No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JENNIFER DUPREE *et al.*,
Petitioners,

vs.

MRS. PAMELA OWENS *et al.*,
Respondents.

On Petition for Writ of Certiorari *to the United States Court of Appeals for the Eleventh Circuit*

(CA11 No. 21-13198 and 21-12571)

Appendix to Petition for *Writ of Certiorari*

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[PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 21-12571

JENNIFER DUPREE,

Plaintiff-Appellant,

versus

MRS. PAMELA OWENS,
DEPARTMENT OF HUMAN SERVICES,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

D.C. Docket No. 1:20-cv-04915-MLB

No. 21-13198

DETRICH BATTLE,

Plaintiff-Appellant,

versus

GEORGIA DEPARTMENT OF CORRECTIONS,

Defendant-Appellee,

HANCOCK STATE PRISON et al.,

Defendants.

Appeal from the United States District Court
for the Middle District of Georgia
D.C. Docket No. 5:20-cv-00063-MTT

Before WILSON, JILL PRYOR, and BRASHER, Circuit Judges.

WILSON, Circuit Judge:

Jennifer Dupree and Detrich Battle appeal orders from the Northern and Middle Districts of Georgia, respectively, challenging: (1) the dismissal of their Title V claims under the Americans with Disabilities Act (ADA) on the basis of sovereign immunity; and, if sovereign immunity correctly applies, (2) the dismissal of their ADA claims with prejudice. Dupree and Battle argue that Congress acted pursuant to valid constitutional authority in abrogating sovereign immunity for Title V ADA claims. They argue alternatively that, if sovereign immunity applies, the dismissal of their ADA claims should be without prejudice, as sovereign immunity is inherently a dismissal based on jurisdictional grounds.

After reviewing the record, and with the benefit of oral argument, we find that sovereign immunity applies to Title V claims when brought in conjunction with Title I claims. For clarity, we vacate and remand for the district court to indicate that the dismissals are without prejudice.

I. Background

As this is a consolidated case, we will separately discuss the factual and procedural background for both Dupree and Battle below.

A. Dupree Factual Background

On March 1, 2018, the Georgia Department of Human Services (DHS) hired Dupree to an administrative role. Shortly

thereafter, Dupree sought an accommodation under the ADA on account of her chronic conditions of bipolar disorder, post-traumatic stress disorder, and depression. Specifically, Dupree requested that DHS accommodate her by adjusting her work schedule to permit her to attend medical appointments by working alternate times. DHS contacted one of Dupree's doctors to confirm her need for an accommodation. The doctor responded by recommending Dupree be placed on leave under the Family and Medical Leave Act. DHS called the doctor, confirmed the doctor found Dupree was "not suitable for work," and subsequently terminated her employment.

B. Battle Factual Background

Battle was previously employed by the Georgia Department of Corrections (GDC), stationed at Hancock State Prison (Hancock). Battle alleges that on December 1, 2014, he was summoned at work to a "harassment meeting on the issue of them taking my money" due to an earlier work-related incident. He alleges he experienced chest pain during the meeting and requested an ambulance or his wife for care, but his superiors refused to make any calls. Battle requested medical leave for December 15–17, 2014, but was denied. Later, on April 15, 2015, Battle claims he fell and injured himself at work. He alleges he was entitled to worker's compensation, but his supervisors mishandled the related paperwork and threatened to fire him. On April 20, 2015, Battle returned to work with doctor-prescribed permanent restrictions. On July 13, 2015, Battle attended a morning briefing but did not receive an

assignment and was sent home. He called "personnel" who stated he had too many restrictions to work. Battle alleges he was "continually harassed," received disparate treatment, and his superiors worsened his medical condition "by unfair practices and treatment" by making him perform manual labor post-injury. While unclear in the record, it appears Battle was placed on leave without pay from July 29, 2015, to April 20, 2018, when he was terminated. In Battle's Equal Employment Opportunity Commission (EEOC) charge, he says his employer's stated reasoning for terminating him was that Battle did not provide updated medical documentation. Battle disputes this, alleging his doctor sent along appropriate documentation and the documentation submission deadline was April 24, 2018—four days after his official termination.

II. Procedural History

Again, we address the procedural histories of Dupree and Battle in turn.

A. Dupree Procedural History

In December of 2020, Dupree filed a pro se complaint in the Northern District of Georgia against DHS, alleging three claims: (1) DHS discriminated against her in violation of Title I of the ADA by failing to provide her with a reasonable accommodation; (2) DHS retaliated against her in violation of Title V of the ADA because of her opposition to a practice of her employer that she believed violated federal anti-discrimination laws; and (3) DHS committed the state law violations of "unfair termination/tort." DHS moved to dismiss the complaint, asserting sovereign

immunity under the Eleventh Amendment and arguing that "unfair or wrongful termination" was not an actional claim under Georgia law. Dupree did not file a response to DHS' motion. The magistrate judge issued a report and recommendation (R&R), finding that the ADA claims should be dismissed with prejudice based on sovereign immunity. Further, the R&R stated the district court should decline supplemental jurisdiction and dismiss the state claims without prejudice. Dupree did not explicitly object to the R&R but instead filed a docket entry "NOTICE of Filing Amended Complaint/objections by Jennifer Dupree re 4 Complaint, 20 FINAL REPORT AND RECOMMENDATION." This docket entry did not respond or object to any of the findings in the R&R. The district court reviewed the R&R for plain error since it found Dupree failed to object and adopted the R&R in its entirety. Dupree timely appealed.

B. Battle Procedural History

On March 20, 2020, Battle filed a recast pro se complaint in the Middle District of Georgia against Hancock and ten individual state employees. Battle alleged state law claims and ADA violations for discriminatory discharge, failure to accommodate, and retaliation against Hancock and the individual state employees in their official and individual capacities. The district court dismissed as frivolous the claims against the state employees in their individual capacities but allowed the claims against their official capacities to proceed.

Hancock filed a motion to dismiss the complaint, stating: (1) the ADA claims were time barred; (2) sovereign immunity applied; and (3) since sovereign immunity applied, the state claims must be dismissed for lack of subject matter jurisdiction. The district court determined that: the GDC should be substituted for Hancock; the state law claims should be dismissed for failure to state a claim; the Title I ADA claims were barred under the Eleventh Amendment; and the official-capacity claims against the ten state employees were "redundant," requiring dismissal. In response to a later motion by the GDC for judgment on the pleadings, the district court found that the ADA retaliation claim was also barred by the Eleventh Amendment. The court entered final judgment in favor of the GDC. Battle timely appealed.

On appeal, the Georgia Attorney General (Attorney General)[1] filed an unopposed motion to consolidate, which we granted. We consider both cases together below.

III. Analysis

Dupree and Battle claim: (1) they are entitled to plain error and de novo review, respectively; (2) the dismissal of their Title V claims under the ADA on the basis of sovereign immunity was improper; and, alternatively, (3) if sovereign immunity correctly

[1] We reference the Attorney General here, and throughout the remainder of the opinion, instead of the GDC or DHS because the Attorney General is defending both parties in this consolidated case.

applies, their ADA and adjoining state disability claims should not have been dismissed with prejudice. We address each claim in turn.

