UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

YUNG-KAI LU, Plaintiff-Appellant, v. UNIVERSITY OF UTAH; LORI McDONALD; RYAN RANDALL; CHALIMAR L. SWAIN; DONN SCHAEFER; MIGUEL CHUA-QUI; MIKE COTTLE; ROBERT BALDWIN; MICHAEL GOODRICH; CHARLES PIELE; CHARLES WIGHT, Defendants-Appellees.	No. 18-4134 (D.C. No. 2:16-CV-00051-CW) (D. Utah)

ORDER AND JUDGMENT*

(Filed Oct. 29, 2019)

Before **EID**, **KELLY**, and **CARSON**, Circuit Judges.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Yung-Kai Lu, a citizen of Taiwan, appeals pro se from a district court order that dismissed his complaint against the University of Utah and some of its employees for not renewing his music scholarship and graduate teaching-assistant position. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm for substantially the same reasons identified by the district court.

BACKGROUND

This is the second time Lu has sued over the nonrenewal of his scholarship and teaching-assistant position. He first sued in 2013, alleging that during the 2010-11 school year, when he was a doctoral music student, the University racially discriminated against him, misused state funds, and provided false criminal records to immigration authorities, resulting in his deportation to Taiwan in October 2011. In an amended complaint, he alleged breach of contract, slander, and infliction of emotional distress, and he claimed the violation of various international treaties. Separately, in August 2015, he filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) that claimed national-origin discrimination and retaliation.

Lu was unsuccessful on both fronts. On October 7, 2015, the district court dismissed his complaint with prejudice. The district court explained that (1) the Eleventh Amendment and the Utah Governmental Immunity Act (UGIA) barred his tort claims; (2) he failed

to plausibly allege a breach of contract in the non-renewal of his scholarship and teaching-assistant position; and (3) he failed to plausibly allege any international claim. Soon thereafter, on October 30, 2015, the EEOC dismissed his charge of discrimination as untimely and issued a right-to-sue letter.

In November 2015, Lu appealed the district court's dismissal of his case. In early 2016, while his appeal was pending, Lu sued the University and its employees again, this time claiming that the non-renewal of his scholarship and teaching-assistant position violated Title VII. In August 2016, this court affirmed the dismissal of Lu's first lawsuit. *See Lu v. Univ. of Utah*, 660 F. App'x 573 (10th Cir. 2016).

Following this court's affirmance, Lu amended his complaint, advancing five claims for relief: (1) Title VII retaliation; (2) Title VII national-origin discrimination; (3) Title VII racial discrimination; (4) Americans with Disabilities Act (ADA) discrimination; and (5) invasion of privacy. Before Lu served any defendant, a magistrate judge recommended dismissing the complaint based on claim preclusion, given that the new claims arose out of the very same transaction underlying Lu's first lawsuit, and he could have asserted all of his claims in the first lawsuit. Alternatively, the magistrate judge recommended dismissal because Lu's Title VII and ADA claims were time barred and his privacy claim was barred by the Eleventh Amendment and the UGIA. Lu filed objections.

The district judge adopted the dismissal recommendation in full and dismissed Lu's claims with prejudice.

DISCUSSION

Because the district court allowed Lu to proceed in forma pauperis, his complaint was governed by 28 U.S.C. § 1915, which required the district court to "dismiss [his] case at any time" upon determining that he "fail[ed] to state a claim on which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii). We review de novo, "look[ing] to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief." *Kay v. Bemis*, 500 F.3d 1214, 1218 (10th Cir. 2007) (internal quotation marks omitted); *see also C.H. Robinson Worldwide, Inc. v. Lobrano*, 695 F.3d 758, 763-64 (8th Cir. 2012) (observing that claim preclusion can provide a basis for dismissing for failure to state a claim if the defense appears on the complaint's face).

Lu identifies no cogent basis on which to reverse the district court's dismissal of his complaint. Indeed, he tenders multiple legal theories having no apparent application to this case, such as verification of EEOC forms, double jeopardy, the statute of frauds, and whether there is a "genuine issue of material fact as to the element of pretext," Aplt. Br. at 39. We "will not consider issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation." *Armstrong v. Arcanum Grp.*, 897 F.3d 1283,

1291 (10th Cir. 2018) (ellipsis and internal quotation marks omitted). And despite our obligation to liberally construe a pro se litigant's filings, we will not serve as an advocate, constructing arguments and searching the record. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

Nevertheless, it is apparent that Lu contests the preclusive effect of the first district court judgment on his employment-discrimination claims, given that he did not receive a right-to-sue letter until after that judgment was entered. Thus, he maintains, he could not have brought those claims in his first lawsuit. We disagree.

Claim preclusion "prevent[s] a party from litigating a legal claim that was *or could have been* the subject of a previously issued final judgment." *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1239 (10th Cir. 2017) (emphasis added, internal quotation marks omitted). The doctrine applies if there was "(1) a final judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits." *Id.* (internal quotation marks omitted).

Although a right-to-sue letter is a condition precedent to pursuing a discrimination suit, it is not jurisdictional, *see* 42 U.S.C. § 2000e-5(f)(1); *Payan v. United Parcel Serv.*, 905 F.3d 1162, 1169 (10th Cir. 2018), and does not affect the rules of claim preclusion, *see Wilkes v. Wyo. Dep't of Emp't*, 314 F.3d 501, 505-06 (10th Cir. 2002), *as amended* (Jan. 14, 2003). Thus, "a plaintiff

waiting on a right-to-sue letter as to one of his claims could [among other things] . . . seek a stay in the district court until he receives the right-to-sue letter." *Stone v. Dep't of Aviation*, 453 F.3d 1271, 1279 (10th Cir. 2006); *accord Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 315-16 (5th Cir. 2004) (collecting cases). This procedure was available to Lu, as he believed upon initiating his first lawsuit that the defendants had discriminated against him, and he filed a discrimination charge with the EEOC while the first lawsuit was ongoing. His failure to pursue the employment discrimination claims, as well as his privacy claim, in the first lawsuit triggered the preclusive effect of the first judgment. *See Nwosun v. Gen. Mills Rests., Inc.*, 124 F.3d 1255, 1257 (10th Cir. 1997) (stating that "all claims or legal theories of recovery that arise from the same transaction, event, or occurrence" share the same preclusive identity and "must . . . be presented in one suit or be barred from subsequent litigation"); *Medtronic*, 847 F.3d at 1239 (stating that "a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not have another chance to do so" (internal quotation marks omitted)).[1]

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[1] To the extent Lu seeks to avoid claim preclusion on the basis that defendant Ryan Randall, an assistant dean, was not sued in the first lawsuit, the district court correctly pointed out that Randall is in privity with the other University defendants. *See United States v. Rogers*, 960 F.2d 1501, 1509 (10th Cir. 1992) (observing that "officers of the same government" are protected from "relitigation of the same issue between [the plaintiff] and another officer of the government" (internal quotation marks omitted)).

