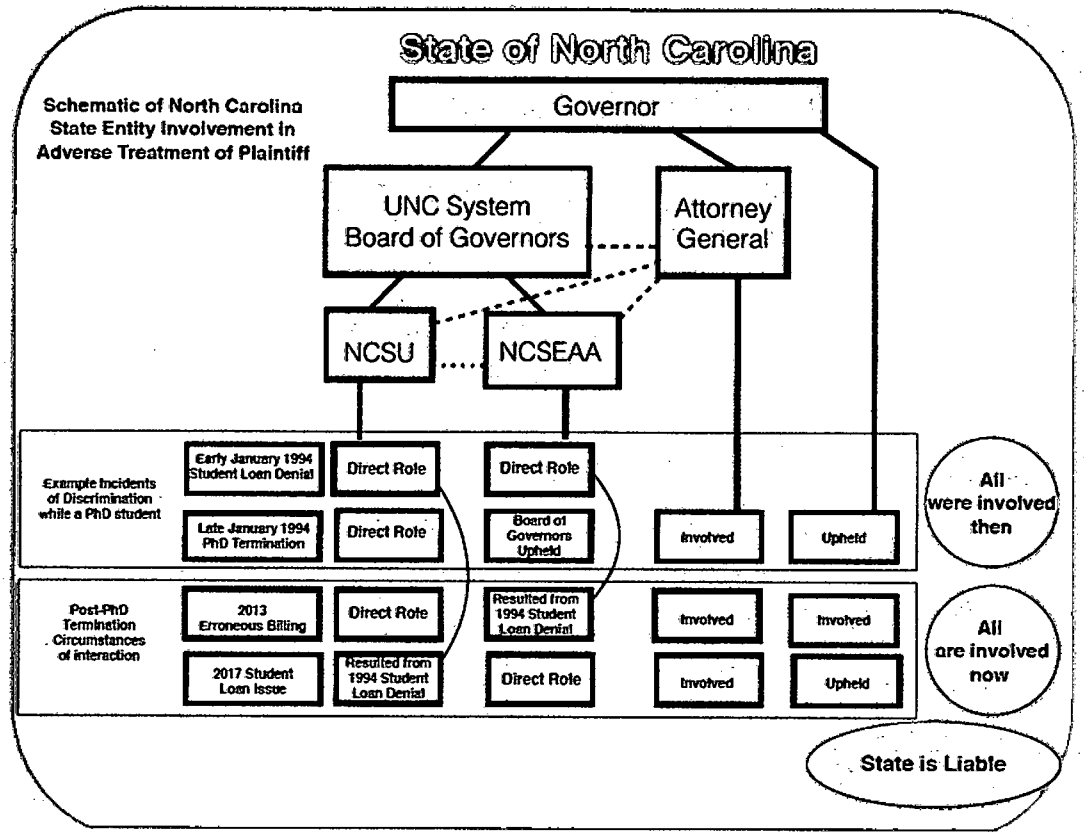
State of North Carolina
Schematic of North Carolina State Entity Involvement in Adverse Treatment of Plaintiff
Governor
UNC System Board of Governors
Attorney General
NCSU
NCSEAA
Example Incidents of Discrimination while a PhD student
Early January 1994 Student Loan Denial
Direct Role
Direct Role
Late January 1994 PhD Termination
Direct Role
Board of Governors Upheld
Involved
Upheld
All were involved then
Post-PhD Termination Circumstances of Interaction
2013 Erroneous Billing
Direct Role
Resulted from 1994 Student Loan Denial
Involved
Involved
2017 Student Loan Issue
Resulted from 1994 Student Loan Denial
Direct Role
Involved
Upheld
All are involved now
State is Liable

APPENDIX A

FILED: September 2, 2015
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 15-1333
(5: 13-cv-00850-FL)

KENDA R. KIRBY
Plaintiff - Appellant

v.

NORTH CAROLINA STATE UNIVERSITY
Defendant - Appellee

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.
This judgment shall take effect upon issuance of this court's mandate in accordanee with Fed. R. App. P. 41.

ls/PATRICIA S. CONNOR, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 15-1333

KENDA R. KIRBY,
Plaintiff - Appellant,

v.

NORTH CAROLINA STATE UNIVERSITY,
Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Louise W. Flanagan, District Judge. (5: 13-cv-00850-FL)

Submitted: August 17, 2015 Decided: September 2, 2015

Before WILKINSON, AGEE, and HARRIS, Circuit Judges.

Affirmed by unpublished per curiam opinion.
Kenda R. Kirby, Appellant Pro Se. Alexander McClure Peters, Special Deputy Attorney General, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

APPENDIX A

PER CURIAM:

Kenda R. Kirby appeals the district court's order denying relief on her civil complaint. The district court referred this case to a magistrate judge pursuant to 28 U.S.C. § 636(b) (1) (B) (2012). The magistrate judge recommended that relief be denied and advised Kirby that failure to file objections to this recommendation could waive appellate review of a district court order based upon the recommendation.

The timely filing of specific objections to a magistrate judge's recommendation is necessary to preserve appellate review of the substance of that recommendation when the parties have been warned of the consequences of noncompliance. Wright v. Collins, 766 F.2d 841, 845-46 (4th Cir. 1985); see also Thomas v. Arn, 4 7 4 U.S. 14 0 (19 8 5). Liberally construed, Kirby's objections to the magistrate judge's report and recommendation specifically challenged the magistrate judge's failure to address her claims concerning Title IX of the Education Amendments of 1972, 20 U.S.C. ss 1681-1688 (2012), and the recommendation to deny relief on her due process and equal protection claims. By failing to file specific objections to the magistrate judge's recommendation with regard to her other claims, after receiving proper notice, Kirby has waived appellate review of those claims.

Turning to the district court's dismissal of Kirby's Title IX, equal protection, and due process claims, we have reviewed the record and discern no reversible error. Accordingly, we affirm the judgement of the district court. Kirby v. N.C. State Univ., No. 5:13-cv-00850-FL (E.D.N.C. mar. 11, 2015). We deny Kirby's motion to allow a new issue on appeal and dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid in the decisional process.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH
CAROLINA WESTERN DIVISION
No. 5:13-CV-850-FL

KENDA R. KIRBY,
Plaintiff,

v.

NORTH CAROLINA STATE UNIVERSITY,
Defendant.