A. Standard of Review

When an appellant fails to timely respond to a magistrate judge's R&R, we, at most, review the appeal "for plain error if necessary in the interests of justice." 11th Cir. R. 3-1; *see also Harrigan v. Metro Dade Police Dep't Station #4*, 977 F.3d 1185, 1191 (11th Cir. 2020). And when the plaintiff fails to respond to the defendant's arguments, any future claims by the plaintiff as to that issue will not be preserved on appeal. *See Gennusa v. Canova*, 748 F.3d 1103, 1116 (11th Cir. 2014). We might *at most* review for plain error. *Burch v. P.J. Cheese, Inc.*, 861 F.3d 1338, 1352 (11th Cir. 2017).

Yet subject matter jurisdiction issues present questions of law that we review de novo, "even when it is raised for the first time on appeal." *United States v. Iguaran*, 821 F.3d 1335, 1336 (11th Cir. 2016) (per curiam); *McCoy v. United States*, 266 F.3d 1245, 1249 (11th Cir. 2001) (holding that "jurisdictional errors are not subject to plain- or harmless-error analysis"). In *Edelman v. Jordan*, the Supreme Court held that "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar," in that it does not need to be raised at the trial court to be considered. 415 U.S. 651, 677–78 (1974), *overruled on other grounds in Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613 (2002). The Supreme Court has also held that "subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived" and courts "have an independent obligation to determine whether

subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (cleaned up).

Dupree and Battle argue for differing standards of review, and both are before us in different postures. Dupree failed to timely respond to the magistrate judge's R&R, meaning we typically review her appeal "for plain error if necessary in the interests of justice." 11th Cir. R. 3-1. Dupree argues that the interest of justice exception should apply, as she was suffering from bipolar disorder, post-traumatic stress disorder, and depression while also litigating pro se. Therefore, she asserts we should review her claim for plain error instead of letting her claim be waived entirely. Battle summarily states his claims should be reviewed de novo as all issues presented in his brief are "pure questions of law."

The Attorney General contends that Dupree waived her appeal by not objecting to the magistrate's report and that even if she could show the "interests of justice" exception to waiver applies, only plain error review is warranted. The Attorney General concedes the standard of review should be de novo for Battle's claim, as it involves a district court's order granting a sovereign immunity defense.

Procedural postures aside, we assume without deciding that de novo is the appropriate standard of review for Battle's claim. His claims involve issues of sovereign immunity and, in both cases, the district court dismissed the case on sovereign immunity grounds. Sovereign immunity is inherently jurisdictional in nature, despite

our circuit's findings to the contrary in two prior unpublished cases.[2] And under *Iguaran*, we review de novo the district court's subject matter jurisdiction, as it presents a question of law. 821 F.3d at 1336. Because Battle loses under de novo review, as explained below, Dupree loses no matter the standard of review.

B. Sovereign Immunity and Title V of the ADA

The Eleventh Amendment renders States immune from certain suits in federal court. U.S. Const. amend. XI. While the text of the Eleventh Amendment "applies only to suits against a State by citizens of another State," the Supreme Court has construed the Eleventh Amendment to apply to suits initiated by citizens against their own States. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001).

In limited circumstances, Congress may abrogate the States' Eleventh Amendment immunity to enforce individual rights enshrined in the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455–56 (1976). To overcome State sovereign immunity, Congress must (1) "unequivocally" declare its intent to abrogate sovereign immunity and (2) "act[] pursuant to a valid grant of constitutional authority." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000).

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[2] *See Thomas v. Clayton Cnty. Bd. of Comm'rs*, No. 22-10762, 2023 WL 1487766, at *3 n.2 (11th Cir. Feb. 3, 2023) (per curiam); *Bailey v. Bd. of Regents of Univ. Sys. of Ga.*, No. 21-11225, 2022 WL 4517092, at *5 (11th Cir. Sept. 28, 2022) (per curiam).

Congress has constitutional authority to abrogate sovereign immunity under Section 5 of the Fourteenth Amendment. *United States v. Georgia*, 546 U.S. 151, 158 (2006). Under Section 5, Congress may (1) create a private right of action against the State for actual constitutional violations or (2) respond to "a pattern of discrimination by the States" by passing legislation to remedy and deter Fourteenth Amendment violations. *Garrett*, 531 U.S. at 365, 374; *see Georgia*, 546 U.S. at 158. When Congress abrogates state sovereign immunity in response to a pattern of state discrimination, it has the prophylactic authority to subject States to suit for some conduct that does not itself violate the constitution. *Kimel*, 528 U.S. at 81.

This privilege is cabined, however, by a necessity of balancing "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), *superseded by statute on other grounds*, 42 U.S.C. § 2000bb *et seq.*, *as recognized in Ramirez v. Collier*, 595 U.S. 411, 424 (2022). To determine whether Congress' response is congruent and proportional, courts employ a three-step inquiry: (1) identify which right Congress "sought to enforce when it enacted the ADA"; (2) examine whether a demonstrated record of unconstitutional discrimination existed to support Congress' decision that preventative legislation was warranted; and (3) determine whether the ADA provision at issue is an appropriate response to the history of mistreatment. *Nat'l Ass'n of the Deaf v. Florida*, 980 F.3d 763, 771 (11th Cir. 2020) (quoting *Ass'n for Disabled Ams., Inc. v. Fla. Int'l Univ.*, 405 F.3d 954, 957 (11th Cir. 2005)).

Notably, there is not controlling case law from our circuit or the Supreme Court addressing whether the Eleventh Amendment specifically bars Title V ADA claims against State entities when brought with Title I claims.[3]

Dupree and Battle argue that Congress acted pursuant to a valid grant of constitutional authority in enacting Title V, thus allowing their claims to overcome sovereign immunity. Dupree and Battle contend that Congress wanted to enforce due process and First Amendment rights under Title V and rely heavily on the Supreme Court's reasoning in *Tennessee v. Lane*, 541 U.S. 509, 522–23 (2004). They claim that Congress found "hundreds of examples of unequal treatment" recognized in *Lane*, which should serve as the pattern of state discrimination needed here. *Id.* at 526. Also, they briefly state that Title V is a congruent and proportional response to discrimination because, if people were afraid to assert their rights under other ADA provisions for fear of retaliation, the other provisions would accomplish little. Overall, Dupree and Battle urge us that sovereign immunity should not apply, thereby allowing their ADA claims and state claims to proceed.

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[3] The Ninth Circuit addressed this argument in *Demshki v. Monteith*, 255 F.3d 986, 988–89 (9th Cir. 2001), finding that sovereign immunity attaches to Title V ADA claims when the Title V claim is based on an underlying Title I violation. Similarly, the Fifth Circuit has recognized that "a plaintiff may bring a retaliation claim against a state entity only to the extent that the underlying claim of discrimination abrogates [state] sovereign immunity." *Block v. Tex. Bd. of Law Examiners*, 952 F.3d 613, 619 (5th Cir. 2020) (internal quotation marks omitted).

The Attorney General argues that Congress did not act pursuant to a valid grant of constitutional authority, leaving sovereign immunity intact. Specifically, the Attorney General argues that the findings referenced in *Lane* are inapposite because the pattern of discrimination involved equal access to the judicial system through courthouses—not state discrimination against public employees. Therefore, the Attorney General claims, the dearth of facts demonstrating the necessary pattern of discrimination needed for a Title V case bars the claim.