Alternatively, as the district court explained, Lu failed to file his EEOC charge within 300 days of the University's non-renewal of his teaching position, *see* 42 U.S.C. § 2000e-5(e)(1) (prescribing a 300-day window for filing an EEOC charge where "the person aggrieved has initially instituted proceedings with a [s]tate or local agency with authority to grant or seek relief from such [unlawful employment] practice"),[2] and the defendants were immune from suit on his privacy claim, *see Lu*, 660 F. App'x at 577 (discussing the University defendants' tort immunity under the Eleventh Amendment and the UGIA).

CONCLUSION

We affirm for substantially the same reasons identified by the district court in its August 21, 2018 Memorandum Decision and Order dismissing Lu's complaint.

Entered for the Court

Allison H. Eid
Circuit Judge

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[2] We need not decide whether Lu's EEOC charge encompassed all of the discrimination claims he asserted in the second lawsuit. We only note that "[a] plaintiff normally may not bring a Title VII action based upon claims that were not part of a timely-filed EEOC charge for which the plaintiff has received a right-to-sue-letter." *Foster v. Ruhrpumpen, Inc.*, 365 F.3d 1191, 1194 (10th Cir. 2004) (internal quotation marks omitted).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

YUNG-KAI LU, Plaintiff, v. UNIVERSITY OF UTAH et al., Defendants.	**MEMORANDUM DECISION & ORDER** (Filed Aug. 21, 2018) Case No. 2:16-cv-51-CW District Judge Clark Waddoups

Plaintiff Yung-Kai Lu, proceeding *in forma pauperis* and pro se, brings this civil rights action against the University of Utah and others (Defendants), seeking compensation for injuries he experienced when Defendants did not renew his teaching-assistantship contract. (Amended Complaint, ECF No. 26.) This action was assigned to United States District Court Judge Clark Waddoups, who then referred it to United States Magistrate Judge Evelyn J. Furse under 28 U.S.C. § 636(b)(1)(B). (R&R, ECF No. 7.) The matter is now before the court on a Report and Recommendation from Magistrate Judge Furse, dated March 28, 2018, in which she recommends that this court dismiss Plaintiff's action because claim preclusion bars it and, alternatively, because Plaintiff's Title VII and ADA claims are time-barred and because the Eleventh Amendment and Utah Governmental Immunity Act bar his tort claims. (*Id.* at 2.) The Report and Recommendation is incorporated by reference. *See* 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b).

After several extensions of time, Plaintiff objected to Judge Furse's Report & Recommendation on July 16, 2018. (Objection, ECF No. 37.) No defendant has yet been served and, therefore, no response to Plaintiff's objection has been filed. Because of Plaintiff's objection, the court reviews Magistrate Judge Furse's report de novo. *Northington v. Marin*, 102 F.3d 1564, 1570 (10th Cir. 1996). Because Plaintiff is proceeding pro se, the court must liberally construe his pleadings, *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972), but it cannot advocate for him, *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

After careful review of the Amended Complaint, the Report and Recommendation, the documents filed in case number 2:13-cv-984 (*Lu* I) in which Plaintiff sued all but one Defendant over the same basic factual circumstances, and Plaintiff's Objection, the court AFFIRMS and ADOPTS Magistrate Judge Furse's recommendation in full and dismisses Plaintiff's action with prejudice for failure to state a claim.

I. *LU* I PRECLUDES PLAINTIFF'S CLAIMS.

While Plaintiff's Amended Complaint asserts distinct causes of action and contains more detail than the Second Amended Complaint in Lu I (*Compare* ECF No. 26, *with* Lu I ECF No. 12), the claims he asserts here arise out of a common nucleus of facts with those in *Lu* I. Both cases involve the University of Utah's decision not to renew Plaintiff's funding and the circumstances and conflicts that arose as a result of that decision.

This is a sufficient connection under the transactional approach as Judge Furse's Report and Recommendation explains. And Plaintiff makes no argument in his Objection that would cause this court to reach a different conclusion.

Plaintiff argues that claim preclusion does not bar this action because Restatement (Second) of Judgments § 26 sets forth multiple exceptions to claim preclusion, several of which he argues apply. But he points the court to no record evidence that satisfies the exceptions.

First, Defendant did not acquiesce to separate suits by failing to timely respond. *See* Restatement (Second) of Judgments § 26(a) (Am. Law Inst. 1982). Rather, under Utah law, Defendants' silence constitutes a denial of the claim. Utah Code Ann. § 63G-7-403(1)(b) ("A claim is considered to be denied if, at the end of the 60-day period, the governmental entity or its insurance carrier has failed to approve or deny the claim."). Second, there were no restraints on the district court's jurisdiction in Lu I that prevented it from hearing the claims Plaintiff raises in this action. *See id.* § 26(c). While it may be true that the evidence Plaintiff relies upon in this action supports a new cause of action for employment, the prior absence of this newly discovered evidence did not limit the *Lu* I court's subject matter jurisdiction or otherwise limit its authority. *See id.* § 26(c) cmt. c. Third, *Lu* I was not "plainly inconsistent with fair and equitable implementation of a statutory or constitutional scheme. *See id.* § 26(d). And Plaintiff's bare citation to *Oklahoma*

Packing Co. v. Oklahoma Gas & Electric Co., 309 U.S. 4 (1940), in which the United States Supreme Court looked to Oklahoma law to decide a res judicata claim, provides the court no basis to conclude to the contrary. *Oklahoma Packing Co.* is not similar to this case. *Id.*

Fourth, Plaintiff has not alleged continuing or recurrent wrongs. *See id.* § 26(e). In support of his claim to the contrary, Plaintiff asserts that his EEOC claim could not have been joined with his breach of contract claim in *Lu* I and that new evidence necessitates this second action. Neither of these arguments is pertinent to § 26(e), *see id.* § 26(e) cmts. f-h (explaining that this exception applies to instances in which "strong substantive policies favor" the possibility of separate actions in "cases involving anticipated continuing or recurrent wrongs" such as contract cases involving series of material breaches or tort actions involving temporary nuisances). Finally, Plaintiff has not shown by clear and convincing evidence that extraordinary reasons exist that should overcome policies favoring preclusion. *See id.* § 26(f). Newly discovered evidence is not an extraordinary reason such that it overcomes the need for finality or other policies favoring preclusion unless the new evidence was "fraudulently concealed or . . . could not have been discovered with due diligence." *Lenox Maclaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, (10th Cir. 2017). Plaintiff has alleged this newly acquired evidence resulted from his "pressur[ing]" the "Utah State Attorney . . . to direct University of Utah to release most of Lu's files," but he has not set forth factual support from which the court

can conclude Defendants fraudulently hid evidence. (*See* Objection 5–6, ECF No. 37.) Therefore, none of the exceptions set forth in Restatement (Second) of Judgments § 26 justify a second action under these circumstances.