ORDER

This matter is before the court on defendant North Carolina State University's ("NCSU") motion to dismiss, pursuant to Federal Rules of Civil Procedure l 2(b)(1), 12(b)(2), and 12(b)(6) (DE 15). Pursuant to 28 U.S.C. § 636(b)(l) and Federal Rule of Civil Procedure 72(b), United States Magistrate Judg James E .. Gates entered a memorandum and recommendation ("M&R") wherein it is recommended that defendant's motion be granted. Plaintiff has filed objections to the M&R, and the deadline for defendant's response has passed. In this posture, the issues raised are ripe for ruling. For the reasons stated below, the court adopts the recommendation in the M&R and grants NCSU's motion to dismiss.

BACKGROUND

Plaintiff commenced this action on December 13, 2013, by filing a motion for leave to proceed informa pauperis, attaching a copy of her proposed complaint. The motion was denied by order dated December 16, 2013, and plaintiff paid her filing fee and filed her complaint January 13, 2014. NCSU filed its motion to dismiss on April 8, 2014, arguing that the court lacked jurisdiction

over it because it was an instrumentality of North Carolina protected by the Eleventh Amendment of the United States Constitution, and that the action was barred by the statute of limitations.

The M&R issued January 23, 2015. The M&R construed plaintiffs complaint as raising claims for violation of the First Amendment and equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution, pursuant to 42 U .S.C. § 1983; conspiracy to violate civil rights pursuant to 42 U.S.C. § 1985; breach of

contract; defamation; and intentional infliction of emotional distress. The M&R recommends dismissal of plaintiff's claims because defendant is entitled to sovereign immunity under the Eleventh Amendment of the United States Constitution.

Where there is no objection to the M&R's summary of the allegations in plaintiff's complaint, the court hereby incorporates that portion of the M&R by reference. As pertinent here, plaintiff was admitted to a Ph.D. program at the College of Veterinary Medicine at NCSU in 1992. (Compl. ,r 8). In April 1993, she attended an event for lesbians and gays in Washington, D.C. (Id., ,r 9). She took her final exams the following week, earning enough points to maintain a passing grade and good standing. (Id.). However, plaintiff later received grade reports showing failing grades. (Id., ,r 10). One of plaintiff's professors, Dr. Ida Washington Smoak, informed plaintiff that Smoak and another professor, Dr.James E. Smallwood, had intentionally changed plaintiff's grades. (Id., ,r 11). Smoak told plaintiff the professors were angry because plaintiff"attended a gay rights rally at an inconvenient time" and because plaintiff"was an avid Clinton supporter." (Id.). Plaintiff alleges that, "in some conservative circles in North Carolina during this time frame, being an 'avid Clinton support' [sic] was considered code for being gay." (Id., ,r 11 n. 2).

Plaintiff filed a grievance, pursuant to NCSU internal procedures, and continued to attend a class in the spring 1994 semester, pending resolution of the grievance. @, ,r,r 12, 16). However,

she received a letter from an unspecified source who threatened her with arrest if she continued attending the class. (Id., ,r 16). She was then prevented from dropping the class, and a grade of "I" (incomplete) filed by course professors was changed to "F" (failing). (Id., ,r 17).

In summer of 2013, plaintiff interviewed for a faculty position at her undergraduate alma mater. (Id., ,r 3). The interviewing department chair requested a copy of plaintiff's NCSU transcript, but NCSU refused the request because it claimed plaintiff owed $321 for the spring 1994 class. (Id., ,r 3 and Ex. B 3-6). Although plaintiff was considered well-qualified for the position with her alma mater, plaintiff ultimately was denied employment due to delay in the transcript's delivery, and also because of credibility

issues raised by the failing grades on her transcripts. (Id., if 4).

DISCUSSION

A. Standard of Review

a. Review of M&R

The district court reviews de novo those portions of a magistrate judge's M&R to which specific objections are filed. 28 U .S.C. § 636(b). The court does not perform a de novo review where a party makes only "general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations." Orpiano v. Johnson, 687 F .2d 44, 4 7 (4th Cir. 1982). Absent a specific and timely filed objection, the court reviews only for "clear error," and need not give any explanation for adopting the M&R. Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310,315 (4th Cir. 2005); Camby v. Davis, 718 F.2d 198,200 (4th Cir.1983). Upon careful review of the record, "the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(l).

L Rule 12(b)(l)

A Rule 12(b)(l) motion challenges the court's subject matter jurisdiction, and the plaintiff bears the burden of showing that federal jurisdiction is appropriate when challenged by the defendant. McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936); Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982). Where, as here, the moving party contends that the complaint "simply fails to allege facts upon which subject matter jurisdiction can be based," then "all facts alleged in the complaint are assumed true." Adams, 697 F .2d at 1219. "Where the jurisdictional facts are intertwined with the facts central to the merits of the dispute ... the entire factual dispute is appropriately resolved only by a proceeding on the merits," and Rule l 2(b)(1) is "an inappropriate basis" to grant dismissal. Adams, 697 F.2d at 1219-20.

2. Rule l 2(b)(6)

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint but "does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." Republican Party ofN.C. v. Martin, 980 F .2d 943, 952 (4th Cir. 1992); see also Edwards v. City of Goldsboro, 178 F .

3d 231, 243-44 (4th Cir. 1999). A complaint states a claim under 12(b)(6) if it contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Igbal, 556 U.S. 662, 678 (2009) (quoting Bell At!. Corp. v. Twombiy, 550 U.S. 544, 570 (2007)). "Asking for plausibie grounds .. . does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal [the] evidence" required to prove the claim. Twombly, 550 U.S. at 556. In evaluating the complaint, the "court accepts all well-pied facts as true and construes these
facts in the light most favorable to the plaintiff," but does not consider "legal conclusions, elements

of a cause of action, .. . bare assertions devoid of further factual enhancement[,] ... unwarranted inferences, unreasonable conclusions, or arguments." Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250,255 (4th Cir. 2009) (citations omitted). When considering a Rule 12(b)(6) motion, a court must keep in mind the principle that "a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89, 94 (2007) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)); Noble v. Barnett, 24 F.3d 582, 587 n.6 (4th Cir.1994). Nevertheless, Erickson does not undermine the requirement that a pleading contain "more than labels and conclusions." Giarratano v. Johnson, 521 F.3d 298, 304 n.5 (4th Cir. 2008) (quoting Twombly. 550 U.S. at 555).1

B. Analysis

Plaintiff objects that her claim is brought pursuant to Title IX of the Educational Amendments of 1972 (20 U .S.C. § 1681 et seq.) ("Title IX"), and asserts that NCSU has waived its
Eleventh Amendment immunity for purposes of this suit.