Dupree and Battle's Title V claims are unpersuasive. Their arguments depend on us extending the reasoning in *Lane* to the case at hand, but the comparison of the two cases is inapt. First, *Lane* involved a Title II claim, not Title I or V claims, which are present here. Second, even assuming that due process and First Amendment rights are the properly identified rights at issue, Dupree and Battle improperly rely on *Lane* in their attempt to show documented patterns of state discrimination, when the patterns addressed in *Lane* do not relate to employment discrimination. They quote passages that state Congress "uncovered . . . evidence . . . in the form of hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions." *Lane*, 541 U.S. at 526. But, as Dupree and Battle admit, the "overwhelming majority" of these findings concerned discrimination in the administration of public programs and services. *Id.* This provides the pattern of discrimination for Title II claims, not Title I or V, which concern employment discrimination and retaliation, respectively.

Thus, Dupree and Battle fail to offer any evidence of a pattern of retaliation or disability discrimination by the State.

Further, without the patterns mentioned above, Title V cannot serve as a congruent and proportional remedy when paired with a Title I claim. A retaliation claim under Title V is predicated on an individual suffering a harm post-asserting rights under a separate ADA provision. Here, the separate ADA provision would be Title I, addressing employment discrimination. But the Supreme Court concluded that sovereign immunity was not abrogated under Title I. *Garrett*, 531 U.S. at 374. *Garrett* demonstrated that Title I was not a valid exercise of Congress' Section 5 power because of the lack of evidence regarding a pattern of unconstitutional employment discrimination by the States. *Id.* Therefore, when the underlying provision—here, Title I—does not allow a plaintiff to assert a claim against the State, it logically follows that a Title V claim that is based on the exercise of a right arising only from Title I cannot be levied against the State. For these reasons, the claim that sovereign immunity was properly abrogated fails. We need not decide whether sovereign immunity attaches to a standalone Title V claim or one where the alleged underlying violation occurs under another title. We leave that discussion for another day.

C. Titles I & V Claim Dismissals

Again, "[s]overeign immunity is jurisdictional in nature." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). Dismissals for a lack of jurisdiction are not judgments on the merits and are to be entered without prejudice. *Stalley ex rel. United States v. Orlando Reg'l*

Healthcare Sys., Inc., 524 F.3d 1229, 1232 (11th Cir. 2008) (per curiam); *see also* Fed. R. Civ. P. 41(b). An unlabeled dismissal is presumed to be without prejudice under Rule 41(b) if it is for lack of jurisdiction.

Dupree and Battle argue that, because the district courts did not specify whether the dismissals were without prejudice, the orders were effectively entered as dismissals with prejudice. They acknowledge that sovereign immunity applies to their Title I claims and ask us to amend the orders below to clarify that the dismissals of their claims are without prejudice.

The Attorney General concedes that a dismissal premised on a jurisdictional issue should be without prejudice. However, the Attorney General maintains that the court's silence does not qualify as error, and the plaintiffs are simply mistaken about the dismissal being with prejudice.

Because the dismissals were based on sovereign immunity grounds, the jurisdictional nature of the dismissal requires it to be entered without prejudice. Under the Federal Rules of Civil Procedure, a dismissal for lack of jurisdiction operates as a dismissal without prejudice if the order does not indicate otherwise. Fed. R. Civ. P. 41(b). However, even if a dismissal is presumptively without prejudice, it is a best practice for district courts to err on the side of clarity and indicate whether prejudice has attached. We therefore vacate and remand for the limited purpose of allowing the district court to dismiss the case without prejudice. We affirm the district court in all other respects.

VACATED and **REMANDED**.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Jennifer Dupree,

Plaintiff,

Case No. 1:20-cv-4915-MLB

v.

Pamela Owens and Department of Human Services,

Defendants.

_____/

ORDER

Pro se Plaintiff Jennifer Dupree sued Defendants Pamela Owens and Georgia Department of Human Services ("DHS") for employment discrimination in violation of the Americans with Disabilities Act ("ADA") and "unfair termination/tort." (Dkt. 4.) DHS moved to dismiss the complaint in its entirety. (Dkt. 14.) Plaintiff did not respond to that motion.[1] The Magistrate Judge issued a Report and Recommendation ("R&R"), recommending Plaintiff's ADA claims be dismissed with

[1] Her failure to respond indicates that there is no opposition to the motion. LR 7.1(B), NDGa.

prejudice and Plaintiff's "unfair termination/tort" claims be dismissed without prejudice. (Dkt. 20.)

I. Background

DHS hired Plaintiff to be a "Secretary Assistance" on March 1, 2018. (Dkt. 4 at 10.) Plaintiff suffers from bipolar mania, post-traumatic stress disorder, and depression. (*Id.* at 6, 10.) She alleges that managing these diagnosed conditions requires "several medical appointments" and "the policy enhancement of being able to attend medical appointments . . . and allow[ing] alternate work times to accommodate her medical appointments." (*Id.* at 10.) At some point, Plaintiff informed DHS that she had a disability and requested accommodations. (*Id.* at 11.) Plaintiff alleges that DHS called her doctor to confirm her diagnoses. (*Id.*) During that phone call, her doctor improperly recommended leave under the Family and Medical Leave Act "on the mistaken basis that [Plaintiff] requested time away from work." (*Id.*) Even though her doctor did not say she was "permanently and indefinitely unable to work," DHS determined she "was not suitable for work" and terminated her employment. (*Id.* at 11–12.)

Plaintiff alleges DHS failed to accommodate her and discriminatorily terminated her in violation of the ADA. (*Id.* at 6, 11.) Although she did not check the retaliation category on her complaint form and does not expressly allege retaliation in any of its attachments, Plaintiff appears to assert a claim for retaliation under the ADA, having checked a portion of the complaint form meant to indicate that a plaintiff believes she was discriminated against because of her "opposition to a practice of [her] employer that [she] believe[s] violated the federal anti-discrimination laws or [her] participation in an EEOC investigation." (*Id.* at 6.) Lastly, Plaintiff asserts a claim of "unfair termination/tort." (*Id.* at 2.) Although she does not specify the scope of her claims, each claim appears to be asserted against both Defendants.

II. Standard of Review

The district court must "conduct[] a plain error review of the portions of the R&R to which neither party offers specific objections and a de novo review of the Magistrate Judge's findings to which [a party] specifically objects." *United States v. McIntosh*, No. 1:18-cr-00431, 2019 WL 7184540, at *3 (N.D. Ga. Dec. 26, 2019); *accord* 28 U.S.C. § 636(b)(1) ("[T]he court shall make a de novo determination of those portions of the

[R&R] to which objection is made."); *United States v. Slay*, 714 F.2d 1093, 1095 (11th Cir. 1983) (per curiam) (explaining that plain error review is appropriate in absence of objection). "Parties filing objections to a magistrate's [R&R] must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by the district court." *Marsden v. Moore*, 847 F.2d 1536, 1548 (11th Cir. 1988). After conducting the required review, "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)(1).

