tests the sufficiency of the complaint; it does not decide the merits of the case." Wein v. American Huts, Inc., 313 F. Supp. 2d 1356, 1359 (S.D. Fla. 2004) (citing Milburn v. United States, 734 F.2d 762, 765 (11th Cir. 1984)). "Regardless of the alleged facts, however, a court may dismiss a complaint on a dispositive issue of law." Bernard v. Calejo, 17 F. Supp. 2d 1311, 1314 (S.D. Fla. 1998) (citing Marshall County Bd. of Educ. v. Marshall County Gas Dist., 992 F.2d 1171, 1174 (11th Cir. 1993) ("[T]he court may dismiss a complaint . . . when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action.")); see also Glover v. Liggett Group, Inc., 459 F.3d 1304, 1308 (11th Cir. 2006); Aque v. Home Depot U.S.A., Inc., 629 F. Supp. 2d 1336, 1350 (N.D. Ga. 2009).

The court will apply these standards in ruling on Defendants' motion [Doc. 36] to dismiss.

III. Discussion

As an initial matter, Defendants have not moved for dismissal of Plaintiff's Title VII claim of sex-based discrimination against Defendant TCGS.[6] [Doc. 44 at 4]. Plaintiff's Title VII claims against GTC and the Individual Defendants are discussed below.

A. Matters Unopposed By Plaintiff

According to Defendants, Plaintiff's brief in opposition does not address these issues: 1) Eleventh Amendment as a bar to state law claims; 2) Applicability of Section 1981; 3) Immunity from suit in tort for Individual Defendants named in their official capacity; 4) TCGS as a properly named Defendant for purposes of 42 U.S.C. § 1983; 5) Plaintiff's compliance (or non-compliance) with the notice requirements of the Georgia Tort Claims Act ("GTCA"); 6) Plaintiff's compliance (or non-compliance) with the service requirements of the GTCA; 7) GTC as a properly named defendant; and 8) Title VII claims against Individual Defendants. [Doc. 44 at 3]. Defendants contend that the defense arguments not addressed within Plaintiff's brief should be dismissed as unopposed. [Doc. 44 at 8–9].

[6] For this reason, the Court does not need to address Plaintiff's arguments within her opposition brief concerning the establishment of a *prima facie* case under Title VII. [Doc. 44 at 4–5].

Plaintiff appears to concede at least that sovereign immunity precludes her from bringing tort claims against Defendants in federal court. Plaintiff explicitly notes in her opposition brief that, "by Amendment, Plaintiff has removed all claims under the state Tort Claims Act."[7] [Doc. 41 at 9]. Plaintiff also represents that, "[b]y amendment, paragraph No. 81 of the Plaintiff's Complaint shall be amended and redacted to remove any reference to Georgia law." [Doc. 41 at 9]. Plaintiff states that she is limiting her "Count VI" claims to "only those damages arising from violation of Federal law."[8] [Doc. 41 at 9, ¶ 3]. If so, Plaintiff is also expressly abandoning her negligent retention claim, consistent with her representation that she is no longer advancing a limited waiver argument for her tort claims under the GTCA.

[7] Therefore, Issues 5 and 6 identified above – failure to comply with the notice and service requirements of the GTCA – are rendered moot. It also appears that Issue 3 – immunity from suit in tort for Individual Defendants named in their official capacities – is moot.

[8] However, Plaintiff does not identify a Count VI and also references Paragraph 81 of her complaint (i.e., the subject of her amendment), which falls within her last cause of action, or Count V. [Doc. 41 at 9; Am. Compl. at 18]. The Court concludes that Plaintiff is referring to Count V and that the mention of Count VI was inadvertent.