Plaintiff next argues that preclusion does not apply because "Plaintiff Lu's contract claim was reviewed under the state contract laws. The previous case never asserted a violation of discrimination law." (*See* Objection 6–7, ECF No. 37.) In support of this assertion, Plaintiff cites language from a bankruptcy appeal in which this court held that issue preclusion barred a second action. *See West v. Christensen*, 576 B.R. 223 (D. Utah 2017). But Judge Furse has not recommended this court dismiss on a theory of issue preclusion. For the reasons set forth in Judge Furse's recommendation, claim preclusion applies. Similarly, Judge Furse has not assumed the causes of action are the same, as Plaintiff contends (*see* Objection 9, ECF No. 37), but decided that they arise out of the same transaction.

Plaintiff also argues that he could not bring his discrimination claim in *Lu* I because he had not yet received a right to sue letter from the EEOC. (EEOC Letter, ECF No. 4-1.) While Plaintiff could not bring a Title VII discrimination claim until after he had exhausted his administrative remedies in front of the EEOC, the lack of a right-to-sue letter does not bar jurisdiction. *Wilkes v. Wyo. Dept. of Emp'ment Div. of Labor Standards*, 314 F.3d 501, 505–06 (10th Cir. 2002). Thus, none of Plaintiff's objections are meritorious, and the court concludes this action is barred by claim preclusion.

II. PLAINTIFF'S CLAIMS ARE TIME-BARRED.

Judge Furse also recommended dismissal of Plaintiff's discrimination and retaliation claims because they are time-barred.[1] Judge Furse found that the 300-day statute of limitations governing Plaintiff's Title VII and ADA claims began to run [sic] 2011, and Plaintiff did not file with the EEOC until 2015. Plaintiff objects that the 300-day period did not begin to run until 2015 when he received evidence of final decision to terminate him as a student and teaching assistant. (Objection 10–11, ECF No. 37.) But the facts of the complaint do not support his position. The alleged discriminatory employment conduct was the decision not to renew his teaching assistantship, which Plaintiff plainly admits he learned about in April 2011. (Amended Complaint ¶ 33.) *See Del. State Coll. v. Ricks*, 449 U.S. 250, 256–59 (1980) ("Determining the timeliness of [an] EEOC complaint, and th[e] ensuing lawsuit, requires [the court] to identify precisely the 'unlawful employment practice' of which" the employee complains.). The court has no doubt that Plaintiff felt the consequences of the employment decision when he was unable to finance his education the following school year, and then deported as a result of his failure to enroll, and recognizes that he may have learned more about the University's internal process related to his status as a student and employee in 2015, but

[1] Judge Furse characterized these claims as asserting causes of action under Title VII of the Civil Rights Act of 1964 and Title I of the Americans with Disabilities Act. Plaintiff did not object and this court agrees that Judge Furse's characterization is proper.

this does not negate the fact that the only discriminatory employment decision was the decision not to renew his funding for the 2011–2012 school year. *See id.* (determining that the date that the Title VII limitations period began to run is the "date of the 'alleged unlawful employment practice,'" not the date consequences of that practice are felt). Because he knew of this decision in 2011, his 2015 EEOC claim was not timely and neither is this lawsuit.

III. Plaintiff's Claims Are Barred as a Result of Defendants' Immunity.

Judge Furse's final basis for dismissal is that, just as the district court and Tenth Circuit decided in *Lu* 1 that any tort claim Plaintiff may have alleged was barred by the Eleventh Amendment and Utah Governmental Immunity Act, so too are any such claims barred in this action. (R&R 18–19, ECF No. 30.) Plaintiff objects that his tort claims are asserted under the Utah Constitution and therefore not barred by the UGIA. (Objection 12, ECF No. 37.) But even under the most generous reading of the Amended Complaint, Plaintiff has set forth no violation of the Utah Constitution. Therefore, any tort claims he may have alleged are barred pursuant to *Lu* I.

Conclusion

This court adopts and affirms the recommendation of Magistrate Judge Furse and HEREBY ORDERS that Plaintiff's claims are dismissed with prejudice.

DATED this 21st day of August, 2018.

BY THE COURT:

/s/ Clark Waddoups
Clark Waddoups
United States District Judge

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

YUNG-KAI LU, Plaintiff, v. UNIVERSITY OF UTAH et al., Defendants.	**ORDER DENYING MOTION FOR OFFICIAL SERVICE OF PROCESS (ECF No. 28) & MOTION TO EXPEDITE SUMMONS DELIVERY BY THE U.S. MARSHALS SERVICE (ECF No. 29); REPORT AND RECOMMENDATION TO DISMISS AMENDED COMPLAINT (ECF No. 26).** (Filed Mar. 28, 2018) Case No. 2:16-cv-00051 District Judge Clark Waddoups Magistrate Judge Evelyn J. Furse

Pro se Plaintiff Yung-Kai Lu, proceeding in forma pauperis, initiated this case on January 20, 2016 (ECF Nos. 1 & 4), and filed the operative Amended Complaint on August 15, 2017 (ECF No 26). Mr. Lu alleges that Defendants (1) University of Utah and current or former University of Utah employees (2) Lori McDonald, (3) Ryan Randall, (4) Chalimar Swain, (5) Donn Schaefer, (6) Miguel Chuaqui, (7) Mike Cottle, (8) Robert Baldwin, (9) Michael Goodrich, (10) Charles Piele, and (11) Charles Wight ("University of Utah

Defendants")[1] failed to renew his graduate assistantship and scholarship in violation of Title VII of Civil Rights Act of 1964 ("Title VII") and Title I of the Americans with Disabilities Act ("ADA"). Mr. Lu also appears to assert tort claims for invasion of privacy. The Amended Complaint has not been served on the University of Utah Defendants, but Mr. Lu has moved the Court for an order directing the United States Marshals Service to serve process. (Mot. for Official Service of Process, ECF No. 28; Mot. to Expedite Summons Delivery by the U.S. Marshals Service, ECF No. 29.) Mr. Lu filed a prior suit in the District of Utah against all of the University of Utah Defendants, except for Mr. Randall, asserting tort and contract claims also arising out of the University of Utah's decision not to renew his graduate assistantship and scholarship. The district judge dismissed Mr. Lu's prior case with prejudice, and the Tenth Circuit affirmed. See Lu v. Univ. of Utah, No. 2:13-CV-00984-TC-BCW, 2015 WL 5838797 (D. Utah Oct. 7, 2015); Lu v. Univ. of Utah, 660 F. App'x 573 (10th Cir. 2016) (unpublished).