Following the entry of the R&R on April 6, 2021, a series of documents were filed. (Dkts. 22; 23; 24.) First, Plaintiff filed an untitled document that appears to be a motion for leave to amend her complaint. (Dkt. 22.) It begins: "I would like to plead mercy before the court to amend my complaint and request removal to the Georgia District court." (*Id.* at 1.) DHS filed a response, entitled "Response in Opposition to Plaintiff's Motion for Reconsideration and/or Motion to Amend the Complaint." (Dkt. 23.) Therein, DHS argues that the Court should deny Plaintiff leave to amend her complaint because it would be futile. (*Id.* at 3.) Next, Plaintiff filed an untitled document that appears to be her

amended complaint. (Dkt. 24.) The docket entry for this document reads: "NOTICE Of Filing Amended Complaint/objections by Jennifer Dupree re 4 Complaint, 20 FINAL REPORT AND RECOMMENDATION." (*Id.*) The Court does not believe either of Plaintiff's filings contain objections to the R&R. To the extent they do, the Court will not consider them because parties filing objections to an R&R must specifically identify the findings they object to, *Marsden*, 847 F.2d at 1548, and Plaintiff has not done so. The Court will thus conduct a plain error review of the Magistrate Judge's recommendation and address Plaintiff's motion for leave to amend at the end of this order.

III. Discussion

A. R&R[2]

DHS moves to dismiss the complaint for lack of jurisdiction and failure to state a claim. (Dkt. 14.) The Magistrate Judge recommends

[2] The Court previously noted that Plaintiff did not file a response to DHS's motion to dismiss. Although this indicates there is no opposition to the motion, LR 7.1(B), this Court typically does not dismiss a pro se plaintiff's complaint solely for failure to respond to a motion to dismiss. *See, e.g.*, *Brown v. CitiMortgage, Inc.*, No. 1:15-cv-04143, 2016 WL 9450410, at *3 (N.D. Ga. May 25, 2016) (collecting cases), *adopted by* 2016 WL 9450409 (N.D. Ga. June 23, 2016). Accordingly, the Court will review the record to determine whether dismissal is warranted.

Plaintiff's ADA claims be dismissed with prejudice and Plaintiff's "unfair termination/tort" claims be dismissed without prejudice. (Dkt. 20 at 21–22.) After conducting a thorough review, the Court finds no plain error in this recommendation.

1. ADA Claims

Broadly construed, Plaintiff's complaint asserts disability discrimination, which arises under Title I of the ADA, and retaliation, which arises under Title V of the ADA. (Dkt. 4.)

a) Against DHS

DHS argues all ADA claims against it should be dismissed because they are barred by Eleventh Amendment immunity. (Dkt. 14 at 4.) The Eleventh Amendment generally "bars federal courts from entertaining suits against states." *Abusaid v. Hillsborough Cnty. Bd. of Cnty. Comm'rs*, 405 F.3d 1298, 1302 (11th Cir. 2005). "The Eleventh Amendment is no bar, however, where (1) the state *consents* to suit in federal court, or (2) where Congress has *abrogated* the state's sovereign immunity." *Alyshah v. Georgia*, 239 F. App'x 473, 474 (11th Cir. 2007) (per curiam) (citing *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990)).

The Magistrate Judge found "Plaintiff's Title I claims are clearly subject to Eleventh Amendment immunity." (Dkt. 20 at 12.) The Court finds no plain error in this recommendation. *See Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001) (holding that the Eleventh Amendment bars individuals from suing a state for money damages under Title I of the ADA). Because the immunity provided to the state extends to state agencies, such as DHS, *Schopler v. Bliss*, 903 F.2d 1373, 1378 (11th Cir. 1990) (per curiam), that immunity prevents Plaintiff from prevailing on her Title I claims against DHS.

The Magistrate Judge found Plaintiff's Title V retaliation claim is also barred by the Eleventh Amendment. (Dkt. 20 at 12–13.) *Garrett* is silent on retaliation claims under Title V of the ADA, and the Eleventh Circuit has not addressed this issue yet. The Magistrate Judge thus looked to persuasive authority and found helpful the Ninth Circuit's holding in *Demshki v. Monteith*, 255 F.3d 986 (9th Cir. 2001). In that case, the Court held that *Garrett* "necessarily applies to claims brought under Title V of the ADA, at least where . . . the claims are ***predicated on alleged violations of Title I***." *Id.* at 988 (emphasis added). The Magistrate Judge found immunity is appropriate here on that same

basis. (Dkt. 20 at 13.) The Court agrees with the Magistrate Judge's analysis and thus finds no plain error in the recommendation. *See, e.g.*, *Westbrooks v. Ga. Dep't of Hum. Servs.*, No. 5:17-cv-00365, 2020 WL 426493, at *2 (M.D. Ga. Jan. 27, 2020) (holding that the plaintiff's retaliation claim under Title V is barred because Title V claims must be predicated upon a violation of another Title of the ADA and allowing a plaintiff to proceed on a Title V claim would allow her to bypass the immunity the state would otherwise receive under the Eleventh Amendment with respect to the clearly barred claim under Title I of the ADA).

Next, the Magistrate Judge acknowledged that pro se plaintiffs generally must be afforded an opportunity to amend their claims but found no opportunity was warranted here because amendment would be futile. (Dkt. 20 at 13–14.) The Court finds no plain error in this recommendation because no amendment could overcome DHS's entitlement to immunity. *See Silberman v. Miami Dade Transit*, 927 F.3d 1123, 1133 (11th Cir. 2019) (explaining that futility may exist when a court determines that a defendant is incapable of being sued).

b) Against Mrs. Owens

Mrs. Owens has not yet been served,[3] and she did not join DHS's motion to dismiss. Nonetheless, DHS argues in a footnote that Plaintiff's ADA claims against Mrs. Owens should be dismissed for failure to state a claim because the ADA does not provide for individual liability. (*See* Dkt. 14 at 2 n.1.) Although parties generally lack standing to seek dismissal of parties other than themselves, *Bank v. Estate of Haynie*, No. 7:10-CV-2634, 2012 WL 13027250, at *2 (N.D. Ala. Mar. 31, 2012), and arguments raised solely in a footnote are generally not properly before the Court, *Mock v. Bell Helicopter Textron, Inc.*, 373 F. App'x 989, 992

[3] Plaintiff is proceeding in forma pauperis. (Dkt. 3 at 1.) The Magistrate Judge thus charged the Clerk with issuing and effecting service of process on each Defendant and instructed Plaintiff to complete and return the USM 285 form and summons indicating, among other things, the address at which each Defendant could be mailed a service waiver package and/or served. (*Id.* at 2–3.) Plaintiff returned the forms for each Defendant but noted an incorrect mailing address for Mrs. Owens, whose service package was returned to the Clerk as undeliverable. (Dkt. 10.) The Magistrate Judge directed Plaintiff to resubmit the forms for Mrs. Owens with a correct mailing address. (Dkt. 13.) Plaintiff then filed a USM 285 form that lists DHS and an individual named Anne Burris—with Mrs. Owens's name crossed out and with the same incorrect address that originally resulted in the service waiver package being returned as undeliverable. (Dkt. 17.) The Magistrate Judge thus explained in his R&R that, "at this juncture, only DHS has received proper notice of the [c]omplaint." (Dkt. 20 at 5.)