B. Defendants Improperly Named

1. GTC Is Not A Proper Defendant

Defendants contend that GTC is not a proper Defendant because it is not a legal entity separate and distinct from the TCSG but rather is a member institution of TCSG. [Doc. 36-1 at 18–19; Am. Compl. ¶ 9]. And see O.C.G.A. § 20-4-14(b) (designating TCSG to "exercise state level leadership, management, and operational control over schools, programs, and services. . . ."); accord Tech. College Sys. of Georgia v. McGruder, 326 Ga. App. 469, 469 n.1, 756 S.E.2d 702, 703 n.1 (2014) (citing § 20-4-14(b)). Defendants compare the relationship between GTC and TCSG to the relationship between individual state universities and the Board of Regents of the University System of Georgia ("Board of Regents"), which Board of Regents – not a given state university – is the proper entity to sue and be sued. See Hicks v. Bd. of Regents of Univ. Sys. of Georgia, 2013 WL 149626, at *1, n.1 (M.D. Ga. January 14, 2013) (dismissing claim brought against the University of Georgia and stating that, "it is clear that the University of Georgia is not a proper defendant") (citation omitted); accord Bowers v. Bd. of Regents of the Univ. Sys. of Georgia, 2012 WL 12893538, at *5 (N.D. Ga. March 20, 2012), affirmed in 509 Fed. Appx. 906 (11th Cir. 2013).[9]

[9] As explained by The Honorable Orinda D. Evans, United States District Judge:

Legal capacity to be sued is determined according to state law. Fed. R.

This point is well established in case law, and the Court finds that the same rationale applies here. See, e.g., Wells v. Columbus Tech. College, 510 Fed. Appx. 893, 895–96 (11th Cir. 2013) (affirming dismissal of § 1983 claims against Columbus Tech and remaining employee-defendants because Columbus Tech, which is part of TCSG, and its employees / officials sued in their official capacities, are immune from suits for monetary damages under the Eleventh Amendment); and see Saripalli v. Tech. College Sys. of Georgia, 2013 WL 6504771, at *1 n.2 (S.D. Ga. December 11, 2013) (TCSG is the real party in interest and proper defendant) (citations omitted), report and recommendation adopted by 2014 WL 808005 (February 28, 2014). The Court finds that TCSG is the real party in interest and the proper Defendant. See Saripalli, 2013 WL 6504771, at *1 n.2 (citations omitted).

> Civ. P. 17(b); see also Dean v. Barber, 951 F.2d 1214, 1214–15 (11th Cir. 1992). The Georgia Supreme Court has established that the [Medical College of Georgia] is not an entity that is capable of suing or being sued. McCafferty v. Med. Coll[ege] of Ga., 249 Ga. 62, 65 (1982) (discussing, at length, the establishment of the Board of Regents and its acquisition of powers of the Trustees of the University of Georgia including the power to sue and be sued), overruled on other grounds by[,] Self v. City of Atlanta, 259 Ga. 78, 79 (1989) (holding that when an entity is given the power "to sue and be sued" that language does not signify a waiver of sovereign immunity against suit).

Id., at *5 n.12.

The Court will **RESPECTFULLY RECOMMEND** that Plaintiff's claims against GTC be dismissed with prejudice as GTC is not a proper Defendant.

2. Individuals Are Not Proper Title VII Defendants

It is also well established that Title VII provides for a private cause of action against employers as that term is defined by statute. See 42 U.S.C. §§ 2000e(b) (defining "employer"). In Busby v. City of Orlando, 931 F.2d 764 (11th Cir. 1991), the Eleventh Circuit held that "[i]ndividual capacity suits under Title VII are . . . inappropriate. . . . The relief granted under Title VII is against the employer, not individual employees whose actions would constitute a violation of the Act." Id. at 772 (citations omitted); accord Hinson v. Clinch County Board of Educ., 231 F.3d 821, 827 (11th Cir. 2000) (quoting Busby); Aque, 629 F. Supp. 2d at 1342 ("It is well established that there is no individual liability under [Title VII]."). "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." Busby, 931 F.2d at 772. Accordingly, Plaintiff's Title VII claim against the individual defendants, in their individual capacities, does not survive Rule 12(b)(6). Id.

And to the extent Plaintiff has also named supervisory employees as defendants in their official capacities, these claims are redundant because she has brought a Title

VII action against her former employer. See Wheeles v. Nelson's Elec. Motor Services, 559 F. Supp. 2d 1260, 1267 (M.D. Ala. 2008) (official capacity claims brought against individual employees deemed redundant and dismissed as such given that employer was properly named as Title VII defendant) (citations omitted).

Here, Plaintiff's employer was TCSG, and GTC is a unit of the same. [Am. Compl. ¶¶ 8–11, 19 ("initially hired by GTC and / or TCSG"]. For the reasons discussed *supra*, TCSG is the proper Title VII Defendant.

The Court will **RESPECTFULLY RECOMMEND** that Plaintiff's Title VII claims against the Individual Defendants, in both their official and individual capacities, be dismissed with prejudice.

