

**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.

\*

**REPLY 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 reply in support of their Partial Motion to Dismiss.

**I. ARGUMENT AND CITATION OF AUTHORITY**

As detailed in Defendants’ Partial Motion to Dismiss, Defendants are entitled to Eleventh Amendment immunity from Plaintiff’s claim for monetary damages under Title I and Title II of the Americans with Disabilities Act (“ADA”);

and his Title IX claim is precluded by Title VII. (Doc. 37-1). Further, Jere Morehead should be dismissed as a party to this action. As demonstrated below, Plaintiff's arguments to the contrary are without merit, and Defendants' motion should be granted.

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

Defendants sought dismissal of all claims against University of Georgia President Jere Morehead because Plaintiff did not plead facts sufficient to show that he has the authority to make coverage determinations for the health insurance plan at issue; or that he has the authority to effectuate any requested relief in this action. (Doc. 37-1, pp. 10-11). Plaintiff did not respond to Defendants' argument, thus abandoning any claim against President Morehead. *See Lawson v. ADT Sec. Servs., Inc.*, 899 F. Supp. 2d 1335, 1337-38 (M.D. Ga. 2012) (granting the defendant's motion for judgment on the pleadings for some claims because the plaintiff's response did not defend them); *Welch v. Delta Air Lines, Inc.*, 978 F. Supp. 1133, 1140 (N.D. Ga. 1997) (granting summary judgment on claims that Plaintiff abandoned by not addressing them in his summary judgment response brief). As a result, President Morehead should be dismissed as a party to this action.

**B. Plaintiff's claims for monetary damages under Title I and Title II of the ADA are barred by Eleventh Amendment immunity.**

In *Board of Trustees of the University of Alabama v. Garrett*, the Supreme Court held that the Eleventh Amendment bars private suits seeking money damages for state violations of Title I of the ADA. *Id.*, 531 U.S. 356 (2001). *Garrett* examined whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled and held: “The legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.” *Id.* Because there was no identified pattern of discrimination by the States in the employment context, the remedy imposed by Congress (the ADA) was not congruent and proportional to the targeted violation. *Id.*, at 374. Thus, under *Garrett*, the Eleventh Amendment bars Plaintiff’s monetary damages claim under Title I of the ADA.

The reasoning in *Garrett* also applies to Plaintiff’s claim under Title II. As Plaintiff acknowledges, fundamental to the “congruence and proportionality” test is an examination of whether there was a history of unconstitutional discrimination to support Congress’s determination that prophylactic legislation was necessary. (Doc. 44, pp. 9-10). This is so because “Congress’ § 5 authority is appropriately exercised only in response to state transgressions.” *Garrett*, 531 U.S. at 368.

Again, *Garrett* held that Congress failed to identify any history of employment discrimination by the states and thus did not properly abrogate sovereign immunity with respect to employment-based claims. *Id.*, 531 U.S., at 368.

“[I]f Congress exceeded its § 5 enforcement powers by its purported abrogation of sovereign immunity as to claims of employment discrimination against state employers under Title I, the same is true when those claims are brought under Title II.” *Lucas v. Ala. Dep't of Pub. Health*, 2016 U.S. Dist. LEXIS 9420, \*10 (M.D. Ala. 2016). “Put another way, it would be illogical to find that history of state discrimination against the disabled in employment is insufficient to permit Congress to enact Title I, but that that (sic) same history is somehow sufficient to allow Congress to fashion Title II.” *Leverette v. Ala. Revenue Dep't*, 453 F. Supp. 2d 1340, 1345 (M.D. Ala. 2006). Thus, Eleventh Amendment immunity extends to employment-based claims asserted under Title II.

Nevertheless, Plaintiff challenges the holding in *Garrett* and its applicability to his claims under Titles I and II by arguing that it does not bar *all* claims for monetary damages, specifically in instances in which a constitutional claim is asserted. (Pl. Br., p. 12). Plaintiff relies on *U.S. v Georgia* to argue this purported exception, but *Georgia* made no such exception to *Garrett* and is nevertheless

inapplicable.<sup>1</sup> *Georgia* did not overrule *Garrett*, provide an exception to its holding, or even address it substantively. *See, generally, United States v. Georgia*, 546 U.S. 151, 158 (2006). In fact, *Georgia* distinguished *Garrett* based on the different underlying claims at issue. *Id.*, at 157-158

The holding in *Georgia* was confined to the claims at issue in that case, which involved services, programs, or activities in prisons, not in employment. *Georgia*, 546 U.S. at 156 (stating that “[w]e granted certiorari to consider whether Title II of the ADA validly abrogates state sovereign immunity *with respect to the claims at issue here.*”) (emphasis added). Specifically, the claims at issue in *Georgia* involved an alleged violation of rights in the prison context, which invoked the Eighth Amendment’s prohibition against cruel and unusual punishment, thereby implicating the Due Process clause of the Fourteenth Amendment. *Id.*, at 157 (finding that the Due Process Clause incorporates the Eighth Amendment’s guarantee against cruel and unusual punishment). The Court held that, in this respect, the plaintiff differed from claimants in other cases addressing Congress’s ability to abrogate sovereign immunity pursuant to its §

---

<sup>1</sup> The instant matter is an employment discrimination case concerning the terms and conditions of Plaintiff’s employment. (*See* Doc. 1, p. 2, stating, “This case is about equal benefits for equal work”). It is not about the State’s provision of healthcare services to the public, as Plaintiff incorrectly contends. (Doc. 44, pp. 10-11).