(11th Cir. 2010) (per curiam), the Court is obligated to review Plaintiff's complaint because she is proceeding in forma pauperis, *Robert v. Garrett*, No. 3:07cv625, 2007 WL 2320064, at *1 (M.D. Ala. Aug. 10, 2007). The Magistrate Judge found Plaintiff's ADA claims against Mrs. Owens are deficient because the ADA generally does not provide for individual liability. (Dkt. 20 at 15.) The Court finds no plain error in this recommendation. *See Mason v. Stallings*, 82 F.3d 1007, 1009 (11th Cir. 1996) (holding that the ADA "does not provide for individual liability, only for employer liability").

2. "Unfair termination/tort" Claims

Plaintiff also asserts an "unfair termination/tort" claim against both Defendants. (Dkt. 4 at 2.) DHS argues that Plaintiff's "unfair termination/tort" claims against both Defendants should be dismissed because, under Georgia law, a cause of action for unfair or wrongful termination does not exist in the context of at-will employment. (Dkt. 14 at 8–9.) Instead of reaching that issue, the Magistrate Judge recommended that the Court decline to exercise jurisdiction over these claims. (Dkt. 20 at 17.) The Court finds no plain error in this recommendation. A district court "may decline to exercise supplemental

jurisdiction over a claim [if it] has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). While courts have discretion to adjudicate state law claims even after dismissal of federal claims, the Supreme Court has cautioned against the exercise of such discretion, at least at the early stages of a case:

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966) (footnotes omitted). These claims require the Court to adjudicate a purely state law dispute, and the case is in its early stages—discovery has not even begun. The Court thus declines to exercise supplemental jurisdiction over these claims and dismisses them without prejudice.[4] *See Ingram v. Sch. Bd. of Miami-Dade Cnty.*, 167 F. App'x 107, 109 (11th Cir. 2006) (per curiam) ("When a court decides not to exercise supplemental jurisdiction under

[4] The Court may sua sponte address matters of supplemental jurisdiction, *Miller v. City of Fort Myers*, 424 F. Supp. 3d 1136, 1152 (M.D. Fla. 2020), so there is no problem dismissing these claims on a different ground than the ground raised in DHS's motion to dismiss.

§ 1367(c)(3) because only state claims remain, the proper action is a dismissal without prejudice so that the complaining party may pursue the claim in state court." (citing *Crosby v. Paulk*, 187 F.3d 1339, 1352 (11th Cir. 1999))).

B. Plaintiff's Motion for Leave to Amend

As noted above, Plaintiff appears to have moved for leave to amend her complaint on April 21, 2021 (Dkt. 22), DHS responded in opposition on May 4, 2021 (Dkt. 23), and Plaintiff then filed her amended complaint on May 5, 2021 (Dkt. 24). Plaintiff seeks to amend her complaint to "add violation of the Georgia Equal Employment for Persons with Disabilities Act and the Fair Employment Practices Act under Georgia Code." (Dkt. 22 at 1.)

Federal Rule of Civil Procedure 15 provides that, after the period permitting amendment as a matter of course, "a party may amend its pleadings only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). A "court should freely give leave when justice so requires." *Id.* But a court may deny leave to amend if there is evidence of undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously

allowed, undue prejudice to the opposing party by virtue of allowing the amendment, or futility of amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). DHS argues that the Court should deny Plaintiff's request because any amendment would be futile. (Dkt. 23 at 3.) The Court agrees.

The claim Plaintiff seeks to add under the Georgia Equal Employment for Persons with Disabilities Code ("GEEPDC") is futile because she did not bring it within the applicable statute of limitations. GEEPDC requires that an action be brought "within 180 days after the alleged prohibited conduct occurred." *See* O.C.G.A. § 34-6A-6(a). The alleged prohibited conduct Plaintiff bases this claim on is her termination (Dkt. 22 ¶ 3), which occurred on or around March 23, 2018 (Dkt. 4 ¶ 6). Plaintiff is well past the 180-day period. The Court thus denies Plaintiff leave to amend her complaint to add a claim under GEEPDC.

The claim Plaintiff seeks to add under the Fair Employment Practices Act ("FEPA") is also futile because Plaintiff has failed to meet the necessary prerequisites to bring such a claim. A FEPA claim must be filed with the Georgia Commission on Equal Opportunity ("GCEO") within 180 days of the unlawful employment practice, otherwise it is

barred. *See* O.C.G.A. § 45-19-36(b); *cf.* 17 Georgia Jurisprudence *Employment & Labor* § 10:9 (2021) ("Under [FEPA], any individual who claims to be aggrieved by an unlawful practice may file a written, sworn complaint with the administrator of the [GCEO]. . . . The complaint must be filed within 180 days after the alleged discriminatory practice or conduct occurs; after 180 days, the complaint is barred."). Although Plaintiff filed a charge of discrimination with the EEOC, there is no evidence that she filed one with the GCEO within 180 days of the alleged unlawful employment practice. The Court thus denies Plaintiff leave to amend her complaint to add a claim under FEPA.

IV. Conclusion

The Court **ADOPTS** the R&R (Dkt. 20), **GRANTS IN PART** DHS's motion to dismiss (Dkt. 14), and **DISMISSES** all claims. The Court also **DENIES** Plaintiff leave to amend her complaint. (Dkt. 22.) The Court **DIRECTS** the Clerk to **STRIKE** Plaintiff's amended complaint (Dkt. 24) and **CLOSE** this action.

SO ORDERED this 29th day of June, 2021.

MICHAEL L. BROWN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JENNIFER DUPREE,	:	CIVIL ACTION NO.
	:	1:20-CV-4915-MLB-JSA
Plaintiff,	:	
	:	
v.	:	
	:	
MRS. PAMELA OWENS and	:	
DEPARTMENT OF HUMAN SERVICES,	:	**ORDER AND FINAL REPORT AND**
	:	**RECOMMENDATION ON A**
Defendants.	:	**MOTION TO DISMISS**

Plaintiff, proceeding *pro se*, filed this lawsuit on December 4, 2020 against the Georgia Department of Human Services ("DHS") and an individual defendant named Pamela Owens. This action is now before the Court upon DHS's Motion to Dismiss [14], which seeks dismissal of the Complaint in its entirety; upon Plaintiff's Motion to Appoint Counsel [15]; and upon DHS's "Motion to Stay Discovery and Pre-Discovery Deadlines," [19] which seeks a stay pending the resolution of the Motion to Dismiss [14] and Motion to Appoint Counsel [15].

For the reasons stated below, the undersigned **RECOMMENDS** that the Motion to Dismiss [14] be **GRANTED in part**. Plaintiff's claims against both defendants under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, *et seq.* should be **DISMISSED WITH PREJUDICE**; Plaintiff's "unfair

termination/tort" claims against both defendants should be **DISMISSED WITHOUT PREJUDICE** for lack of jurisdiction.

Further, Plaintiff's Motion to Appoint Counsel [15] is **DENIED**. DHS's Motion to Stay [19] is **GRANTED in part** to the extent it seeks a stay of preliminary deadlines for proceedings required under Rules 16 and 26 of the Federal Rules of Civil Procedure but **DENIED in part as moot** to the extent it seeks a stay of discovery in this action. As such, all pre-discovery deadlines related to Rules 16 and 26 of the Federal Rules of Civil Procedure are **STAYED** pending the District Court's final adjudication of DHS's Motion to Dismiss [14].