C. Eleventh Amendment Immunity & Sovereign Immunity

Defendants assert that TCSG is an arm of the State of Georgia and, as such, is entitled to immunity under the Eleventh Amendment as well as state sovereign immunity. [Doc. 36-1 at 6–9; Doc. 44 at 5, 7–8]. Defendants contend that all of Plaintiff's state law claims are precluded in light of immunity, as well as aspects of Plaintiff's 42 U.S.C. § 1983 action (against state actors). Plaintiff does not address this issue in her brief.

> The Eleventh Amendment provides as follows:
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> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. Thus, the Eleventh Amendment bars suit against a state or its agencies, departments or officials, absent a waiver by statute, when monetary recovery would be paid from state funds. See Kentucky v. Graham, 105 S. Ct. 3099, 3107 (1985); and see Williams v. Dist. Bd. of Trustees of Edison Community College, Fla., 421 F.3d 1190, 1192 (11th Cir. 2005) ("[t]he Eleventh Amendment bars federal courts from entertaining [litigation brought] against states"). "Although the express language of the [Eleventh] [A]mendment does not bar suits against a state by its own citizens, the Supreme Court has held that an unconsenting state is immune from lawsuits brought in federal court by the state's own citizens." Carr v. City of Florence, 916 F.2d 1521, 1524 (11th Cir. 1990) (citing Hans v. Louisiana, 10 S. Ct. 504, 505 (1890)).

The law is "well-settled that Eleventh Amendment immunity bars suits brought in federal court when an 'arm of the State' is sued." Manders v. Lee, 338 F.3d 1304, 1308 (11th Cir. 2003) (citation omitted). "To receive Eleventh Amendment immunity, a defendant need not be labeled a "state officer" or "state official," but instead need only be acting as an "arm of the State," which includes agents and instrumentalities of

the State. Id. (quoting Regents of the Univ. of Cal. v. Doe, 117 S. Ct. 900, 903–04 (1997)). The following factors are relevant in determining "whether an entity is an 'arm of the State'. . . : (1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity." Id. at 1309 (citations omitted). "Although state law is considered, the question whether an entity is an arm of the state is one of federal law." Williams, 421 F.3d at 1192 (citing Manders, 338 F.3d at 1309); and see Manders, 338 F.3d at 1309 n.10 (explaining that arm of the state issue is question of federal law that depends in part upon "'the provisions of state law that define the agency's character'") (quoting Regents, 117 S. Ct. at 904 n.5).

Applying the above factors, the Eleventh Circuit held in Williams that a Florida community college is an arm of the state for Eleventh Amendment purposes.[10] See

[10] To summarize the court's reasoning, the court first recognized that in the State of Florida, "a community college is an entity created and governed by state law, and it is intended to serve as a bridge between state and local educational institutions." Id. at 1192. Next, the court found that the "State Board of Education exercises substantial control over community colleges. . . . [and that] members of the board of trustees of community colleges are appointed by state officials." Id. at 1193 (degree of control by state "weighs heavily in favor of concluding that a[n entity] is an arm of the state"). In terms of source of funding, while not exclusively funded by the state, the court observed that state approval of community college budgets was required and demonstrated state control. Id. at 1194 (citation omitted). Finally, the panel noted that the state would be regarded as the judgment debtor for the community college in the event of an adverse judgment. Id. (citation omitted).

Williams, 421 F.3d at 1192–95 (deciding as a matter of first impression that a Florida community college is an arm of the state and therefore protected by Eleventh Amendment immunity); see also Wells, 510 Fed. Appx. at 895–96 (stating in dictum that Columbus Tech is "a state entity for Eleventh Amendment purposes"); and see Lindsay v. Tech. College Sys. of Georgia, 2013 WL 591981 at *3 (N.D. Ga. February 14, 2013) (finding claims brought against TCSG alleging violation of False Claims Act and other federal statutes were barred by sovereign immunity and explaining that "TCSG is an agency, thus an instrumentality, of the State"). The same rationale applies here.