For the reasons addressed below, the undersigned[2] RECOMMENDS the District Judge DISMISS Mr. Lu's claims against the University of Utah Defendants for failure to state a claim upon which this Court can

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[1] In the Amended Complaint, Mr. Lu also refers to Mr. Randall as Ryan Randll, Mike Cottle as David Cottle, and Mr. Baldwin as Charles Bladwin.

[2] On August 18, 2017, District Judge Clark Waddoups referred this case to the undersigned Magistrate Judge under 28 U.S.C. § 636(b)(1)(B). (ECF No. 7.)

grant relief because claim preclusion bars the present case. Alternatively, the undersigned RECOMMENDS the District Judge DISMISS Mr. Lu's Amended Complaint because his Title VII and ADA claims are time-barred, and the Eleventh Amendment and Utah Governmental Immunity Act (UGIA) bar his tort claims. The undersigned further DENIES Mr. Lu's Motion for Official Service of Process (ECF No. 28) and Motion to Expedite Summons Delivery by the U.S. Marshals Service (ECF No. 29) because his Complaint fails to sate [sic] an actionable claim.

RELEVANT BACKGROUND

Mr. Lu initiated the present lawsuit on January 20, 2016 ("Lu II"). (ECF Nos. 1 & 4.) The Court permitted Mr. Lu proceed in forma pauperis under 28 U.S.C. § 1915 ("IFP statute"), (ECF No. 3), and appointed him pro bono counsel for the limited purpose of assisting him in determining whether he has a cognizable claim and the best way to proceed. (Order for Partial Appt. of Counsel, ECF No. 13.) The Court also granted Mr. Lu leave to file an Amended Complaint, (Order Granting Mot. for Leave to File Am. Compl., ECF No. 16), which he filed on August 15, 2017. (Am. Compl., ECF No. 26). Mr. Lu's First Amended Complaint ("Amended Complaint") is the operative complaint in this case. On August 25, 2017, Mr. Lu moved the Court for an order directing the United States Marshals Service to serve process pursuant to 28 U.S.C. § 1915, (Mot. for Official Service of Process, ECF No. 28), and on February 26, 2018, filed a motion to expedite service of process. (Mot.

to Expedite Summons Delivery by the U.S. Marshals Service, ECF No. 29.) The Court has not ruled on the Motions, and the University of Utah Defendants have not yet been served.

Mr. Lu's Complaint in this case asserts claims arising out of the University of Utah's failure to renew his graduate assistantship and scholarship. (See generally Am. Compl., ECF No. 26.) Mr. Lu indicates that the statement on the nature of his current case is "based on the factual background" in the decision dismissing his case in the prior suit he filed in the District of Utah. (Am. Compl., ¶ 26, ECF No. 26.) Mr. Lu alleges that he was pursuing a master's degree at the University of Indiana in mid-2010, when Defendant Donn Schaefer, Associate Director of University of Utah's School of Music, called him several times promising him a graduate assistantship and a scholarship to support him for three years while he studied for a doctoral degree. (Id., ¶¶ 26, 27.) The University of Utah sent Mr. Lu a "Graduate Assistantship Contract," which stated that the assistantship was a nine-month appointment for the 2010–2011 academic year, explained that the appointments were for one academic year at a time, and that the University policy is to limit appointments to three years for doctoral students. (Id., ¶¶ 29, 30.) The contract also required Mr. Lu to commit to working on average twenty hours per week and complete at least nine credit hours per semester with a grade of B or higher for each class. (Id., ¶ 30.) Mr. Lu signed the contract on May 18, 2010, obtained an educational visa, and moved to Salt Lake City in August 2010. (Id.,

¶ 32.) In an April 2011 meeting, Mr. Schaefer told Mr. Lu that the University of Utah had no money to continue to fund Mr. Lu's graduate assistantship and scholarship. (Id., ¶ 33.) Mr. Lu alleges, however, that Mr. Schaefer had told him as late as August 2010 that all he "had to do to continue his scholarship was to maintain a GPA of at least 3.00." (Id.)

After the April 2011 meeting, Mr. Lu met with a number of other University of Utah employees—including Defendants Robert Baldwin, the Interim Director of Graduate Studies for the School of Music, Charles A. Wight, Dean of the Graduate School, Chalimar L. Swain, Director of the International Center, Ryan Randall, Assistant Dean of Studies for Behavior Intervention and Advocacy, and Lori McDonald, Assistant Director of the Dean of Students—regarding various issues relating to the decision not to renew his graduate assistantship and scholarship. (Am. Compl., ¶¶ 36–41, ECF No. 26.) Among other things, Mr. Lu alleges that Mr. Baldwin told him the University could not offer him another graduate assistantship or scholarship in part because Defendant Miguel Chauqui, Head of the Composition Department for the School of Music, reported that Mr. Lu "had been rude to him." (Id., ¶ 37.)

Mr. Lu alleges further alleges that in late-August to mid-September 2011, Ms. McDonald gave the U.S. Immigration Court and the U.S. Immigration and Customs Enforcement Agency incorrect information about his "criminal history report" and provided false records stating that he "had been dismissed from the

University of North Texas, had been arrested by University of Utah police officers, was subject to restraining orders in Utah and Indiana, and was a threat to public safety." (Am. Compl., ¶ 42, ECF No. 26.) He claims that the statements were false, "eventually led to his arrest, deportation to Taiwan, and the abandonment of his personal possessions," and that as a result, "he has suffered emotional distress and can no longer pursue his doctoral studies or obtain a visa to return to the United States." (Id., ¶ 43.) Mr. Lu claims that in June 2012, he called Ms. McDonald asking her to correct the allegedly erroneous information, and she refused. (Id., ¶ 47.) He claims that she then "took adverse actions against [him] by reporting more false information to the University of Utah Police Department and Immigration Custom Enforcement again such as that [he] had assaulted her." (Id., ¶ 48.)