5 powers and distinguished *Garrett*, specifically, on this basis. *Id.*, at 157-158 (citing *Garrett*, 531 U.S., at 362, 367-368 as an example in which the failure to accommodate was not unconstitutional).

This distinction is meaningful because it hinges on the constitutional rights implicated by the claims at issue, namely the differing treatment of Equal Protection claims versus other constitutional claims, such as under the Due Process clause. It follows that the cases to which Plaintiff cites holding that Congress properly abrogated Eleventh Amendment immunity for *certain* Title II claims are distinguishable, as the alleged violations implicated the Due Process and Confrontation clauses, as opposed to the employment claims at issue here and in *Garrett*, which implicate the Equal Protection clause.

For instance, in *Tennessee v Lane*, the plaintiffs alleged they were denied access to state courts because of their disability in violation of Title II of the ADA. *Id.*, 541 U.S. 509, 522-523 (2004). *Lane* found that the Title II claims at issue implicated the Due Process and Confrontation clauses, which were subject to a “more searching judicial review.” *Id.*, at 522. Notably, *Lane* distinguished the Title II claims at issue from the Title I claims addressed in *Garrett*, which only implicated the Equal Protection clause. *Id.*, at 522. Thus, the fact that Plaintiff asserts an Equal Protection claim here does not change the explicit holding in

*Garrett* that the States have Eleventh Amendment immunity from monetary damage claims in the employment context, for which there was no finding of a history of discrimination by the States.<sup>2</sup>

Moreover, as argued in Defendants' Partial Motion to Dismiss, district courts in the circuit have uniformly held that Title II does not validly abrogate sovereign immunity in the employment discrimination context. (See Doc. 37-1, pp. 6-7, citing *Clifton v. Ga. Merit System*, 478 F. Supp. 2d 1356, 1368 (N.D. Ga. 2007); *Leverette v. Ala. Revenue Dep't*, 453 F. Supp. 2d 1340, 1345 (M.D. Ala. 2006); *Lucas v. Ala. Dep't of Pub. Health*, 2016 U.S. Dist. LEXIS 9420, \*7-10 (M.D. Ala. 2016); *Kessler v. Fla. Dep't of Revenue*, 2009 U.S. Dist. LEXIS 139060, \*5 (S.D. Fla. 2009); *Golden v. Ga. Dep't of Corrections*, 2011 U.S. Dist. LEXIS 47751 (N.D. Ga. 2011); *Rooks v. Altamaha Technical College*, 2007 U.S. Dist. LEXIS 58892 (S.D. Ga. 2007); *Williamson v. Ga. Dep't of Human Res. & Ga. Reg'l Hosp.*, 150 F. Supp. 2d 1375, 1381 (S.D. Ga. 2001). Plaintiff cites no cases in this circuit that have reached a contrary finding.

Given the binding precedent set forth in *Garrett* and the considerable persuasive authority in this circuit with respect to the Title II claim, Plaintiff's

---

<sup>2</sup> *Garrett*, in fact, examined the ADA from an Equal Protection perspective, the constitutional right in question. *Garrett*, 531 U.S., at 365.

claims for monetary damages under Title I and Title II of the ADA are barred by Eleventh Amendment immunity.

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

Plaintiff urges this Court to allow his Title IX claim to go forward because he complied with the EEOC process. (Doc. 44., pp. 13-14). However, his specific compliance with the EEOC process is irrelevant. Rather, the issue is whether Title VII is the exclusive remedy for his claims. Whether Title VII precludes a Title IX claim based on the same underlying facts is a threshold legal issue which involves consideration of Congress' intent at the time Title VII was created. This analysis, then, is not affected by a particular plaintiff's compliance with Title VII's comprehensive administrative and remedial scheme. Put simply, Title VII either preempts Title IX or it does not, regardless of Plaintiff's actual participation in the EEOC process.

While Plaintiff is correct that there is a circuit split on this issue, this does not justify allowing his claim to go forward absent a ruling. As Defendants previously argued, lower courts in this circuit have consistently found that Title VII is the exclusive remedy for claims of sex discrimination in employment. (Doc. 37-1, pp. 8-10). Plaintiff presents no authority from this circuit finding otherwise. Nor does he advance any compelling argument as to why this Court should diverge



**CERTIFICATE OF SERVICE**

I hereby certify that on December 7, 2018, I electronically filed the foregoing REPLY IN SUPPORT OF THE PARTIAL MOTION TO DISMISS ON BEHALF OF THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, JAMES HULL, JERE MOREHEAD, AND KARIN ELLIOTT with the Clerk of Court using the CM/ECF system, which will automatically send electronic notification of such filing to the following attorneys of record:

Noah Ethan Lewis  
nlewis@transcendlegal.org

Anton Sorkin  
anton@justiceatwork.com

Amanda A. Farahany  
amanda@bf-llp.com

James A. Washburn  
james.washburn@troutmansanders.com

John Sikes Gibbs, III  
evan.gibbs@troutmansanders.com

*/s/ Shelley S. Seinberg*  
SHELLEY S. SEINBERG  
Georgia Bar No. 617056  
*Counsel for Defendants Board of  
Regents, Hull, Morehead, and Elliott*