The Fourth Circuit has not definitively ruled on whether dismissal on Eleventh Amendment grounds is properly based on Rule 12(b)(l) or 12(b)(6). See Andrews v. Daw, 201 F.3d 521, 525 n. 2 (4th Cir. 2000). Because the issues raised by application of the Eleventh Amendment in this
case do not implicate the merits, the M&R proceeded under Rule 12(b)(l). Plaintiff does not

specifically object to this part of the analysis, and the court finds no clear error.

The Eleventh Amendment provides that "[t]he 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

1

The M&R did not analyze defendant's motion under Rule 12(b)(2), and the court does not find that rule relevant

United States by citizens of another state, or by citizens or subjects of any foreign state." U.S. Const., Amend. XL Although the text expressly provides states with immunity from suits brought by "citizens of another state, or by citizens or subjects of any foreign state" only, the immunity has been extended to suits brought by a state's own citizens. Idaho v. Coeur d'Alene Tribe ofIdaho, 521 U.S. 261, 267-68 (1997). The states' immunity also extends to "state agents and state instrumentalities." Regents of the Univ. of Cal. v. Doe, 519 U.S. 425,429 (1997); Lee-Thomas v. Prince George's Cnty. Pub. Schs., 666 F.3d 244, 248 (4th Cir. 2012). NCSU is one such "instrumentality." Huang v. Bd. of Governors of Univ. of N.C., 902 F.2d 1134, 1138 (4th Cir. 1990).

There are three exceptions to the Eleventh Amendment's bar against suits. Lee-Thomas, 666 F. 3d at 248-49. The first applies when an individual sues "for prospective injunctive relief against state officials acting in violation of federallaw." Id. (quoting Frew ex rel. Frew v. Hawkins, 540 U.S. 431, 437 (2004). That exception does not apply to any of the claims here, because the complaint does not name as defendants any state official. See Lee-Thomas, 666 F .3d at 249.

Second, Congress may abrogate Eleventh Amendment immunity without state consent by both "unequivocally intend[ing] to do so and act[ing] pursuant to a valid grant of constitutional authority." Id. (quoting Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001)); Litman v. George Mason Univ., 186 F .3d 544, 549 (4th Cir. 1999). In doing so, Congress acts under the authority of section 5 of the Fourteenth Amendment. Litman, 186 F .3d at 550. Third, a state may waive its immunity in federal court. Lee-Thomas, 666 F .3d at 249. As is pertinent here, one way that a state may waive such

immunity is when it "voluntarily participat[es] in federal spending programs when Congress expresses a clear intent to condition participation in the programs on a

State's consent to waive its constitutional immunity." Litman, 186 F.3d at 550 (brackets and internal quotation marks omitted).

Neither of these exceptions apply to plaintiffs section 1983 or section 1985 claims, nor to plaintiffs claims under North Carolina common law. See Quern v. Jordan, 440 U.S. 332, 342-45 (1979) (holding section 1983 did not abrogate state sovereign immunity); Clark v. Md. Dep't ofPub. Safety and Correctional Servs., 247 F. Supp. 2d 773, 776, n. 2 (D. Md. 2003) (holding section 1985 did not abrogate state sovereign immunity). Accordingly, the M&R properly recommended dismissal of all these claims pursuant to the Eleventh Amendment.

By contrast, the third exception, for state waiver, applies to actions brought under Title IX against recipients of federal funding under that statute. Title IX, in conjunction with 42 U.S.C. § 2000d-7(a)(l), represents Congress' expression of a "clear, unambiguous, and unequivocal condition of waiver of Eleventh Amendment immunity." Litman, 186 F .3d at 554. Thus, by accepting federal funding under Title IX, a state agrees to waive its Eleventh Amendment immunity. Id.2 Although the complaint does not expressly allege that NCSU has accepted such funding, the court assumes that this condition has been met for purposes of the instant motion to dismiss.

However, plaintiffs Title IX claim suffers from a different malady - failure to allege sufficient facts to state a plausible claim for relief, under Rule 12(b)(6). Iqbal, 556 U.S. at 678.

Title IX provides that "'[n]o person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (emphasis added). Cases interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), offer

In Litman, the Fourth Circuit declined to address whether the second exception, for unilateral Congressional abrogation, applied to Title IX actions. Litman, 186 F.3d at 557. As was the case in Litman, it is not necessary to address that issue here.

guidance in evaluating a claim brought under Title IX. Jennings v. Univ. ofN.C., 482 F.3d 686, 695 (4th Cir. 2007). In one such Title VII case, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 7 5, 80 (1998), the court noted that the "critical issue ... is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." Likewise, in Jennings, the Fourth Circuit stated that a necessary elements to a Title IX claim for sexual harassment was that the plaintiff "was subjected to harassment based on her sex." Jennings, 482 F.3d at 695 (emphasis added).

The factual allegations that relate to the motive of the alleged discrimination are found in the professors' statements that they changed plaintiff's grades because she "attended a gay rights rally at an inconvenient time" and was an "avid Clinton supporter" (allegedly a "code" word for "being gay"). (Compl., ,r 11 n. 2). Nothing in the complaint suggests that a male individual would have been treated any differently for attending the gay and lesbian event, or for being homosexual or being perceived as homosexual.3

Plaintiff's allegations come closer to the type of sexual discrimination described in Price Waterhouse v. Hopkins, where the Supreme Court recognized that "sex stereotyping" could constitute a ground of sex discrimination in violation of Title VII. Price Waterhouse v. Hopkins, 490 U.S. 228, 250-52 (1989). The evidence supporting sex stereotyping in that case included comments that the plaintiff was "macho," "overcompenshted for being a woman," needed to take "a course at charm school," and could improve her chances for partnership if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Id. at 235. The court found that these comments could constitute "sex

3 Plaintiff's actual sexual orientation is not clear from the complaint.

stereotyping." Id., at 250-51. The Eighth Circuit has recognized that a claim under Title IX, as well as Title VII, may lie when harassment is motivated by the plaintiff's "failure to conform with gender stereotypes." Wolfe v. Fayetteville, Ark. Sch. Dist., 648 F .3d 860, 867 (8th Cir.2011). For its part, the Fourth Circuit recently declined an opportunity to expressly rule on whether a "failure to conform to gender stereotypes" could constitute a Title IX violation. M.D. v. Sch. Bd. of Richmond, 560 F. App'x 199,202 (4th Cir. 2014).