In October 2012, Mr. Lu filed a notice of claim through the University of Utah's Internal Audit Department. (Am. Compl., ¶ 50, ECF No. 26.) Mr. Lu alleges that the auditors, Defendants Charles Piele and Michael G. Goodrich, investigated his complaint and produced a report, from which Mr. Lu learned that Defendant David Cottle, an Associate Professor, had given him and "unfavorable teaching report even though [he] had never before received such feedback." (Id., ¶¶ 50, 51.) Mr. Lu alleges that this teaching report "presumably" led to the auditors' conclusion that he had not sufficiently performed his duties. (Id., ¶ 52.) Mr. Lu asserts that he challenged the report, but the auditors insisted he could not do so and that the

investigation was closed. (Id., ¶ 53.) Mr. Lu states that he then filed his "original complaint with this court on October 31, 2013." (Id., ¶ 54.)

Mr. Lu alleges that from December 2014 to July 2015, he corresponded with the Utah State Attorney "and discovered evidence of discrimination in employment and education." (Am. Compl., ¶ 55, ECF No. 26.) He claims that after "matching" the evidence from the Utah State Attorney "and the previous documents from the University of Utah," he filed charges of discrimination under Title VII of the Civil Rights Act of 1964 with the Equal Employment Opportunity Commission ("EEOC") in August 2015. (Id., ¶¶ 3, 56.) Mr. Lu's Charge of Discrimination with the EEOC, which he attached to his original Complaint, states:

> I am an international student in or around August 2010, I was selected for a Graduate Assistantship with the Respondent. In or around April 2011, I was denied renewal of the internship contract and terminated.
>
> I immediately complained about the unfair denial of the scholarship, unfair treatment and wrongful termination through the University's complaint system. I was wrongfully profiled due to my national origin and I was subjected to harassment from the onset of my complaint, including but not limited to, a mental stability screening was performed on me and denied a transfer to other universities. Dean of Student Services, Lori McDonald led the faculty members to provide false accusations to the Immigration Custom Enforcement

> which led to my deportation in our around September 2011, and prevented me to return to the United States. In or around December 2012, the University of Utah Auditors ignored my request for further investigation and their negative reports prevented new teaching assistantships.
>
> I believe I was discriminated against due to my national origin, Taiwanese, in violation of Title VII of the Civil Rights Act of 1664 [sic], as amended and retaliated against for complaining to my supervisor and administrators.

(Ex. 54001, Docs. from EEOC, ECF No. 4-1 at 5.) On October 30, 2015, Mr. Lu claims he received a Notice of Right to Sue letter from the EEOC. (Am. Compl., ¶ 57, ECF No. 26.) The EEOC's Dismissal and Notice of Right to Sue, which is attached to Mr. Lu's original Complaint, indicates that his charge was dismissed because it "was not timely filed with EEOC; [i]n other words, you waited too long after the date(s) of the alleged discrimination to file your charge." (Ex. 54001, Docs. from EEOC, ECF No. 4-1 at 3.) Mr. Lu filed a notice of claim with the Utah State Attorney General's Office in December 2015, (Am. Compl., ¶ 58, ECF No. 26), and then commenced this suit in January 2016. (ECF Nos. 1 & 4.)

The Amended Complaint states that Mr. Lu brings his "lawsuit under title VII of the Civil Right Act of 1964," and that "[t]his action is brought pursuant to Title VII of the Civil Rights Act of 1964 as amended, for employment discrimination." (Am. Compl., ¶¶ 5, 6,

ECF No. 26.) But Mr. Lu fails to clearly plead his causes of action or indicate against which Defendant(s) each cause of action is pled. However, viewing the Amended Complaint in the light most favorable to Mr. Lu, he appears to assert (1) Title VII retaliation (Section 704, 42 U.S.C. 2000e-3) claims against Defendants Wight, McDonald, Goodrich, Piele, Schaefer, Chuaqui, Baldwin, Swain, and Cottle, (Am. Compl., ¶¶ 65–131, ECF No. 26); (2) Title VII national origin discrimination (Section 703, 42 U.S.C. 2000e-2) claims against Defendants Cottle, McDonald, Swain, Randall, Schaefer, Goodrich, Piele, (id., ¶¶ 142–74), (3) Title VII racial discrimination (Section 703, 42 U.S.C. 2000e-2) claims against all of the University of Utah Defendants (id., ¶¶ 175–212), (4) Title I ADA employment discrimination claims against Defendants University of Utah, McDonald, and Randall, (id., ¶ 213–24), and (5) invasion of privacy tort claims against Defendant McDonald (id., ¶¶ 132–41, 225–27).

Mr. Lu claims that as a result of these violations, he lost his U.S. visa in 2011, he is barred from returning to the United States for five years, he suffered emotional distress and professional losses since 2011, and that he suffers ongoing discrimination because the University of Utah Defendants "still refuse to admit the mistakes and correct all the mistakes on his academic and immigration records." (Am. Compl., ¶¶ 228–29, ECF No. 126.) Mr. Lu seeks injunctive relief, monetary damages for professional losses and the loss of his assistantship and scholarship, a public apology,

and the dismissal of the University of Utah employees. (Id., ¶¶ 233–42.)

Mr. Lu filed his initial case in the District of Utah against all of the University of Utah Defendants, except Mr. Randall, on October 28, 2013. (Lu v. Univ. of Utah, No. 2:13-CV-00984-TC-BCW, 2015 WL 5838797 (D. Utah Oct. 7, 2015) ("Lu I").) As with the present suit, Mr. Lu asserted claims arising out of the University of Utah's decision not to renew his graduate assistantship and scholarship. (Lu I, Second Am. Compl., ECF No. 12.) However, in that case, he asserted claims for breach of contract, as well as tort claims, including slander. (Id., ¶¶ 11–28.) Contrary to Mr. Lu's assertion in this case that he "discovered evidence of discrimination in employment and education," from December 2014 to July 2015, (Am. Compl., ¶ 55, ECF No. 26), Mr. Lu initially brought employment discrimination claims in Lu I. (Lu I, Compl., ECF No. 3 at 1–2; Civil Cover Sheet, ECF No. 3–3.) He later removed these claims (see, e.g., Lu I, Am. Compl., ECF No. 9), but nonetheless, he knew about such claims and the basis for those claims when filing his Complaint in October 2013. The University of Utah Defendants were served with the Second Amended Complaint, and filed a motion to dismiss the claims asserted against them. (Lu I, Mot. to Dismiss, ECF No. 54.) Mr. Lu responded to the motion to dismiss. (Lu I, Obj. to Motion to Dismiss, ECF No. 58.) On October 7, 2015, the district judge granted the University of Utah Defendants' motion, and dismissed Mr. Lu's claims with prejudice. (Lu I, Mem. Decision & Order, ECF No. 68, 2015 WL

5838797.) The district court found that Lu's tort claims were barred under the Eleventh Amendment and Utah Governmental Immunity Act (UGIA). (Id. at 6–10.) The district court further found that Mr. Lu failed to allege plausible breach of contract claims given the unambiguous language as to the term of the agreement, and Utah's parol evidence rule and statute of frauds barred any verbal promise that Mr. Lu would receive three years of scholarships. (Id. at 11–13.) The district court also found that Mr. Lu failed to establish a right to relief under the Alien Tort Claims Act (ATCA), Taiwan Relations Act, the International Covenant on Economic, Social and Cultural Rights or any other international treaty. (Id. at 14.)