I. BACKGROUND

The following facts are alleged in the Complaint [4] and are assumed to be true for purposes of this discussion. Plaintiff was hired by DHS as a "Secretary Assistance" on March 1, 2018. Compl. [4] at 10 ¶ 1. Plaintiff states that she suffers from bipolar mania, post-traumatic stress disorder, and depression, and that managing these diagnosed conditions requires "several medical appointments." *Id.* at 6 ¶ 13; 10 ¶ 2. According to Plaintiff, these chronic conditions "require[ ] the policy enhancement of being able to attend medical appointments . . . and allow alternate work times to accommodate [ ] medical appointments." *Id.* at 10 ¶ 7. At

some point,[1] Plaintiff informed her employer that she was disabled on these bases and requested accommodations for her disability. *Id.* at 11 ¶ 8. Plaintiff states that her employer called her doctor to confirm her diagnoses; according to Plaintiff, her doctor improperly "recommended [leave under the Family and Medical Leave Act] to [her] employer in error on the mistaken basis that [she] requested time away from work." *Id.* at 11 ¶¶ 9–10. Notwithstanding the fact that her doctor did not state that she was "permanently and indefinitely unable to work," Plaintiff states that DHS determined that she "was not suitable for work" and accordingly terminated her employment. *Id.* at 11 ¶ 10; 12 ¶ 15, 18

Based on these facts, Plaintiff asserts that DHS failed to accommodate her and discriminatorily terminated her in violation of the ADA. *Id.* at 6 ¶¶ 12–13; 11 ¶ 8. Although she did not mark the "retaliation" category in her complaint form and does not expressly allege it in any of its attachments, Plaintiff appears to additionally assert a claim for retaliation under the ADA, having marked a portion of the complaint form meant to indicate that a plaintiff believes they were discriminated against because of their "opposition to a practice of [their] employer that [they]

[1] Plaintiff does not state the date on which any specific relevant incident occurred, except for stating that she was hired on March 1, 2018 and that the "alleged discrimination occur[ed]" on March 23, 2018. Compl. [4] at 4 ¶ 6; 10 ¶ 1. The undersigned assumes all relevant events to have taken place between those dates.

believe violated the federal anti-discrimination laws or [their] participation in an EEOC investigation." *Id.* at 6 ¶¶ 12–13. Plaintiff finally asserts a claim of "unfair termination/tort." *Id.* at 2 ¶ 1. Although Plaintiff does not specify the scope of her claims, each claim appears to be asserted against both DHS and Owens.

When filing her Complaint, Plaintiff requested to proceed *in forma pauperis*, a request which the Court granted. *See* Order [3] at 1. In so doing, the Court charged the Clerk with service of the summons and Complaint to each Defendant, and instructed Plaintiff to complete and return USM 285 and summons forms indicating, *inter alia*, the address at which each Defendant could be mailed a service waiver package and/or served. *See id.* at 2–3. Plaintiff returned forms for each Defendant, but noted an incorrect mailing address for Owens, whose service waiver package was returned to the Clerk as undeliverable. *See* Mailing [10]; Order [13]. The Court thus directed Plaintiff to re-submit service forms for Owens with a correct mailing address. *See* Order [13]. Plaintiff appears to have responded to the Court's Order by filing a USM 285 form that lists DHS and an individual named Anne Burris as its subject, with Owens' name crossed out, and with the same incorrect address that originally resulted in an undeliverable mailing. *See* [17]. Plaintiff additionally filed a summons listing Georgia Governor Brian Kemp as the defendant. *See* [17-1]. The

Clerk has not processed these forms for the mailing of a service package to Owens; as such, at this juncture, only DHS has received proper notice of the Complaint.

II. DISCUSSION

A. *Motion to Dismiss*

DHS moves to dismiss the Complaint under Rule 12 of the Federal Rules of Civil Procedure, both for lack of jurisdiction and for failure to state a claim. Plaintiff has not filed any response to the Motion to Dismiss, indicating that she does not oppose dismissal. *See* LR 7.1B, NDGa ("Failure to file a response shall indicate that there is no opposition to the motion."). Nevertheless, Courts in this district do not typically dismiss a *pro se* plaintiff's complaint solely for lack of response to a motion to dismiss. *See Brown v. CitiMortgage, Inc.*, No. 1:15-CV-4143-CC-AJB, 2016 WL 9450410, at *3 (N.D. Ga. May 25, 2016), *report & rec. adopted by* 2016 WL 9450409 (N.D. Ga. Jun. 23, 2016) (collecting cases). Rather, the Court is obliged to review the record to determine whether dismissal is warranted, and not simply apply a "rubber-stamp" to DHS's unopposed arguments. *See Moses v. Wells Fargo Bank N.A.*, No. 1:18-cv-1246-TCB-JCF, 2018 WL 6720498, at *1 (N.D. Ga. Oct. 19, 2018), *report & rec. adopted by* 2018 WL 6720449 (N.D. Ga. Nov. 8, 2018).

1. Standards on a Motion to Dismiss

a. Standards Under Rule 12(b)(1)

DHS argues that Plaintiff's claims brought under the ADA must be dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction because sovereign immunity bars them. Federal courts have limited jurisdiction; "[t]hey possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations and internal quotation marks omitted). Under Rule 12(b)(1), the Court must dismiss an action if it lacks subject matter jurisdiction to hear a plaintiff's claims. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Courts are to presume that they lack subject-matter jurisdiction, and "the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen*, 511 U.S. at 377 (citations and internal quotation marks omitted).

Attacks on subject matter jurisdiction under Rule 12(b)(1) come in two forms: facial attacks and factual attacks. *Lawrence v. Dunbar*, 919 F.2d 1525, 1528–29 (11th Cir. 1990); *see also Hulsey v. Gunn*, 905 F. Supp. 1067, 1070 (N.D. Ga. 1995). "Facial attacks" on the complaint require "the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the

allegations in his complaint are taken as true for the purposes of the motion." *Lawrence*, 919 F.2d at 1529 (quoting *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980)). "Factual attacks," on the other hand, challenge "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Id.*

The Eleventh Circuit has held that these two types of attack "differ substantially." *Id.* "On a facial attack, a plaintiff is afforded safeguards similar to those provided in opposing a Rule 12(b)(6) motion—the court must consider the allegations of the complaint to be true." *Id.* (quoting *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981)). A factual attack under Rule 12(b)(1) challenges subject matter jurisdiction "irrespective of the pleadings." *Morrison v. Amway Corp.*, 323 F.3d 920, 924 n.5 (11th Cir. 2003). In resolving a 12(b)(1) factual attack, a court is "free to independently weigh facts" and consider evidence outside of the pleadings, so long as its conclusions do not implicate the merits of the plaintiff's claims. *Id.* at 925.

In this case, DHS challenges the existence of subject matter jurisdiction over Plaintiff's ADA claim because, it argues, sovereign immunity bars such a claim against it. Thus, it appears that DHS is making a facial attack, rather than a factual attack, because DHS does not rely on information outside the pleadings to argue that

the Court lacks subject matter jurisdiction over Plaintiff's claim brought under the ADA.

b. Standards Under Rule 12(b)(6)

Rule 8(a)(2) of the Federal Rules of Civil Procedure provides that a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). A plaintiff, however, may not merely plead facts in a complaint sufficient to find a claim to relief is conceivable; instead, the complaint must set forth "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570.

