IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

SKYLER MUSGROVE,	*	
	*	
Plaintiff,	*	
	*	CIVIL ACTION FILE NO.
v.	*	3:18-CV-00080-CDL
	*	
THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, *et al*.,	*	
	*	
Defendants.	*	

PARTIAL MOTION TO DISMISS ON BEHALF OF DEFENDANTS BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, JAMES HULL, JERE MOREHEAD, AND KARIN ELLIOTT

COME NOW the Board of Regents of the University System of Georgia ("Board of Regents"), James Hull, Jere Morehead, and Karin Elliott, each in their official capacities ("Defendants"), by and through counsel, the Attorney General of the State of Georgia, and pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), submit this Partial Motion to Dismiss. Defendants seek the dismissal of the following claims and remedies against them: (1) monetary damages under Title I of the Americans with Disabilities Act (Count I); (2) monetary damages under Title II of the Americans with Disabilities Act (Count II); (3) Title IX of the Educational Amendments of 1972 (Count VI); and (4) all claims against Jere

Morehead. Defendants' arguments and citations of authority in support of this motion are contained in the supporting brief, filed contemporaneously herewith.

Respectfully submitted this 12th day of October, 2018.

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Local Rule 7.1.D Certification:

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

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2018, I electronically filed the foregoing PARTIAL MOTION TO DISMISS ON BEHALF OF DEFENDANTS BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, JAMES HULL, JERE MOREHEAD, AND KARIN ELLIOTT with the Clerk of the Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

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BRIEF IN SUPPORT OF THE PARTIAL MOTION TO DISMISS ON BEHALF OF DEFENDANTS BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, JAMES HULL, JERE MOREHEAD, AND KARIN ELLIOTT

COME NOW the Board of Regents of the University System of Georgia ("Board of Regents"), James Hull, Jere Morehead, and Karin Elliott, each in their official capacities ("Defendants"), by and through counsel, the Attorney General of the State of Georgia, and file this brief in support of their Partial Motion to Dismiss, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Defendants seek the dismissal of the following claims and remedies against them: (1) monetary damages under Title I of the Americans with Disabilities Act (Count I); (2) monetary damages under Title II of the Americans with Disabilities Act

(Count II); (3) Title IX of the Educational Amendments of 1972 (Count VI); and (4) all claims against Jere Morehead.

I. INTRODUCTION

Skyler Musgrove ("Plaintiff") is employed by the Board of Regents at the University of Georgia. (Doc. 1, ¶ 1). He alleges that he has gender dysphoria, and that he was denied and continues to be denied health insurance coverage and short-term disability benefits because of exclusions within these policies for transgender related medical services. (*Id*., ¶¶ 3, 50, 51, 54, 61). Plaintiff asserts claims for disability and sex discrimination under Titles I and II of the American with Disabilities Act of 1990, as amended, 42 U.S.C. § 12101 *et seq*. ("ADA"); Section 504 of the Rehabilitation Act, 29 U.S.C. § 701; the Equal Protection Clause of the Fourteenth Amendment; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. ("Title VII"); and Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681, *et seq*. ("Title IX").

As shown below, Defendants are entitled to Eleventh Amendment immunity from Plaintiff's claim for monetary damages under Title I and Title II of the ADA. Plaintiff's Title IX claim should be dismissed because it is preempted by Title VII. Further, Jere Morehead, named in his official capacity as the President of UGA,

has no authority to afford or effectuate any relief requested by Plaintiff and should be dismissed as a party to this action.

II. STANDARD OF REVIEW

Under Rule 12(b)(6), a complaint is subject to dismissal if it does not "state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*.

The standard for the Court's consideration of a Rule 12(b)(6) motion to dismiss is comprised of two main principles. "First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to the legal conclusion." *Iqbal*, 556 U.S. at 678. Similarly, unwarranted deductions of fact in a complaint are not admitted as true. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009) (internal citation omitted). "Second, only a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 679.

Yet, "[r]egardless of the alleged facts, 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) (holding that a 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).

III. ARGUMENT AND CITATION OF AUTHORITY

A. Plaintiff's claim for monetary damages brought pursuant to Title I of the ADA is barred Eleventh Amendment immunity.

Plaintiff's claim for monetary damages under Title I of the ADA is barred by Eleventh Amendment immunity. The Eleventh Amendment protects a state from being sued in federal courts without its consent. *Carr v. City of Florence*, 916 F.2d 1521, 1524 (11th Cir. 1990). Congress may only abrogate this immunity where it clearly expresses its intent to do so and "acts pursuant to a valid grant of constitutional authority." *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (U.S. 2001). "The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court." *Id.* (internal citation omitted).