Mr. Lu appealed the district court's dismissal of his claims, (Lu I, Notice of Appeal, ECF No. 75), and the Tenth Circuit affirmed the district court's decision. (Lu v. Univ. of Utah, 660 F. App'x 573 (10th Cir. 2016) (unpublished)).

STANDARD OF REVIEW

Whenever the court authorizes a party to proceed without the prepayment of fees under the IFP statute, the court must "dismiss the case at any time if the court determines that . . . the action . . . fails to state a claim on which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii). In determining whether a complaint fails to state a claim for relief under the IFP statute, the court employs the same standard used for analyzing motions to dismiss for failure to state a

claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. See Kay v. Bemis, 500 F.3d 1214, 1217-18 (10th Cir. 2007).

While a court construes liberally the filings of a pro se plaintiff and holds them "to a less stringent standard than formal pleadings drafted by lawyers," Hall v. Bellmon, 935 F.2d 1106, 110 (10th Cir. 1991), a pro se plaintiff must "'follow the same rules of procedure that govern other litigants.'" Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 840 (10th Cir. 2005) (quoting Nielson v. Price, 17 F.3d 1276, 1277 (10th Cir. 1994)). Thus, a pro se plaintiff still has "'the burden of alleging sufficient facts on which a recognized legal claim could be based.'" Jenkins v. Currier, 514 F.3d 1030, 1032 (10th Cir. 2008) (quoting Hall, 935 F.2d at 1110). While the court must make some allowances for "the [pro se] plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements[,]" Hall, 935 F.2d at 1110, "the court cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." Garrett, 425 F.3d at 840; see also Whitney v. State of N.M., 113 F.3d 1170, 1175 (10th Cir. 1997) (stating court should "not supply additional factual allegations to round out a [pro se] plaintiff's complaint or construct a legal theory on a plaintiff's behalf").

In assessing whether to dismiss a case, a court may take judicial notice of filings of decisions and records in prior cases involving the same parties. Merswin

v. Williams Cos., 364 F. App'x 438, 441 (10th Cir. 2010) (unpublished) ("district court can take judicial notice of its own decision and records in a prior case involving the same parties"); Tal v. Hogan, 453 F.3d 1244, 1265 n. 24 (10th Cir. 2006) (noting court's authority to take judicial notice of facts outside the record even when applying Rule 12(b)(6)). Thus, the undersigned takes judicial notice of the decisions and records in Lu I.

DISCUSSION

I. CLAIM PRECLUSION

"Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Clark v. Haas Grp., Inc., 953 F.2d 1235, 1238 (10th Cir. 1992). "The fundamental policies underlying the doctrine of res judicata (or claim preclusion) are finality, judicial economy, preventing repetitive litigation and forum-shopping, and 'the interest in bringing litigation to an end.'" Plotner v. AT & T Corp., 224 F.3d 1161, 1168 (10th Cir. 2000) (quoting Nwosun v. Gen. Mills Rests., Inc., 124 F.3d 1255, 1258 (10th Cir. 1997)).[3]

The "court applies federal law to determine the effect of a previous federal judgment." Hartsel Springs Ranch of Colorado, Inc. v. Bluegreen Corp., 296 F.3d

[3] Over the years, courts have shifted to the term "claim preclusion" rather than res judicata. Plotner, 224 F.3d at 1168 n.2 (citing Yapp v. Excel Corp., 186 F.3d 1222, 1226 n. 1 (10th Cir. 1999), as expressing a preference for the term "claim preclusion").

982, 986 (10th Cir. 2002). Claim preclusion requires the satisfaction of four elements:

> (1) the prior suit must have ended with a judgment on the merits; (2) the parties must be identical or in privity; (3) the suit must be based on the same cause of action; and (4) the plaintiff must have had a full and fair opportunity to litigate the claim in the prior suit.

Nwosun, 124 F.3d at 1257.

Mr. Lu asserted claims in Lu I against the University of Utah Defendants, except Mr. Randall, arising out of the University of Utah's decision not to renew his graduate assistantship and scholarship. That case ended with a judgment on the merits, and Mr. Lu had a full and fair opportunity to litigate his claims in that case. Therefore, claim preclusion bars Mr. Lu's present case.

A. Judgment on the Merits

The district court dismissed Lu I under Federal Rule of Civil Procedure 12(b)(6). (See Lu, 660 F. App'x at 575 ("[T]he district court dismissed Lu's amended complaint under Fed. R. Civ. P. 12(b)(6)")); see also Lu I, Mem. Decision and Order at 1-2, ECF No. 68, 2015 WL 5838797.) The dismissal with prejudice under Rule 12(b)(6) operates as a dismissal on the merits. See Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 399 n.3 (1981) ("The dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a 'judgment on the merits.'" (quoting Angel v. Bullington, 330 U.S.

183, 190 (1947))); Slocum v. Corp. Exp. U.S. Inc., 446 F. App'x 957, 960 (10th Cir. 2011) (unpublished) ("[A] Rule 12(b)(6) dismissal is [] an adjudication on the merits (not a technical or procedural dismissal), since it requires an evaluation of the substance of a complaint.").