Assuming arguendo that the Fourth Circuit would recognize such a claim in a Title IX context, plaintiff again fails to allege sufficient facts in support. There are no allegations of circumstances akin to those in Price Waterhouse, showing that plaintiff's professors believed she was not behaving in an appropriately feminine manner. The facts alleged fail to support that any gender-based discrimination existed in this case.

While the complaint might allege discrimination on the basis of political viewpoint, such is not the subject of Title IX. Similarly, Title IX does not protect against discrimination based on actual or perceived sexual orientation. See Mayes v. Bd. of Educ. of Prince George's Cnty., No. 8:13-CV-3086, at 1 (D. Md. Nov. 26, 2013) (unavailable on legal search engine); M.D. v. Sch. Bd. of Richmond, No. 3:13-CV-329, 2013 WL 2404842, at *3 (E.D. Va. May 31, 2013) (vacated on other grounds, M.D., 560 F. App'x at 203; Tyrrell v. Seaford Union Free Sch. Dist., 792 F. Supp. 2d 601, 622-23 (E.D.N.Y. 201 l); see also Bibby v. Phiia. Coca Coia Bottling Co_.., 260 F.3d 257,261 (3d Cir. 2001) (holding that Title VII of the Civil Rights Act of 1964 does not prohibit discrimination based on sexual orientation); Spearman v. Ford Motor Co., 231F.3d 1080, 1084 (7th Cir. 2000) (same).

Plaintiff's invitation to overturn the Eleventh Amendment is declined, such power being beyond this court's authority. Davis v. Balkom, 369 U.S. 811, 811 (1962) ("Both state and federal courts have an equally binding obligation to uphold the Constitution.").

CONCLUSION

Based on the foregoing, upon de nova review of the portions of the M&R to which specific objections were raised, and upon considered review of the remainder, the court ADOPTS the M&R in full. Defendants' motion to dismiss (DE 15) is GRANTED. The clerk is DIRECTED to close this case.

SO ORDERED this the 10th day of March, 2015.
(signature)
LOUISE W. FLANAGAN
United States District Judge

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

KENDA R. KIRBY,
Plaintiff,

V.

NORTH CAROLINA STATE UNIVERSITY,
Defendant.

JUDGMENT
No. 5:13-CV-850-FL

Decision by Court.
This action came before the Honorable Louise W. Flanagan, United States District Judge, for consideration of the defendant's motion to dismiss pursuant to Federal Rules of Civil Procedure 12(B)(l), 12(B)(2), and 12(b)(6).
IT IS ORDERED, ADJUDGED AND DECREED in accordance with the court's order entered March 10, 2015, and for the reasons set forth more specifically therein, that defendant's motion to dismiss is granted. The plaintiff shall have and recover nothing from this action.

This Judgment Filed and Entered on March 11, 2015, and Copies To:
Alexander McClure Peters (via CM/ECF Notice of Electronic Filing) Kenda R. Kirby (via U.S. Mail) 7493 County Road 73, Coyle, OK 73027
March 11, 2015
JULIE RICHARDS JOHNSTON, CLERK
/s/ Christa N. Baker
(By) Christa N. Baker, Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH
CAROLINA WESTERN DIVISION
5:13-CV-850-FL

KENDA R. KIRBY,
Plaintiff,

V.

NORTH CAROLINA STATE UNIVERSITY,
Defendant.

MEMORANDUM AND RECOMMENDATION

This case, brought by pro se plaintiff Kenda Kirby ("plaintiff'), comes before the court on the motion (D.E. 15) by defendant North Carolina State University ("NCSU") to dismiss the case for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief may be granted, pursuant to Fed. R. Civ. P. 12(b)(l), (2), and (6), respectively. Plaintiff has responded (see D.E. 18) and the motion is ripe for adjudication. The motion was referred to the undersigned Magistrate Judge for issuance of a memorandum and recommendation. (See 3rd D.E. after D.E. 18). For the reasons set forth below, it will be recommended that NCSU's motion be allowed and this case be dismissed.

I. BACKGROUND

Plaintiff filed her complaint on 13 January 2014. (See Compl. (D.E. 3)). Taking its allegations in the light most favorable to plaintiff, 1 the complaint alleges as follows:
In 1992, plaintiff was admitted to a Ph.D. program at the College of Veterinary
Medicine ("CVM") at NCSU. (Id. ,i 8). In April 1993, she attended a lesbian and gay event in Washington, D.C. (Id. ,i 3). She took final exams the following week, doing well enough to

1 This summary reflects the principles set out in the Discussion section below that the allegations of the complaint must be viewed favorably toward plaintiff.

maintain her good standing at NCSU. (Id. ,r 9). CVM subsequently changed her grades because of her support for President Clinton and attendance at the rally. (Id. ,r 11). In January 1994, CVM terminated plaintiff from the Ph.D. program on the stated grounds of low grades, among others. (Id. ,r 16). Plaintiff filed a grievance, pursuant to NCSU's internal procedures, and attended a class in the spring 1994 semester ("spring class") pending resolution of the grievance. (Id.). In March 1994, CVM instructed plaintiff to stop attending the class or face arrest. (Id.). She attempted to drop the class without success, and NCSU changed the "I" (signifying "Incomplete") she had initially received for the spring class to an "F." (Id. ,r,r 17, 18). Plaintiff ultimately lost her grievance. (Id. ,r 1). NCSU's actions against plaintiff were based on sexual and political bias against her. (Id. ,r 2). Almost 20 years later, around May 2013, plaintiff applied for a faculty position at her undergraduate school. (Id. ,r 3; Ex. B (D.E. 3-2) 3). The interviewing department chair requested a copy of her transcript from NCSU. (Compl. ,r 3). NCSU did not honor the request on the grounds that plaintiff owed $321 for the spring class and sent her a bill for this charge. (See Compl., Ex. B 3-6). This was the first time plaintiff learned NCSU claimed she owed any payment for the spring class. (See Compl. ,r 6). Plaintiff had had student loan funds designated to pay the charge, but CVM had rejected them in 1994. (Id. ,r 14). In June 2013, NCSU told plaintiff that it would "'ruin her credit"' if she did not pay the $321 charge. (Id. ,r 4).