Further, Eleventh Amendment immunity extends to state agencies and state actors. "Lawsuits against a state official in his or her official capacity are suits against the state when 'the state is the real, substantial party in interest.'" Carr, 916 F.2d at 1524 (quoting Pennhurst State School & Hospital v. Halderman, 104 S. Ct. 900, 908 (1984)). As pled by Daily, TCSG "is an agency of the State of Georgia" and the Individual Defendants were all employees and / or officials of GTC / TCSG. [Am. Compl. ¶ 7]. The Court finds that Eleventh Amendment immunity is available to TCSG, an agency of the State of Georgia, as well as Individual Defendants as state actors.

In addition to Eleventh Amendment protection, the Georgia Constitution provides for the State's sovereign immunity from suit unless immunity is waived by an Act of the Georgia General Assembly and only on the limited terms and conditions set forth in such Act.[11] GA. CONST. art. I, § II, para. IX(e). More specifically, "[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).

Of particular relevance here, Georgia Code reads in part:

> (a) The defense of sovereign immunity is waived as to any action ex contractu for the breach of *any written contract* . . . entered into by the state, departments and agencies of the state, and state authorities.
>
> (b) Venue with respect to any such action shall be proper in the Superior Court of Fulton County, Georgia. . . .

O.C.G.A. § 50-21-1(2018) (emphasis added).

Defendants correctly state that Plaintiff has not alleged facts in support of any written employment contract between herself and TCSG,[12] which means there can be

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[11] As noted, Plaintiff has indicated that she is not pursuing any claims against Defendants under the GTCA.

[12] Plaintiff alleges that she "entered [into] a contract of employment with GTC and / or TCSG in 2006" when first hired. [Am. Compl. ¶ 20]. Plaintiff does not allege that she had a written employment contract and does not attach a copy of any written

no waiver of sovereign immunity under O.C.G.A. § 50-21-1(a). [Doc. 36-1 at 9; Doc. 44 at 7]. Likewise, even if Plaintiff had entered into a written contract – which Defendant TCSG denies – she could not seek enforcement in this federal forum in 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); see also Florida Dep't of Health and Rehab. Services v. Florida Nursing Home Ass'n, 101 S. Ct. 1032, 1034 (1981) (reiterating proper standard for waiver of Eleventh Amendment immunity by a state, holding that state's general waiver of sovereign immunity for state agency "does not constitute a waiver by the state of its constitutional immunity under the Eleventh Amendment from suit in federal court") (citation and internal quotation marks omitted).

For all of these reasons, the Court finds that, if not deemed abandoned, Plaintiff's state law claims, whether framed in tort, contract, or as a state constitutional claim, are barred by the Eleventh Amendment and by State sovereign immunity and subject to dismissal as a matter of law.

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contract to her Amended Complaint. Plaintiff's contract theory is discussed in greater detail *infra*.

The Court will **RESPECTFULLY RECOMMEND** that Plaintiff's state law claims as to TCSG and the Individual Defendants in their official capacities, including any claim under the State of Georgia Constitution (Count I, ¶ 64), breach of contract (Count III), IIED (Count IV), and negligent retention (Count V), be dismissed with prejudice.

The Court will **RESPECTFULLY RECOMMEND** that Plaintiff's state law claims as to the Individual Defendants in their individual capacities, be dismissed without prejudice.[13]

D. Plaintiff's Official Capacity Section 1983 Claims Are Barred By Immunity

Defendants seek dismissal as a matter of law of Plaintiff's claim alleging violations of federal law by and through 42 U.S.C. § 1983. Defendants contend that

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[13] The Court's reading of the Amended Complaint reflects that Plaintiff only intends to name TCSG and / or GTC in her breach of contract and negligent retention claims but sought to name all Defendants in her IIED claim. With respect to state law tort claims brought against Individual Defendants in their individual capacities, Plaintiff's Amended Complaint only speaks to plural "Defendants" and fails to allege sufficient facts concerning the acts of any specific individual to support her tort claims. See T-12 Entertainment, LLC v. Young Kings Enterprises, Inc., 36 F. Supp. 3d 1380, 1387 (N.D. Ga. 2014) (noting that in cases with multiple defendants, defendants' "inability-to-frame-an-answer problem" is impeded by the complaint's failure to specify which defendant is responsible for each act alleged) (citing Beckwith v. Bellsouth Telecomms. Inc., 146 Fed. Appx. 368, 372 (11th Cir. 2005)).

they are immune from Plaintiff's official capacity claims under § 1983. [Doc. 36-1 at 17–18]. The Court agrees that Defendants, as state actors, are immune from Plaintiff's Section 1983 claims.[14] [Doc. 36-1 at 17–18].