B. Parties Identical or in Privity

The named parties in the present case are identical to those in Lu I, except that Mr. Lu adds an additional individual defendant, Ryan Randall. Mr. Lu alleges that at the time the events detailed in the Amended Complaint arose, Mr. Randall served as the Assistant Dean of Studies for Behavior Intervention and Advocacy at the University of Utah. (Am. Compl., ¶ 17, ECF No. 26.) Mr. Randall, a Utah government employee at the time the University of Utah declined to renew Mr. Lu's graduate assistantship and scholarship, is in privity with the other University of Utah Defendants. See United States v. Rogers, 960 F.2d 1501, 1509 (10th Cir. 1992) (stating that privity exists " 'between officers of the same government' " (quoting Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 402 (1940)). In Malek v. Brockbrader, the Tenth Circuit, citing Rogers, found that for purposes of claim preclusion, Utah state employees named by a plaintiff in a second suit were in privity with Utah state employees named in the first suit:

> Next, the parties in this action are identical or in privity to the parties in the first action. [Plaintiff] originally brought an action

> against the chairman, members and staff of the Utah Board of Pardons and Parole. [] The complaint in this case names members of the board and prison staff. These defendants, as government employees, are clearly in privity with the defendants in the previous action. []

190 F. App'x 613, 615 (10th Cir. 2006) (unpublished) (internal citation omitted). Thus, the parties in this case are identical to, or in privity with, the parties in Lu I.

C. Same Cause of Action

The Tenth Circuit applies the "transactional approach" to determine what constitutes the same cause of action. See Plotner, 224 F.3d at 1169. "Under this approach, a cause of action includes all claims or legal theories of recovery that arise from the same transaction, event, or occurrence. All claims arising out of the transaction must therefore be presented in one suit or be barred from subsequent litigation." Nwosun, 124 F.3d at 1257.

Mr. Lu asserted contract and tort claims against the University of Utah Defendants in Lu I, and asserts Title VII and ADA employment discrimination and tort claims against the University of Utah Defendants in this case. Despite asserting different causes of action, Mr. Lu bases both Lu I and the present case on the same transaction and event—the University of Utah's decision not to renew his graduate assistantship and scholarship. See, e.g., Wilkes v. Wyoming Dep't of

Employment Div. of Labor Standards, 314 F.3d 501, 504 (10th Cir. 2002), as amended (Jan. 14, 2003) ("This court repeatedly has held that " 'all claims arising from the same employment relationship constitute the same transaction or series of transactions for claim preclusion purposes.' " (quoting Mitchell v. City of Moore, 218 F.3d 1190, 1202 (10th Cir. 2000))). Therefore, Lu II arises out of the same transaction, and thus the same cause of action, that Lu I addressed—the allegedly wrongful failure to renew Mr. Lu's graduate assistantship and scholarship.

The fact Mr. Lu did not file a Charge of Discrimination with the EEOC until August 2015, (Am. Compl., ¶ 3, ECF No. 26; Ex. 54001, Docs. from EEOC, ECF No. 4-1 at 5), or receive a Notice of Right to Sue letter from the EEOC until October 2015, (Am. Compl., ¶57, ECF No. 26; Ex. 54001, Docs. from EEOC, ECF No. 4-1 at 3), does not alter this conclusion. Because Utah has its own agency with authority to contest unlawful employment practices, Mr. Lu was required to file his charge with the EEOC within 300 days of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(e)(1). Mr. Lu's allegations concerning alleged employment discrimination occurred in 2011 and 2012. (Ex. 54001, Docs. from EEOC, ECF No. 4-1 at 5; see also Am. Compl., ¶¶ 22–54.) In waiting until 2015 to file a charge with the EEOC, Mr. Lu failed to file charges within in the requisite statutory period, and the EEOC, in fact, dismissed his charge because it was not timely filed. (Ex. 54001, Docs. from EEOC, ECF No. 4-1 at 3.)

In Wilkes, the plaintiff argued that claim preclusion should not bar her second suit because she was statutorily prohibited from bringing her Title VII claim until she received a right-to-sue letter from the EEOC. 314 F.3d at 505. The Tenth Circuit rejected this argument, finding that the plaintiff had the obligation to preserve each of her claims independently and held that the plaintiff's Title VII claim was "barred by the doctrine of claim preclusion." Id. at 506. Here, Mr. Lu cannot escape claim preclusion because he failed to timely file his charge with the EEOC and then subsequently received an untimely right-to-sue letter. Mr. Lu had the obligation to preserve his Title VII claims to the extent he sought to assert them.

Mr. Lu's Title VII claims, like the others asserted in this case and Lu I, arise out of the University of Utah's decision not to renew Mr. Lu's graduate assistantship and scholarship and therefore constitute the same cause of action for claim preclusion purposes.

D. Full and Fair Opportunity to Litigate

Finally, in examining whether Mr. Lu had a full and fair opportunity to litigate his claims in his prior case, the Court must consider whether deficiencies existed in those cases that undermined "the fundamental fairness of the original proceedings." Petromanagement Corp. v. Acme-Thomas Joint Venture, 835 F.2d 1329, 1334 (10th Cir. 1988); see also Morgan v. City of Rawlins, 792 F.2d 975, 979 (10th Cir. 1986) ("[I]f there is reason to doubt the quality, extensiveness, or

fairness of procedures followed in prior litigation, redetermination of the issues is warranted.")

Nothing in the record of Lu I indicates deficiencies in, or the inadequacy of, that proceeding. Mr. Lu had a full and full and fair opportunity to litigate his claims in the District of Utah. Mr. Lu filed a response to the University of Utah Defendants' motion to dismiss, (Lu I, Obj. to Mot. to Dismiss, ECF No. 58), and the district judge considered his arguments in ruling on the motion. (See Lu I, Mem. Decision and Order, ECF No. 68, 2015 WL 5838797.) Furthermore, Mr. Lu appealed the district judge's decision to the Tenth Circuit, (Lu I, Notice of Appeal, ECF No. 75), which considered his arguments in its reaching its decision. (See Lu, 660 F. App'x 573.) Thus, Mr. Lu had the opportunity to fully and fairly litigate his claims in Lu I in both the District of Utah and the Tenth Circuit.

II. STATUTE OF LIMITATIONS & IMMUNITY

Mr. Lu's claims are also subject to dismissal because they are barred by the applicable statutes of limitations or barred under the Eleventh Amendment and Utah Governmental Immunity Act (UGIA). Viewing the Amended Complaint in the light most favorable to Mr. Lu, he appears to assert claims under Title VII of Civil Rights Act of 1964, Title I of the ADA, and tort claims for invasion of privacy. (Am. Compl., ¶¶ 65–131 (Title VII retaliation), 142–74 (Title VII national origin discrimination), 175–212 (Title VII racial discrimination), 213–24 (Title I ADA employment discrimination),

132–41 (invasion of privacy tort claim), 225–27 (same), ECF No. 26).