When evaluating a motion to dismiss under Rule 12(b)(6), the Court cannot consider matters outside of the pleadings, and must accept the allegations of the non-movant's pleadings as true, but "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). Moreover, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions,

and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citations omitted).

Iqbal went on to instruct that, while a court must accept all factual allegations in a complaint as true, it need not accept as true legal conclusions recited in a complaint. Repeating that "only a complaint that states a plausible claim for relief survives a motion to dismiss" the Supreme Court advised that "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'shown'—'that the pleader is entitled to relief.'" *Iqbal,* 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)) (other citations omitted).

Although the Supreme Court requires a plaintiff to allege sufficient facts to state a plausible claim for relief, because Plaintiff is proceeding *pro se* in this case, the Complaint must be "liberally construed." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). "[A] *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Id.*; *see also Miller v. Donald*, 541 F.3d 1091, 1100 (11th Cir. 2008); Fed. R. Civ. P. 8(e) ("Pleadings must be construed so as to do

justice"). At the same time, however, nothing in the leniency which courts afford *pro se* filings excuses a plaintiff from complying with threshold requirements of the Federal Rules of Civil Procedure. *See Trawinski v. United Tech.*, 313 F.3d 1295, 1297 (11th Cir. 2002). A court may not rewrite inadequate pleadings—including those filed by *pro se* plaintiffs—to plead essential allegations. *See Pontier v. City of Clearwater*, 881 F. Supp. 1565, 1568 (M.D. Fla. 1995). Moreover, although a *pro se* complaint is held to less stringent standards than formal pleadings drafted by attorneys, "the Court need not accept as true legal conclusions or unwarranted factual inferences." *Montgomery v. Huntington Bank*, 346 F.3d 693, 698 (6th Cir. 2006).

2. ADA Claims

a. ADA Claims Against DHS

DHS argues that, as an agency of the State of Georgia, it is shielded from Plaintiff's ADA claims by state sovereign immunity. Thus, it seeks the dismissal of those claims for lack of jurisdiction.

Sovereign immunity, as recognized by the Eleventh Amendment of the Constitution and interpreted by courts, generally "bars federal courts from entertaining suits against states." *Abusaid v. Hillsborough Cty. Bd. of Comm'rs*, 405 F.3d 1298, 1302 (11th Cir. 2005). Thus, "in the absence of consent[,] a suit in which

the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *see also Stephens v. Ga. Dep't of Transp.*, 134 F. App'x 320, 324 (11th Cir. 2005). "Although, by its terms, the Eleventh Amendment does not bar suits against a state in federal court by its own citizens, the Supreme Court has extended its protections to apply in such cases." *Abusaid*, 405 F.3d at 1303. However, the Eleventh Amendment is not absolute: it "is no bar . . . where (1) the state consents to suit in federal court, or (2) where Congress has abrogated the state's sovereign immunity." *Alyshah v. Georgia*, 239 F. App'x 473, 474 (11th Cir. 2007) (citing *Port Auth. Trans–Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990)). When exercising its power to enforce provisions such as the Fourteenth Amendment to the United States Constitution, Congress may abrogate state sovereign immunity to suit. *See Ala. State Conference of N.A.A.C.P. v. Alabama*, 949 F.3d 647, 654 (11th Cir. 2020).

Although the ADA states that it abrogates Eleventh Amendment immunity from suits arising under its provisions, the Supreme Court has held that this provision exceeds Congress's power to abrogate immunity, at least as to suits arising under the employment discrimination provisions of Title I of the ADA. *See Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001). Thus, employment discrimination

claims brought against states or state agencies under Title I of the ADA remain barred by the Eleventh Amendment. Further, although the Supreme Court has not directly addressed whether employment discrimination actions brought under other titles of the ADA, such as Title II and Title V, are likewise subject to state sovereign immunity, several courts have determined that *Garrett*'s reasoning extends to such actions. *See Clifton v. Ga. Merit Sys.*, 478 F. Supp. 2d 1356, 1368 (N.D. Ga. 2007) (Title II); *Lucas v. State of Ala. Dep't of Pub. Health*, No. 3:15CV941-WKW, 2016 WL 335547, at *4 (M.D. Ala. Jan. 7, 2016), *report & rec. adopted by* 2016 WL 344965 (M.D. Ala. Jan. 27, 2016) (collecting authority as to Title V); *see also Demshki v. Montieth*, 255 F.3d 986, 988 (9th Cir. 2001) (concluding that *Garrett*'s "holding necessarily applies to claims brought under Title V of the ADA, at least where . . . the claims are predicated on alleged violations of Title I").

Broadly construed, Plaintiff's Complaint asserts claims of failure-to-accommodate and discriminatory termination because of disability, which arise under Title I of the ADA, and retaliation, which arises under Title V. *See* 42 U.S.C. §§ 12112, 12203. Plaintiff's Title I claims are clearly subject to Eleventh Amendment immunity under *Garrett*. *Garrett* did not expressly discuss retaliation claims under Title V of the ADA, and the Eleventh Circuit has not yet addressed this issue. Nevertheless, the Ninth Circuit and the majority of the lower courts that have

reached the question have found that *Garrett* "necessarily applies to claims brought under Title V [when] the claims are predicated on alleged violations of Title I." *Demshki v. Monteith*, 255 F.3d 986, 988 (9th Cir. 2001). The Ninth Circuit reasoned that:

> There is nothing in the ADA's legislative findings demonstrating a pattern of discrimination by states against employees who oppose unlawful employment discrimination against the disabled. Absent a history of such evil by the states, Congress may not abrogate the states' Eleventh Amendment immunity from Title V claims. *See Garrett*, 121 S.Ct. at 967–68.

Id. at 989. The Court finds that immunity is appropriate here on this basis. Thus, the undersigned agrees with DHS that all of Plaintiff's ADA claims are subject to Eleventh Amendment immunity, to which DHS is entitled as a state agency.

Although plaintiffs proceeding *pro se* typically must be afforded an opportunity to amend their claims before their dismissal, no such opportunity must be afforded where amendment would be futile. *See Silberman v. Miami Dade Transit*, 927 F.3d 1123, 1133 (11th Cir. 2019); *see also Heard v. Publix Supermarkets Inc*, 808 F. App'x 904, 905–06 (11th Cir. 2020) (*per curiam*). Here, no amendment to Plaintiff's ADA claims could overcome DHS's entitlement to sovereign immunity as to those claims. *See Silberman*, 927 F.3d at 1133 (explaining that futility may exist when a court determines that a defendant is incapable of being

sued). As such, Plaintiff's ADA claims against DHS are due for dismissal with prejudice.

b. ADA Claims Against Owens

Although Owens, who has not yet been served, has not joined its motion to dismiss, DHS nonetheless argues in its motion that Plaintiff's ADA claims against her are due for dismissal for failure to state a claim. In a footnote, DHS contends that the ADA does not provide for individual liability and that Plaintiff therefore cannot assert ADA claims against Owens.