As previously discussed, because TCSG is an arm of the state, TCSG is entitled to the benefit of Eleventh Amendment immunity.[15] See Saripalli, 2013 WL 6504771, at *1 n.2 (TCSG is the real party in interest and proper defendant; dismissing § 1983 claims asserted against college system) (citations omitted); see also Doe v. Univ. of Alabama in Huntsville, 177 F. Supp. 3d 1380, 1386–87 (N.D. Ala. 2016) (dismissing with prejudice plaintiff's § 1983 claims against state university for lack of jurisdiction in light of Eleventh Amendment immunity).

Similarly, Plaintiff's § 1983 claims brought against the Individual Defendants named in their respective official capacities are subject to dismissal on Eleventh

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[14] "To establish a claim under 42 U.S.C. § 1983, a plaintiff must prove: (1) a violation of a constitutional right; and (2) that the alleged violation was committed by a person acting under the color of state law or a private individual who conspired with state actors." Melton v. Abston, 841 F.3d 1207, 1220 (11th Cir. 2016) (citations omitted) (Alabama sheriffs and deputies held to be state officials immune from suit as officers of state under Eleventh Amendment). In this case, Plaintiff's Amended Complaint complains of violation of the equal protection clauses under both the state and federal constitutions. [Am. Compl. ¶¶ 64, 69].

[15] TCSG is not a "person" for purposes of § 1983 in any event. [Doc. 36-1 at 17 n.6 (citing Will v. Michigan State Dep't of Police, 109 S. Ct. 2304, 2309 (1989))].

Amendment grounds. See Melton, 841 F.3d at 1233 (citation omitted) ("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."). There is no allegation of waiver.

Plaintiff's § 1983 claims against the Individual Defendants in their *individual* capacities is not challenged within Defendants' motion to dismiss. And the Court does not reach the question of qualified immunity, argued by Plaintiff in opposition. Defendants indicate that, aside from the fact that Defendants did not move for dismissal on qualified immunity grounds, applicability of qualified immunity is better left until the record is more developed. [Doc. 44 at 4–5]. Defendants state that Plaintiff's qualified immunity discussion is premature and "explicitly preserve[ ] their ability to raise the defense of qualified immunity at a later phase in the proceedings, once the record and Plaintiff's claims are more fully developed." [Doc. 44 at 4 (citing Doc. 36-1 at 18 n.8)].

The Court will **RESPECTFULLY RECOMMEND** that Plaintiff's § 1983 claims brought against TCSG and the Individual Defendants in their official capacities be dismissed with prejudice.

E. Even If Not Barred By Immunity, Plaintiff Cannot State A Breach of Contract Claim Against Defendant TCSG

The Court further finds that Plaintiff fails to state a claim for breach of contract. Plaintiff's contractual claim is premised upon the existence of the TSCG Policies Manual. Plaintiff specifically alleges as follows:

> Whether express or implied, as part and parcel of the Plaintiff's employment agreement, TCSG warranted, **by and through its policy manual** which was promulgated by statu[t]e, that the work environment would not be discriminatory in violation of Title VII and would be governed by its State Board Policies and TCSG Procedures Manual.
>
> Defendants breached that contract by violating those established policies and procedures.
>
> Defendants also breached their contractual duties to Plaintiff by failing to provide to Plaintiff the protection that they had promised to provide to Plaintiff by virtue of their policies and procedures.

[Am. Compl. ¶¶ 71–73 (emphasis added)]. In opposing Defendants' motion, Plaintiff contends that TCSG's compliance with federal anti-discrimination laws was promised, warranted, and even *guaranteed* by way of her employment agreement and TCSG's Policies Manual. [Doc. 41 at 6–8]. Plaintiff states that the terms of the Policies Manual regarding employment expressly incorporate federal law. [Doc. 41 at 7 (citing Policy 2.1.1, the nondiscrimination provision of the Manual)]. And Plaintiff argues that discrimination based upon gender, the same conduct underlying her Title VII

claim and a matter that requires construction of federal law, also constitutes breach of contract.[16] [Doc. 41 at 8].