A. Title VII

Mr. Lu's Title VII claims are barred by the statute of limitations. As noted above, in a state such as Utah that has its own agency with authority to contest unlawful employment practices, an employee wishing to challenge an allegedly unlawful employment practice must file a charge of discrimination with the EEOC within 300 days after the alleged conduct occurred. 42 U.S.C. § 2000e-5(e)(1). " 'The filing [of a charge with the EEOC] is a prerequisite to a civil suit under Title VII and a claim is time-barred if it is not filed within these time limits.' " Al-Ali v. Salt Lake Cmty. Coll., 269 F. App'x 842, 846 (10th Cir. 2008) (unpublished) (quoting Davidson v. Am. Online, Inc., 337 F.3d 1179, 1183 (10th Cir. 2003)).

Mr. Lu complains of employment practices that occurred in 2011 and 2012, but did not file a discrimination charge with the EEOC until August 2015—well past the 300 day window to do so.[4] (Ex. 54001, Docs. from EEOC, ECF No. 4-1 at 5; see also Am. Compl., ¶¶ 3, 22–54.) As the EEOC recognized in its dismissal of his charge, Mr. Lu's charge was not timely filed. (Ex.

[4] Despite asserting claims for Title VII racial discrimination, (Am. Compl., ¶¶ 175–212), Mr. Lu did not file a charge for racial discrimination with the EEOC. (Ex. 54001, Docs. from EEOC, ECF No. 4-1 at 5). His charge alleges national origin discrimination and retaliation only. (See id.)

54001, Docs. from EEOC, ECF No. 4-1 at 3.) In addition, no doctrines that would toll or otherwise impact the timeliness of Mr. Lu's assertion of Title VII claims, such as the continuing violation doctrine, apply here. The University of Utah elected to not renew Mr. Lu's graduate assistantship and scholarship in 2011 (Am. Compl., ¶ 33, ECF No. 26), he was deported and no longer attending the University of Utah in September 2011, (Ex. 54001, Docs. from EEOC, ECF No. 4-1 at 5), and the conduct which Mr. Lu alleges violates Title VII occurred in 2011 or 2012. (Ex. 54001, Docs. from EEOC, ECF No. 4-1 at 5; Am. Compl., ¶¶ 65–131, 142–74, 175–212, ECF No. 26.) Further, Mr. Lu initially asserted employment discrimination claims in Lu I in 2013, and therefore, knew about the basis for such claims at that time. (See Lu I, Compl., ECF No. 3 at 1-2; Civil Cover Sheet, ECF No. 3-3.) Accordingly, Mr. Lu's Title VII claims—which arise out of the University of Utah's decision not to renew his graduate assistantship and scholarship—are time-barred.

B. ADA

Mr. Lu's ADA claim is similarly barred. "Incorporating the procedural rules of Title VII, the ADA requires an individual to file a timely administrative claim within 300 days." Davidson, 337 F.3d at 1183 (citing 42 U.S.C. § 12117(a); § 2000e-5). Filing a charge of disability discrimination with the EEOC within in the requisite time period is a "prerequisite to a civil suit," and a claim under the ADA "is time-barred if it is not filed within these time limits." Id.

Mr. Lu filed a charge of discrimination with the EEOC based on national origin discrimination and retaliation. (Ex. 54001, Docs. from EEOC, ECF No. 4-1 at 5.) He did not include a disability discrimination charge. (See id.) Mr. Lu does not allege that he separately filed a charge of disability discrimination with the EEOC. Because Mr. Lu failed to file a disability discrimination charge with the EEOC—let alone within the requisite time period given that his allegations relate to conduct occurring in 2011 and 2012—his ADA claim is time-barred.

C. Tort Claims

The Amended Complaint, viewed in the light most favorable to Mr. Lu, also appears to allege tort claims for invasion of privacy. While these claims are not clearly pled and may be barred by applicable statute of limitations,[5] the claims are in any event clearly barred under the Eleventh Amendment and UGIA.

In Lu I, the district court found Mr. Lu's tort claims against the University of Utah Defendants barred by the Eleventh Amendment and UGIA. (Lu I, Mem. Decision and Order at 9–10, ECF No. 68, 2015 WL 5838797; Lu, 660 F. App'x at 576 ("In granting the defendants' motion, the district court found Lu's tort claims barred under both the Eleventh Amendment and the Utah Governmental Immunity Act (UGIA)").)

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[5] See, e.g., Jensen v. Sawyers, 2005 UT 81, ¶¶ 31–58 (applying one-year statute of limitations to a false light invasion of privacy tort claim).

The Tenth Circuit subsequently affirmed this finding. (Lu, 660 F. App'x at 577 ("[I]t is well-settled that the University of Utah is considered an 'arm of the state' entitled to Eleventh Amendment immunity, Watson v. Univ. of Utah Med. Ctr., 75 F.3d 569, 574–75 (10th Cir. 1996), as are its officials acting in their official capacity."); see also id. (finding that "Lu's allegations relate to actions taken by the individual defendants in the exercise of a governmental function," and his claims therefore barred under the UGIA)). Therefore, to the extent Mr. Lu asserts tort claims in the Amended Complaint, those claims are barred under the Eleventh Amendment and the UGIA.

RECOMMENDATION

The Complaint meets all four elements of claim preclusion and, as a result, fails to state a claim upon which this Court can grant relief. Furthermore, permitting the case to proceed for a second time would waste judicial resources through the exact type of repetitive litigation that claim preclusion prohibits. Therefore, the undersigned RECOMMENDS the District Judge dismiss Mr. Lu's Amended Complaint pursuant to 28 U.S.C. § 1915 for failure to state a claim upon which the Court can grant relief. Alternatively, the undersigned RECOMMENDS that the District Judge dismiss Mr. Lu's Amended Complaint on the grounds that his Title VII and ADA claims are time-barred, and the Eleventh Amendment and UGIA bar his tort claims.

The Court will send copies of this Report and Recommendation to the parties and hereby notifies them of their right to object to the same. The Court further notifies the parties that they must file any objection to this Report and Recommendation with the clerk of the district court, pursuant to 28 U.S.C § 636(b) and Fed. R. Civ. P. 72(b), within fourteen (14) days of receiving it. Failure to file objections may constitute waiver of objections upon subsequent review.

ORDER

The undersigned DENIES Mr. Lu's Motion for Official Service of Process (ECF No. 28) and Motion to Expedite Summons Delivery by the U.S. Marshals Service (ECF No 29) because his Complaint fails to state a claim.

DATED this 28th day of March 2018.

BY THE COURT:

/s/ Evelyn J. Furse
Honorable Evelyn J. Furse
United States Magistrate Judge