Accordingly, Eleventh Amendment immunity bars suits against a state or one of its agencies, departments, or officials when the state is the real party in interest or when any monetary recovery would be paid from state funds absent a waiver by the state or a valid congressional override. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100-01 (1984); *DeKalb County School District v. Schrenko*, 109 F.3d 680, 687 (11th Cir. 1997). Any monetary claims against Defendants Hull, Morehead, and Elliott in their official capacities are similarly barred.[1]

The United States Supreme Court has ruled that Title I of the ADA is barred by the Eleventh Amendment as applied to the states for damages. *Garrett*, 531 U.S. 356 (2001); *Manning v. Ellis*, 2006 U.S. Dist. LEXIS 51426, 3-4 (M.D. Ga. July 27, 2006) (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989)). The Supreme Court reached this conclusion by finding invalid the abrogation of States' sovereign immunity from suit by Congress pursuant to § 5 of the Fourteenth Amendment to the United States Constitution. *Garrett,* 531 U.S. at 374.

As an agency of the State of Georgia, the Board of Regents is entitled to the same immunity as is the State itself. *See Williams v. Board of Regents*, 477 F.3d

[1] Suits against public officials in their official capacities "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (quoting *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 690, n.55 (1978)).

1282, 1301-02 (11th Cir. 2007); *Stephens v. Georgia Dep't of Transp.*, 134 Fed. Appx. 320, 324 (11th Cir. 2005); O.C.G.A. §§ 49-2-1, 49-2-5. As such, Plaintiff's claim for monetary damages under Title I of the ADA is barred by Eleventh Amendment immunity.

B. <u>Plaintiff's claim for monetary damages brought pursuant to Title II of the ADA is barred Eleventh Amendment immunity.</u>

Plaintiff's claim for monetary damages under Title II of the ADA is also barred by Eleventh Amendment Immunity.[2] In *Clifton v. Ga. Merit System*, the Northern District of Georgia held that "Congress did not validly abrogate sovereign immunity with regard to state employment discrimination actions under Title II." *Id*., 478 F. Supp. 2d 1356, 1368 (N.D. Ga. 2007). The Court found that a Plaintiff should not be allowed to "circumvent the holding of *Garrett* immunizing states from employment discrimination claims brought pursuant to Title I of the ADA by commencing suit under Title II, a subchapter that lacks any of the procedural protections afforded employers under Title I." *Id*. The Court thus dismissed the Title II ADA claim on the basis of Eleventh Amendment immunity.

[2] The Eleventh Circuit has found that Title II of the ADA allows a cause of action for employment discrimination; however, the Court did not consider whether Eleventh Amendment immunity would bar such a claim against a state employer. *See Bledsoe v. Palm Beach County Soil & Water Conservation Dist.,* 133 F. 3d 816, 825 (11th Cir. 1998).

Similarly, in *Leverette v. Ala. Revenue Dep't*, the court concluded that, with regard to Title II of the ADA, Congress did not validly abrogate sovereign immunity for employment discrimination claims against state employers. 453 F. Supp. 2d 1340, 1345 (M.D. Ala. 2006). *See also Lucas v. Ala. Dep't of Pub. Health*, 2016 U.S. Dist. LEXIS 9420, *7-10 (M.D. Ala. 2016) (dismissing Title II ADA claim on the basis of Eleventh Amendment immunity, citing *Clifton* and *Leverette*); *Kessler v. Fla. Dep't of Revenue*, 2009 U.S. Dist. LEXIS 139060, *5 (S.D. Fla. 2009) (holding that the state is immune from claims of employment discrimination by a private individual under Title II of the ADA); *Golden v. Ga. Dep't of Corrections*, 2011 U.S. Dist. LEXIS 47751 (N.D. Ga. 2011) (holding that a plaintiff's claims for monetary damages under both Title I and II of the ADA were barred); *Rooks v. Altamaha Technical College*, 2007 U.S. Dist. LEXIS 58892 (S.D. Ga. 2007) (dismissing Title II ADA claim on the basis of the State of Georgia's Eleventh Amendment immunity); *Williamson v. Ga. Dep't of Human Res. & Ga. Reg'l Hosp.*, 150 F. Supp. 2d 1375, 1381 (S.D. Ga. 2001) (holding that the Eleventh Amendment prohibits Title II ADA claims against States for money damages);.

Therefore, Plaintiff's claim for monetary damages under Title II of the ADA is barred by Eleventh Amendment immunity and should be dismissed.

C. Plaintiff's Title IX claim is preempted by Title VII.

Plaintiff's Title IX claim should be dismissed because it is preempted by Title VII. "Title IX prohibits sex discrimination by recipients of federal education funding." *Jackson v. Birmingham Bd. of Educ.,* 544 U.S. 167, 173 (2005). Title VII also prohibits an employer from discriminating against any individual with respect to the compensation, terms, conditions, or privileges of employment because of that individual's sex. 42 U.S.C. § 2000e-2(a). Plaintiff asserts claims of employment discrimination under both Title VII and Title IX and premises these claims on the same underlying facts.