NCSU eventually did provide a copy of plaintiffs transcript to her and the prospective employer. (See id. ,r,r 3, 4). Plaintiff had not previously known of the change of her grade for the spring class. (See id. ,r 3). Plaintiffs undergraduate school denied her the faculty position because of the delay in NCSU' s provision of her transcript and credibility issues regarding her presented by NCSU's changes in her grades, although she was well qualified for the job. (Id. ,r

4). Her undergraduate school informed her that her lack of a Ph.D., which was denied her by NCSU, would forever prevent her from gaining fulltime, salaried employment or benefits on a faculty. (Id.).

Plaintiff appears to assert claims against NCSU for violation of the First Amendment and the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution, pursuant to 42 U.S.C. § 1983; conspiracy to violate civil rights pursuant to 42 U.S.C. § 1985 ("§ 1985"); breach of contract; defamation; and intentional infliction of emotional distress. She seeks from NCSU: $3.5 million in compensatory damages; $2.5 million in punitive damages; revision of her transcript to show her purportedly correct grades, her being in good standing at NCSU, and her receipt of a Ph.D.; issuance of the Ph.D.; forgiveness of all her student loans and other debt to NCSU; letters of apology (one on behalf of NCSU and the other CVM); and other relief. (Com pl. il 35).

II. DISCUSSION

In support of its motion to dismiss, NCSU argues that the court lacks subject matter jurisdiction over it because it enjoys sovereign immunity under the Eleventh Amendment to the United States Constitution. It also argues that plaintiffs claims are time barred. Because the court finds that the issue of sovereign immunity is dispositive of this case, it will confine its analysis to that issue.

A. Applicable Legal Principles

1. Standard of Review

Dismissal on Eleventh Amendment grounds may be sought by a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) or a motion to dismiss for failure to state

a claim upon which relief can be granted under Rule 12(b)(6). Here, NCSU asserts its motion pursuant to both provisions.

The purpose of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is to test the legal sufficiency of the complaint. Edwards v. City of Goldsboro, 178 F.3d 231, 243-44 (4th Cir. 1999). The plaintiffs "[£]actual allegations must be enough to raise a right of relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). A complaint attacked by a motion to dismiss will survive if it contains 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 Twombly, 550 U.S. at 570). While the court must take the facts in the light most

favorable to the plaintiff, the court "need not accept the legal conclusions drawn from the facts [or] . . . . unwarranted inferences, unreasonable conclusions, or arguments." Eastern Shore Mkts., Inc. v. J.D. Assocs. Ltd. P 'ship, 213 F .3d 175, 180 (4th Cir. 2000). The standard used to evaluate the sufficiency of the pleading is flexible, and a pro se complaint, however inartfully pied, is held to less stringent standards than formal pleadings drafted by attorneys. Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam).2

In considering a Rule 12(b)(6) motion, a court may consider documents attached to the complaint (such as an EEOC right-to-sue letter) so long as the documents are integral to the complaint and authentic. See Secretary of State for Defence v. Trimble Navigation Ltd., 484 F .3d 700, 705 (4th Cir. 2007). Moreover, the court need not accept as true allegations that are contradicted by exhibits to the complaint. Veney v. Wyche, 293 F.3d 726, 730 (4th Cir. 2002)

(citing Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)).

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Erickson, however, does not undermine the "requirement that a pleading contain 'more than labels and conclusions.'" Giarratano v. Johnson, 521 F.3d 298, 304 n.5 (4th Cir. 2008) (quoting Twombly, 550 U.S. at 555).

On a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) based on the insufficiency of the allegations of the complaint, as here, "all the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration." Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982). The plaintiff bears the burden of showing that federal jurisdiction exists. Id. at 1219.

The Fourth Circuit has not definitively ruled whether dismissal on Eleventh Amendment grounds should be based on Rule 12(b)(l) or Rule 12(b)(6). Andrews v. Daw, 201 F.3d 521, 525 n.2 (4th Cir. 2000) (discussing the Fourth Circuit split in dismissing cases on Eleventh Amendment grounds under both Rule 12(b)(l) and Rule 12(b)(6)); see also Wis. Dep't of Corrs. v. Schacht, 524 U.S. 381, 389 (1998) ("The Eleventh Amendment ... does not

automatically destroy original jurisdiction."). Here, the court finds it appropriate to proceed under Rule 12(b)(l), where sovereign immunity under the Eleventh Amendment is not entangled in the merits of plaintiffs claims and is dispositive of the case. See Hendy v. Bello, 555 Fed. Appx. 224, 226-27 (4th Cir. 6 Feb. 2014) (upholding dismissal on grounds of Eleventh Amendment immunity pursuant to Rule 12(b)(l)) (citing Vulcan Materials Co. v. Massiah, 645 F.3d 249,261 (4th Cir. 2011)); cf Plumer v. State of Md., 915 F.2d 927, 932 n.5 (4th Cir. 1990) (instructing that in a case where a defendant's objection to the court's jurisdiction is also a challenge to the existence of a federal cause of action the proper procedure is to find jurisdiction and address the objection as an attack on the merits of plaintiffs claims). The court's analysis and ultimate conclusion would not materially differ, however, even if it were proceeding under Rule 12(b)(6).

2. Sovereign Immunity under the Eleventh Amendment

The Eleventh Amendment limits the authority of the federal courts to hear claims against the states. In doing so, it recognizes that the doctrine of sovereign immunity limited the judicial authority granted in Article III of the United States Constitution. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98 (1984). By its terms, the amendment addresses only suits against a state by citizens of another state or another country. The amendment reads: "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. However, the Supreme Court has interpreted the sovereign immunity that the Eleventh Amendment recognizes to apply as well to suits against a state by its own citizens. Pennhurst, 465 U.S. at 98 (citing Hans v. Louisiana, 134 U.S. 1, 15 (1890), overruled on other grounds by statute, 42 U.S.C. § 2000d-7). A state may waive its sovereign immunity against suit in federal court, but such waiver must be unequivocally expressed. Id., 465 U.S. at 99. Similarly, while Congress may abrogate the Eleventh Amendment in legislation under the

