

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

SKYLER MUSGROVE,

\*

Plaintiff,

\*

vs.

\*

BOARD OF REGENTS OF THE  
UNIVERSITY SYSTEM OF GEORGIA,  
JAMES HULL, JERE MOREHEAD,  
KARIN ELLIOTT, and BLUE CROSS  
BLUE SHIELD HEALTHCARE PLAN OF  
GEORGIA, INC.,

\*

CASE NO. 3:18-CV-80 (CDL)

\*

\*

Defendants.

\*

\*

O R D E R

Defendants Board of Regents of the University System of Georgia ("Board of Regents") and Blue Cross Blue Shield Healthcare Plan of Georgia, Inc. ("Blue Cross") have filed motions to dismiss (ECF Nos. 24 & 37). One issue presented by the Board of Regents' motion is whether the Eleventh Amendment bars Musgrove's claims under Titles I and II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*

Congress may abrogate Eleventh Amendment immunity when "it both unequivocally intends to do so and 'act[s] pursuant to a valid grant of constitutional authority.'" *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001) (alteration in original) (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000)). The Board of Regents does not dispute that Congress intended to

abrogate Eleventh Amendment immunity for ADA claims. The question is whether when it did so, did it act pursuant to a valid grant of constitutional authority? Musgrove argues that Congress acted with a valid grant of constitutional authority via § 5 of the Fourteenth Amendment because Musgrove's ADA claim also amounts to an "actual violation" of the Equal Protection Clause. Section 5 grants Congress the "power to enforce, by appropriate legislation" the Amendment's substantive provisions, including the Equal Protection Clause. U.S. Const. amend XIV, § 5. One way Congress may abrogate Eleventh Amendment immunity pursuant to § 5 is by "creat[ing] private remedies against the States for actual violations of [the Fourteenth Amendment]." *Nat'l Ass'n of Bds. of Pharm. v. Bd. of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297, 1315 (11th Cir. 2011) (second alteration in original) (quoting *United States v. Georgia*, 546 U.S. 151, 158 (2006)). To determine whether Congress's enactment of the ADA created a private remedy for an actual violation of the Equal Protection Clause, under the circumstances here as argued by Musgrove, the Court must first "identify with some precision the scope" of Musgrove's rights under the Clause. *Garrett*, 531 U.S. at 365.

The parties have not adequately briefed the issue of whether Musgrove's ADA claims overcome Eleventh Amendment immunity under the "actual violation" theory. See, e.g., *Nat'l Ass'n of Bds. of Pharm.*, 633 F.3d at 1315-19 (discussing whether plaintiff's

allegations established a due process violation). The parties are directed to provide supplemental briefing on the following issues: what the scope of Musgrove's rights are under the Equal Protection Clause, whether Musgrove's Complaint states an "actual violation" of the Clause and, if so, whether his ADA claims overcome the Eleventh Amendment pursuant to the "actual violation" rationale.<sup>1</sup>

The Court is not yet convinced that *Garrett* is dispositive of Musgrove's "actual violation" argument. Contrary to the Board of Regents' suggestion, *Garrett* does not seem to hold that Eleventh Amendment immunity can never be abrogated for an ADA damages claim. But before an abrogation determination can be made, it appears that the Court may have to determine whether a constitutional violation has been stated. Neither side's briefing on this issue is particularly illuminating.

The Court has previously scheduled a hearing on the pending motions to dismiss for February 6, 2019 at 10:00 AM in the United States Courthouse in Athens, Georgia. The parties' supplemental briefing shall be due by January 23, 2019. The parties should be prepared to discuss these issues and any other issues raised by the pending motions to dismiss at the hearing.

IT IS SO ORDERED, this 21st day of December, 2018.

S/Clay D. Land  
\_\_\_\_\_  
CLAY D. LAND

---

<sup>1</sup> Blue Cross may also file a supplemental brief if it believes these issues impact its motion to dismiss.

CHIEF U.S. DISTRICT COURT JUDGE  
MIDDLE DISTRICT OF GEORGIA