Plaintiff's purported breach of contract claim is nonsensical and not supported by law. As already noted, Plaintiff's state law claims are barred by immunity. Moreover, as a general rule, breach of contract claims premised upon information within personnel or employee manuals are not cognizable. See O'Connor v. Fulton County, 302 Ga. 70, 71, 805 S.E.2d 56, 58 (2017) ("the policies and information in personnel or employee manuals neither create a contract . . ., nor support a claim for breach of contract"); accord Everson v. DeKalb County School Dist., 344 Ga. App. 665, 667, 811, S.E. 2d 9, 12 (2018) (citation omitted) (personnel manuals providing for termination for cause and termination procedures are not contracts of employment, and employer's failure to follow its prescribed termination procedures is not actionable); but see Ellison v. DeKalb County, 236 Ga. App. 185, 186, 511 S.E.2d 284,

[16] In support of this proposition, Plaintiff cites cases that involve federal question and / or removal jurisdiction over state law claims that implicate a significant, disputed federal issue. See, e.g., Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg., 125 S. Ct. 2363, 2368–71 (2005) (removal jurisdiction over quiet title action proper; national interest in providing federal forum for federal tax litigation deemed sufficiently substantial to support federal question jurisdiction); Thurston v. Motor Lines, Inc. v. Jordan K. Rand, Ltd., 103 S. Ct. 1343, 1343–44 (1983) (federal question jurisdiction over tariff dispute supplied by Interstate Commerce Act). [Doc. 41 at 8].

285 (1999) (identifying exception, and explaining that "provisions in an employee manual relating to additional compensation plans, of which an employee is aware, may amount to a binding contract between the parties") (citations omitted).

Alternatively, the Court will **RESPECTFULLY RECOMMEND** that Plaintiff's breach of contract claim (Count III) be dismissed for failure to state a claim upon which relief may be granted.

F. Section 1981 Does Not Apply To Sex-Based Discrimination

As discussed *supra*, Plaintiff's Amended Complaint only alleges sex-based discrimination. Pursuant to 42 U.S.C. § 1981,

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a). "[T]he term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." § 1981(b).

The elements of a cause of action under § 1981 are "(1) that the plaintiff is a member of a racial minority; (2) that the defendant intended to discriminate on the

basis of race; and (3) that the discrimination concerned one or more of the activities enumerated in the statute." Jackson v. BellSouth Telecomms., 372 F.3d 1250, 1270 (11th Cir. 2004) (citing Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1235 (11th Cir. 2000)).

Plaintiff alleges no facts in support of her Section 1981 claim. Thus, to the extent Plaintiff seeks to allege a violation of 42 U.S.C. § 1981 within Count II [Am. Compl. ¶ 68], such a claim is due to be dismissed.

The undersigned will **RESPECTFULLY RECOMMEND** that Plaintiff's claim alleging violation of 42 U.S.C. § 1981 be dismissed with prejudice.

IV. Conclusion

Based on the foregoing reasons and cited authority, the undersigned **RESPECTFULLY RECOMMENDS** that Defendants' partial motion [Doc. 36] to dismiss be **GRANTED** on all issues. Accordingly, the undersigned respectfully recommends that:

1) Plaintiff's claims against GTC be dismissed with prejudice;

2) Plaintiff's Title VII claims against the Individual Defendants, in both their official and individual capacities, be dismissed with prejudice.

3) Plaintiff's state law claims as to TCSG and / or the Individual Defendants in their official capacities, including any claim under the State of Georgia Constitution (Count I, ¶ 64), breach of contract (Count III), IIED (Count IV), and negligent retention (Count V), be dismissed with prejudice, and that Plaintiff's state law claims as to Individual Defendants in their individual capacities only, be dismissed without prejudice.

4) Alternatively, Plaintiff's breach of contract claim (Count III) be dismissed for failure to state a claim upon which relief may be granted;

5) Plaintiff's claims alleging violation of 42 U.S.C. § 1983 brought against TCSG and the Individual Defendants in their official capacities be dismissed with prejudice; and

6) Plaintiff's claim alleging violation of 42 U.S.C. § 1981 [Am. Compl. ¶ 68, Count II) be dismissed with prejudice.

If the District Court adopts the instant Report and Recommendation, Plaintiff's Title VII claim against Defendant TCSG only, and Plaintiff's Section 1983 claim against the Individual Defendants, in their individual capacities only, which were not the subject of the instant motion to dismiss, will proceed.

SO ORDERED THIS 24th day of September, 2018.

JANET F. KING
UNITED STATES MAGISTRATE JUDGE