Fourteenth Amendment, an unequivocal expression of Congress's intent to do so is required. See id. The doctrine of sovereign immunity under the Eleventh Amendment applies not only to a state itself, but also its institutions and other instrumentalities, which may include state universities. See, e.g., Huang v. Bd. of Governors of the Univ. of N. C., 902 F .2d 1134, 113 8 (4th Cir. 1990); Bin Xu v. Univ. of NC. at Charlotte ("UNCC"), Civ. No. 3:08-CV-403-DCK, 2009 WL 7216040, at *3 (W.D.N.C. 30 Sept. 2009), mem. and recomm. adopted in relevant part by 2010 WL 5067423 (6 Dec. 2010); Brown v. Rector & Visitors of the Univ. of Va., No. 3:07CV30, 2008 WL 1943956, at *4 (W.D. Va. 2 May 2008). Further, the limitation effected

by the Eleventh Amendment applies to claims against a state and its instrumentalities regardless of the nature of the relief sought. Pennhurst, 465 U.S. at 100 (citing Missouri v. Fiske, 290 U.S. 18, 27 (1933)). The claims against state instrumentalities specifically held to be covered by sovereign immunity under the Eleventh Amendment include claims pursuant to§ 1983 and§ 1985, and claims for breach of contract, defamation, intentional infliction of emotional distress, and injunctive and declaratory relief. 3 Will v. Michigan Dep 't of State Police, 491 U.S. 58, 71 (1989) (§ 1983 claims); Huang, 902 F.2d at 1136-37, 1138-39 (upholding summary judgment dismissing monetary damages claims by professor for free speech and due process violations under § 1983 and § 1981; intentional infliction of mental distress; defamation; and intentional interference with contractual relations); Liu v. Jackson, No. 4:09-CV-415-A, 2010 WL 342251, at *4 (N.D. Tex. 29 Jan. 2010) (dismissing claims by graduate student against officials with University of North Texas and others for federal constitutional violations pursuant to § 1983, defamation, false arrest, breach of contract; and fraud); Bin Xu, 2009 WL 7216040, at *3 (dismissing claims by pro se Ph.D. student for Fourteenth Amendment equal protection and Fifth Amendment due process violations pursuant to § 1983, conspiracy to violate civil rights pursuant to § 1985, interference with civil rights under N.C. law, and violation of N.C.

constitutional rights); Brown, 2008 WL 1943956, at *2 (dismissing claims by Ph.D. student for federal due process violations, breach of contract, declaratory judgment, injunctive relief, compensatory damages, and attorney's fees).

3

Although Ex Parte Young, 209 U.S. 123 (1908) recognized an exception under the Eleventh Amendment for prospective injunctive relief, the Supreme Court has subsequently specified that it applies only to state officials and not a state or its instrumentalities. See Puerto Rico Aqueduct & Sewer Auth. V. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993).

B. Analysis

There is no question that NCSU is an instrumentality of the state of North Carolina. It was established by North Carolina as one of the institutions comprising the University of North Carolina ("UNC"). N.C. Gen. Stat. § 116-4.4 Plaintiff has made no showing that NCSU has waived its Eleventh Amendment immunity from suit in federal court or that such immunity has been abrogated by Congress. See Huang, 902 F.2d at 1138-39 (rejecting contention that N.C. Gen. Stat. § 116-3 providing for the Board of Governors of UNC waived the Eleventh Amendment immunity of the Board, NCSU, and other defendants); Hooper v. North Carolina, 379 F. Supp. 2d 804, 812-13 (M.D.N.C. 2005) (noting that N.C.'s waiver of sovereign immunity for negligence claims against it requires that such claims be brought in the Industrial Commission and rejecting contention that the purchase of insurance by N.C. Central University ("NCCU") or N.C. Gen. Stat. § 15A-297 relating to wiretapping waived NCCU's and other defendants' immunity); Alston v. NC. A & T State University ("NC A & T"), 304 F. Supp. 2d 774, 783-84 (M.D.N.C. 2004) (rejecting contentions of waiver of the Eleventh Amendment immunity of NC A & T based on, e.g., N.C.'s limited waiver with respect to negligence claims

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This statute reads:

§ 116-4. Constituent institutions of the University of North Carolina

The University of North Carolina shall be composed of the following institutions of higher education: the University of North Carolina at Chapel Hill, North

Carolina State University at Raleigh, the University of North Carolina at Greensboro, the University of North Carolina at Charlotte, the University of North Carolina at Asheville, the University of North Carolina at Wilmington, Appalachian State University, East Carolina University, Elizabeth City State University, Fayetteville State University, North Carolina Agricultural and Technical State University, North Carolina Central University, North Carolina School of the Arts, redesignated effective August 1, 2008, as the "University of North Carolina School of the Arts," Pembroke State University, redesignated effective July 1, 1996, as the "University of North Carolina at Pembroke", Western Carolina University and Winston-Salem State University, and the constituent high school, the North Carolina School of Science and Mathematics.

N.C. Gen. Stat.§ I 16-4 (emphasis added).

and NC A & T's purchase of insurance); Jennings v. Univ. of NC. at Chapel Hill, 240 F. Supp. 2d 492, 498 (M.D.N.C. 2002) (holding that Congress had not overridden Eleventh Amendment immunity in suit against UNC at Chapel Hill and other defendants except under Title VII, which is not relevant here). NCSU is therefore protected by Eleventh Amendment immunity. See, e.g., Huang, 902 F.2d at 1138-39 (NCSU protected); Bin Xu, 2009 WL 7216040, at *3 (UNCC protected); Hooper, 379 F. Supp. 2d at 811-13 (NCCU protected); Alston, 304 F. Supp. 2d at 782-84 (NC A & T protected); Jennings, 240 F. Supp. 2d at 498 (UNC at Chapel Hill protected). Under the authorities cited, protection extends to all of the claims apparently asserted by plaintiff. This court accordingly lacks subject matter jurisdiction over this case, and it should be dismissed pursuant to Rule 12(b)(l).

III. CONCLUSION

For the reasons stated above, IT IS HEREBY RECOMMENDED that NCSU's motion to dismiss (D.E. 15) be ALLOWED and that this action be DISMISSED.

IT IS ORDERED that the Clerk shall send copies of this Memorandum and Recommendation to plaintiff, who shall have until 6 February 2015 to file written objections. Failure to file timely written objections

bars an aggrieved party from receiving a de novo review by the District Judge on an issue covered in the Memorandum and Recommendation and, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Judge. Any response to objections shall be filed within 14 days after service of the objections on the responding party.

This, the 23rd day of January 2015.

(signature)
James E. Gates
United States Magistrate Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH
CAROLINA WESTERN DIVISION
No. 5:17-CV-371-BO

KENDA R. KIRBY,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant

ORDER

This cause comes before the Court on defendant's motion to dismiss plaintiffs pro se complaint in its entirety. Plaintiff has responded, the time for filing a reply has expired, and the motion is ripe for ruling. For the reasons that follow, the motion to dismiss is granted.