Although not yet addressed by the Eleventh Circuit, district courts in this circuit have consistently dismissed Title IX claims as preempted by Title VII. In *Drisin v. Fla. Int'l Univ. Bd. of Trs*., the Southern District of Florida held that a plaintiff's Title IX claim was preempted by Title VII as a matter of law. *Id*., 2017 U.S. Dist. LEXIS 100247, *14 (S.D. Fla. June 27, 2017). The Court reasoned that Title VII provides a comprehensive scheme for aggrieved individuals to enforce the prohibition against discrimination in employment. If a comparable cause of action were allowed under Title IX, it would "eviscerate Title VII's technical and administrative requirements, thereby giving plaintiffs who work at federally funded institutions unfettered ability to bring what are in reality Title VII sexual

discrimination claims without adhering to the same rules required of every other employment discrimination plaintiff in the country." *Id*., at *18 (quoting *Gibson v. Hickman*, 2 F. Supp. 2d 1481, 1484 (M.D. Ga. 1998)). The court further found that "Title IX was not intended to enable employees of educational institutions complaining of gender discrimination to bypass the remedial scheme Congress established in Title VII." *Id*., at *14 (internal citations and quotations omitted).

Likewise, in *Carvalho-Knighton v. Univ. of S. Fla. Bd. of Trs*., the court did not permit a Title IX claim to go forward because it overlapped with the related Title VII claim and "would be preempted by it." *Id*., 2015 U.S. Dist. LEXIS 184759, *5-6 (M.D. Fla. 2015) (citing *Morris v. Wallace Community College Selma,* 125 F. Supp. 2d 1315, 1343 (S.D. Ala. 2001) ("In light of the weight of authority that a Title IX claim of employment discrimination may not be maintained to the extent that Title VII provides a parallel remedy . . . plaintiff's Title IX claim is precluded by Title VII."); *Schultz v. Bd. of Trustees of Univ. of West Florida*, No. 3:06cv442-RS-MD, 2007 U.S. Dist. LEXIS 36815, 2007 WL 1490714 at *2 (N.D. Fla. May 21, 2007) (finding "consistent with the weight of authority, that the 'precisely drawn, detailed enforcement structure' and 'comprehensive remedial scheme' that is Title VII preempts the more general remedy under Title IX in this case")). *See also Hazel v. School Bd. of Dade Cnty*.,

7 F. Supp. 2d 1349, 1354 (S.D. Fla. 1998) (Title VII is the exclusive remedy for employment discrimination claims on the basis of sex in federally funded educational institutions); *Hankinson v. Thomas County Sch. Dist*., 2005 U.S. Dist. LEXIS 25576, *6 (M.D. Ga. 2005) (holding that Title VII preempts employment discrimination claims brought under Title IX); *Gibson*, 2 F. Supp. 2d at 1484 (holding that Title VII preempts employment discrimination claims for money damages brought under Title IX).[3] Therefore, Plaintiff's Title IX claim is preempted by Title VII and should be dismissed.

D. Jere Morehead, named in his official capacity as President of the University of Georgia, should be dismissed as a party to this action.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Here, however, Plaintiff has not pled facts sufficient to show that President Jere Morehead adopted the health and disability insurance plans at issue; or has the authority to effectuate any requested relief in this action. Rather, as asserted in Plaintiff's Complaint, the Board of Regents of the University System of Georgia has the authority over health

[3] The court in *Gibson* noted that other circuit courts had further refined the analysis by holding that claims for injunctive relief related to federal funding (a remedy not provided for by Title VII) are not preempted. *Gibson*, 2 F. Supp. 2d at 1484. Plaintiff's makes no such claim here.

and disability insurance coverage. Specifically, the Board of Regents, not UGA, has exclusive power over the government, control and management of the University System of Georgia. (Doc. 1, ¶ 14). The health insurance plan attached to Plaintiff's complaint states that the University System of Georgia is "the legal entity that has adopted the Plan and has authority regarding its operation, amendment, and termination." (Doc. 1-2 p. 92). The Board of Regents is the plan sponsor. (*Id*., p. 106). Plaintiff also alleges that the Board of Regents is the body responsible for determining coverage. (Doc. 1, ¶ 55).

There are no allegations that UGA or President Morehead have the authority to make coverage determinations for the health and disability insurance plans at issue or to modify those plans, which is the injunctive relief that Plaintiff seeks.[4] As President Morehead does not have authority over the Board of Regents' health and disability plans and cannot effectuate the coverage changes Plaintiff is seeking, he should be dismissed as a party to this action.

IV. CONCLUSION

[4] Although Plaintiff generally alleges that Elliott, Hull and Morehead adopted the healthcare policy, these are merely conclusory allegations, which fail to show any affirmative action by President Morehead related to the adoption of the policies or any authority on his part to modify the Board of Regents' health or disability insurance plans. (*See* Doc. 1, ¶¶ 159, 167, 171).

For the above and foregoing reasons, Defendants respectfully request that the Court grant this Partial Motion to Dismiss.

Respectfully submitted this 12th day of October, 2018.

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