BACKGROUND _

Plaintiff filed this action on July 24, 2017, alleging that she was subjected to overt bias and discriminatory actions by North Carolina State University (NCSU) College of Veterinary Medicine professors which lead them to breach plaintiff's contract and violate her due process rights. Plaintiff alleges her enrollment in the College of Veterinary Medicine Ph.D. program was tenninated in 1994 after her grades were changed from passing to failing upon the school's discovery that plaintiff attended a weekend lesbian, gay, bisexual, and transgender event. Following her tennination from the Ph.D. program, plaintiff alleges that, in 2013, defendant erroneously billed plaintiff for tuition for the spring semester of 1994 and refused to retract that tuition bill. Plaintiff alleges that in 2017 she discovered that the North Carolina State Education Assistance Authority had withheld student loan funds which had been overpaid by plaintiff.

Specifically, plaintiff alleges that on January 31, 2017, she received a document from the U.S. Department of Education showing overpayment of student loans to North Carolina. Cmp. 1

53.Plaintiff alleges that her total approved graduate student loans for her time at NCSU were$7,500 for year one and $3,750 for year two (representing only half of the year). Id. 1 54. Plaintiff's student loan consolidation application reflected the NCSU loan balance was $12,364.71. Id. 155 .. The total interest which had accrued during default totaled $605.30 and an approximate consolidation fee of $2,448.11 was also applied. [DE 1-4 at 13]. The consolidation statement shows that the U.S. Department of Education paid NCSU $15,736.67 at consolidation, which plaintiff alleges represents an overpayment as

she only owed approximately $12,627.75 on her loans. Id As plaintiff has paid off her consolidated loans, she contends that that overpayment is due to her. Id . Plaintiff alleges that she contacted the N.C. State Education Assistance Authority (NCSEAA), which found that there had not been an overpayment. Id 1 61-63; [DE 1-4 at 14]. Plaintiff alleges that she has requested a refund and defendant has refused to remedy the situation, that this is evidence of retaliation, and that it appears that at least one state official at the NCSEAA committed fraud.

In her complaint, plaintiff additionally outlines the history of her dealings with the College of Veterinary Medicine and defendant generally, which includes a grievance filed with NCSU in 1994 which culminated with an appeal through the University of North Carolina Board of Trustees.

In 2013, plaintiff contended a new cause of action accrued which led to the filing of a complaint in this court, which was dismissed for failure to state a claim and which dismissal was affirmed on appeal. See Kirby v. N Carolina State Univ., No. 5:13-CV-850-FL, 2015 WL 1036946, at *1 (E.D.N.C. Mar. 10, 2015), ajf'd, 615 F. App'x 136 (4th Cir. 2015), cert. denied, No. 15-8399, 137 S.Ct. 34(2016). That complaint involved plaintiff's current allegations relating to her termination from the Ph.D. program at NCSU. Plaintiff further alleged that in the summer of 2013, when interviewing for a faculty position at another institution, NCSU refused to release plaintiff's

transcript as it contended that plaintiff owed $321 for a class she took in the spring of 1994. Plaintiff was denied the faculty position due to the delay in the transcript's delivery and credibility issues raised by the failing grades on plaintiff's transcripts. In the 2013 complaint, plaintiff alleged a claim under Title IX of the Educational Amendments of 1972. Id. Plaintiff brings this action for discrimination and retaliation under Title IX of the Educational Amendments Act of 1972. 20 U.S.C. § 1681, et seq. The relief which plaintiff seeks is an injunction ordering defendant to correct her 1994 College of Veterinary Medicine transcripts, to award plaintiff a Ph.D. in Cell Biology and Morphology, to cancel any outstanding bills from NCSU, to refund any overpaid portions of plaintiff's student loans with fees and interest, and to issue a formal letter of apology. Plaintiff further seeks $13 million in compensatory damages as well as costs.

DISCUSSION

Defendant has moved to dismiss plaintiff's complaint under Rules 12(b)(l) and 12(b)(6) of the Federal Rules of Civil Procedure, arguing that plaintiff's claims are barred by Eleventh Amendment immunity and the statute oflimitations and that plaintiff has otherwise failed to state a claim upon which relief can be granted. Federal Rule of Civil Procedure 12(b)(l)

authorizes dismissal of a claim for lack of subject matter jurisdiction. When subject matter jurisdiction is challenged, the plaintiff has the burden of proving jurisdiction to survive the motion. Evans v. B.F Perkins Co., 166 F.3d 642, 647-50 (4th Cir. 1999). "In determining whether jurisdiction exists, the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." Richmond, Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991).

A Rule 12(b)(6) motion tests the legal sufficiency of the CQmplaint. Papasan v. Allain, 478 U.S. 265, 283 (1986). When acting on a motion to dismiss under Rule 12(b)(6), "the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." Mylan Labs., Inc. v. Matkari, 7 F .3d 1130, 1134 (4th Cir.1993). A complaint must allege enough facts to state a claim for relief that is facially plausible. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). Facial plausibility means that the facts pied "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," and mere recitals of the elements of a cause of action supported by conclusory statements do not suffice. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A complaint must be dismissed if the factual allegations do not nudge the plaintiffs claims "across the line from conceivable to plausible." Twombly, 550 U.S. at 570. Pro se complaints are held to a less stringent standard than those drafted by lawyers. Estelle v. Gamble, 429 U.S. 97, 106 (1976) (internal quotation and citation omitted).

In considering a motion to dismiss pursuant to Rule 12(b)(6), the Court may consider documents attached to the complaint, as well as those attached to the motion to dismiss so long as they are integral to the complaint and authentic. Fed. R. Civ. P. I0(c); Sec '.Y of State for Defence v. Trimble Navigation Ltd., 484 F.3d 700, 705 (4th Cir. 2007); Philips v. Pitt County Mem 'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009). A court ruling on a motion to dismiss under Rule 12(b) (6) may also properly take judicial _notice of matters of public record. Sec '.Y of State for Defence, 484 F . 3d at 705.

Plaintiff contends that an alleged overpayment by the U.S. Department of Education to NCSU which the state, through the NCSEAA, has failed to refund to plaintiff is evidence of a continuing pattern or practice of discrimination by the state against plaintiff. Title IX provides,

with certain exceptions, that"[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Retaliation against a person for complaining of sex discrimination is a form of intentional sex discrimination that is encompassed under Title IX. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 174 (2005); see also Preston v. Virginia ex rel. New River Community College, 31 F.3d 203,206 (4th Cir. 1993). A plaintiff alleging retaliation under Title IX must demonstrate that she was retaliated against because she complained of sex discrimination. Jackson, 544 U.S. at 184.

The Court first addresses defendant's Eleventh Amendment immunity defense. "The Eleventh Amendment bars suit against non-consenting states by private individuals in federal court." Bd of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001). This guarantee applies not only to suits against the State itself but also to suits where "one of[the state's] agencies or departments is named as the defendant." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). Although plaintiff has named only the State of North Carolina as a defendant, liberally construing her claims the Court declines to find that the Eleventh Amendment bars any Title IX claims which plaintiff attempts to raise here against NCSU. See Kirby v. N. Carolina State Univ., No. 5:13-CV-850-FL, 2015 WL 1036946, at *4 (E.D.N.C. Mar. 10, 2015); see also Litman v. George Mason Univ., 186 F.3d 544,555 (4th Cir. 1999) ("In enacting Tile IX, Congress pennissibly conditioned the receipt of Title IX funds on a waiver of sovereign immunity."). As to plaintiffs claims against the state generally or its instrumentality the NCSEAA, however, plaintiff has failed to allege any basis for waiver of Eleventh Amendment or sovereign immunity and her claims are barred. See Lee-Thomas v. Prince George's Cty. Pub. Sch., 666 F. 3d 244, 248-9 (4th

Cir. 2012); see also Sossamon v. Texas, 563 U.S. 277,278 (2011) (waiver of sovereign immunity strictly construed in favor of sovereign).

Second, any substantive sex discrimination claims raised in this complaint arising out of plaintiff's tennination from the College of Veterinary Medicine program in 1994 are plainly timebarred. See Rouse v. Duke Univ., 535 F. App'x 289, 294 (4th Cir. 2013) (statute of limitations under Title IX is three years) (citing N.C. Gen. Stat.§ 1-52(16)); Wilminkv. Kanawha Cty. Bd of Educ., 214 F. App'x 294, 296 n.3 (4th Cir. 2007) ("because Title IX does not contain an express statute of limitations, 'every circuit to consider the issue has held that Title IX also borrows

the relevant state's statute of limitations for personal injury.'") (citation omitted). Plaintiff relies on her January 2017 discovery of the alleged overpayment by the U.S. Department of Education as the date on which her claim accrued. See, e.g., Jennings v. Univ. of N. Carolina at Chapel Hill, 240 F. Supp. 2d 492, 499 (M.D.N.C. 2002) (where claim is comprised of a series of acts, so long as one of the acts occurred within the limitations period the entire time period may be considered). However, plaintiff has failed to sufficiently allege how any student loan overpayment and refusal to reimburse plaintiff is part of a pattern or practice of retaliation or discrimination under Title IX. Plaintiff has not plausibly alleged that any statements or actions by the NCSEAA are in any way connected to any mistreatment in 1994 by NCSU, nor has she plausibly alleged that NCSEAA's actions were taken in retaliation for plaintiff's earlier complaints. In other words, plaintiff has failed to plausibly allege that NCSEAA's actions were intentionally discriminatory or were taken because plaintiff had previously complained of sex discrimination. See, e.g., [DE 10 at 12] Pl's Mem. Opp. (noting that NCSEAA's actions may or may not have been the result of intentional bias). She therefore cannot rely on her January 2017 discovery to breathe life into the three-year limitations period which is otherwise applicable under Title IX.

Further, although not raised as a defense, the Rule 12(b)(6) dismissal of plaintiffs prior complaint in this Court is preclusive of plaintiffs claims arising out of her 1994 Ph.D. program termination that plaintiff again raises here, despite that she attempts to rely on new evidence of continued discrimination. See Federated Dep 't Stores, Inc. v. Moitie, 452 U.S. 394, 398, 399 n. 3 (1981) (dismissal for failure to state a claim is final adjudicatipn on the merits for purposes ofres judicata); see also Clodfelter v. Republic of Sudan, 720 F.3d 199, 209 (4th Cir. 2013) (court may consider resjudicata defense sua sponte). Finally, plaintiffs bare allegations concerning breach of contract and deprivation of due process arising out of her termination from the Ph.D. program, as well as her bare allegation of fraud against an employee of the NCSEAA, fail to state a plausible claim for relief.

CONCLUSION

In sum, plaintiffs claims against the State of North Carolina itself are barred by Eleventh Amendment immunity and plaintiff's claims under Title IX are either time-barred or she has failed to state a claim. This court's prior judgment is further preclusive of plaintiff's allegations arising out of her 1994 termination from the College of Veterinary Medicine, and plaintiff has failed to provide any factual allegations which would support a claim for breach of contract, deprivation of due process, or fraud, and she has therefore failed to state a claim upon which relief can be granted. It is for these reasons that

defendant's motion to dismiss [DE 7] is GRANTED and plaintiffs complaint is in its entirety DISMISSED.

SO ORDERED, this 9 day of February, 2018.

TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

APPENDIX E

FILED: June 18, 2018

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 18-1289
(5: 17-cv-00371-BO)

KENDA R. KIRBY
Plaintiff - Appellant

V.

ST ATE OF NORTH CAROLINA, Office of the Attorney General
Defendant - Appellee

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.
This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

Isl PATRICIA S. CONNOR, CLERK

UNPUBLISHED
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
No. 18-1289

KENDA R. KIRBY
Plaintiff - Appellant

V.

ST ATE OF NORTH CAROLINA, Office of the Attorney General
Defendant - Appellee

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, District Judge. (5: l 7-cv-00371-BO)

Submitted: June 14, 2018 Decided: June 18, 2018

Before TRAXLER, DUNCAN, and WYNN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Kenda R. Kirby, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

APPENDIX E

PERCURIAM:

Kenda R. Kirby appeals the district court's order denying relief on her civil complaint. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. Kirby v. North Carolina, No. 5: 17-cv-00371-8O (E.D.N.C. Feb. 12, 2018). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

APPENDIX F

FILED: July 10, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1289
(5: 17-cv-00371-BO)

KENDA R. KIRBY
Plaintiff - Appellant
V.
STATE OF NORTH CAROLINA, Office of the
Attorney General
Defendant - Appellee

MANDATE

The judgment of this court, entered June 18, 2018,
takes effect today.
This constitutes the formal mandate of this court
issued pursuant to Rule
41(a) of the Federal Rules of Appellate Procedure.

ls/Patricia S. Connor, Clerk