"It is generally accepted that parties lack standing to seek dismissal of parties other than themselves." *E.E.O.C. v. Brooks Run Mining Co., LLC*, No. 5:08-CV-00071, 2008 WL 2543545, at *2 (S.D. W. Va. June 23, 2008) (collecting authority); *see also Watts v. City of Hollywood*, No. 15-61123-CIV, 2015 WL 13567492, at *3 (S.D. Fla. Sept. 4, 2015); *Bank v. Estate of Haynie*, No. 7:10-CV-2364-SLB, 2012 WL 13027250, at *2 (M.D. Ala. Mar. 31, 2012). Further, generally, arguments raised solely in a footnote are not properly before the Court. *See Mock v. Bell Helicopter Textron, Inc.*, 373 F. App'x 989, 992 (11th Cir. 2010) (*per curiam*).

However, because Plaintiff is proceeding *in forma pauperis*, the Court is obligated to consider whether Plaintiff's Complaint states a claim and is empowered to dismiss it *sua sponte* upon a determination that it "or any portion thereof [ ] is

frivolous, malicious, fails to state a claim, or seeks damages from defendants who are immune," even when no argument has been properly raised by motion. *Robert v. Garrett*, No. 3:07-cv-625, 2007 WL 2320064, at *1 (M.D. Ala. Aug. 10, 2007); *see also* 28 U.S.C. § 1915(e)(2)(B)(i)–(iii). A claim is frivolous under 28 U.S.C. § 1915(e)(2)(B)(i) "if it is 'without arguable merit either in law or fact.'" *Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002) (quoting *Bilal v. Driver*, 251 F.3d 1346, 1349 (11th Cir. 2001)). A plaintiff fails to state a claim under § 1915(e)(2)(B)(ii) "when the facts as pleaded do not state a claim for relief that is 'plausible on its face.'" *Thompson v. Fernandez Rundle*, 393 F. App'x 675, 678 (11th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Upon careful review, the undersigned finds that Plaintiff's claims of disability discrimination and retaliation against Owens, an individual defendant, are deficient. The ADA generally "does not provide for individual liability" for claims of disability discrimination. *Mason v. Stallings*, 82 F.3d 1007, 1009 (11th Cir. 1996); *see also Aque v. Home Depot U.S.A., Inc.*, 629 F. Supp. 2d 1336, 1342 (N.D. Ga. 2009) (Martin, J.). Rather, it provides "only for employer liability." *Mason*, 82 F.3d at 1009. Owens thus cannot be held individually liable for the discriminatory termination of which Plaintiff complains. And although the ADA does create individual liability for retaliation claims in some circumstances, it does not do so in

the realm of employment-related claims. *See Albra v. Advan, Inc.*, 490 F.3d 826, 835 (11th Cir. 2007) (*per curiam*); *see also Udoinyion v. The Guardian Security*, 440 F. App'x 731, 734 (11th Cir. 2014) (*per curiam*). Thus, Plaintiff's retaliation claim against Owens fails, too.

As with her ADA claims against DHS, the deficiencies in Plaintiff's ADA claims against Owens are inherent to the defendant she attempts to sue. No amendment of her ADA discrimination and retaliation claims could attach individual liability to Owens. Accordingly, Plaintiff's ADA claims against Owens are due for dismissal with prejudice.

3. "Unfair Termination/Tort" Claims

DHS argues that Plaintiff's "unfair termination/tort" claims against both defendants are due for dismissal because, under Georgia law, no causes of action for unfair or wrongful termination exist in the context of at-will employment.

DHS points out that Georgia, like most states, is an at-will employment state. *See* O.C.G.A. § 34-7-1 ("An indefinite hiring may be terminated at will by either party."). Thus, absent any enumerated or judicially-created exception to the presumption of at-will employment, or any contractual displacement of the presumption, "an employee may not recover from [an] employer in tort for wrongful discharge." *Reilly v. Alcan Aluminum Corp.*, 528 S.E.2d 238, 239 (Ga. 2000). Under

this "'fundamental statutory rule,'" the "motivation underlying the termination usually does not matter; an employer may discharge an at-will employee without liability." *Reid v. City of Albany*, 622 S.E.2d 875, 876 (Ga. Ct. App. 2005) (quoting *Reilly*, 528 S.E.2d at 240). DHS argues that the Complaint fails to include any pleading indicating that she was anything other than an at-will employee and that she therefore fails to state any "unfair termination/tort" claims.

DHS's arguments require the Court to delve into whether Plaintiff's Complaint pleads facts sufficient to establish that she was not an at-will employee under Georgia law, and, if not, whether Plaintiff is due an opportunity to file an amended complaint expounding on the matter. Given the factual nature of whether an employee has been hired at-will or for a term, or whether their employment is otherwise subject to an exception to the default presumption of at-will employment, the Court would likely be obligated to permit Plaintiff an opportunity to amend the Complaint upon any finding that it, as currently pleaded, fails to show that she was anything other than an at-will employee.

Rather than attempt to adjudicate a question of Georgia law, the Court should decline to exercise jurisdiction over the matter. Under 28 U.S.C. § 1367(c)(3), the Court may "decline to exercise supplemental jurisdiction over a claim [if] the district court has dismissed all claims over which it has original jurisdiction." While federal

courts have discretion to continue to adjudicate state law claims under the supplemental jurisdiction statute even after dismissal of pendent federal claims, the Supreme Court has explained that such discretion should be rarely exercised, at least at the early stages of a case:

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966); *see also Betts v. Hall*, 679 F. App'x 810, 814 (11th Cir. 2017) (*per curiam*) ("'[I]f the federal claims are dismissed prior to trial, *Gibbs* strongly encourages or even requires dismissal' of supplemental state law claims.") (quoting *Mergens v. Dreyfoos*, 166 F.3d 1114, 1119 (11th Cir. 1999)).

Should the District Court dismiss Plaintiff's ADA claims as recommended above, the Court will be without any federal question before it that invokes its original jurisdiction. At that point, there will be no reason for the Court to continue to exercise jurisdiction over what would then be a purely state law dispute between Plaintiff, DHS, and Owens. Further, the case remains in its infancy, without discovery having even begun. Thus, judicial economy would not be furthered by keeping this case in federal court. Accordingly, bearing in mind the overwhelming

considerations of comity to state courts in interpreting and applying state law, the undersigned recommends dismissal of Plaintiff's "unfair termination/tort" claims against both DHS and Owens without prejudice.[2] *See Ingram*, 167 F. App'x at 109 (noting that courts declining to exercise supplemental jurisdiction should note that their dismissals are "made without prejudice, in keeping with its purpose of allowing a state court to address the remaining issue").

B. *Motion to Appoint Counsel*

For a second time in this action, Plaintiff requests that the Court appoint counsel to represent her. Plaintiff states that she has limited income and cannot afford to retain counsel. Despite reaching out to over 100 attorneys, Plaintiff states that she has been unsuccessful in obtaining counsel to represent her without prepayment of fees.

As explained previously, the decision to seek *pro bono*, or free, counsel to represent a litigant in a civil case is within the discretion of the Court. *See Caston v.*

[2] Courts may *sua sponte* address matters of supplemental jurisdiction. *Miller v. City of Fort Myers*, 424 F. Supp. 3d 1136, 1152 (M.D. Fla. 2020); *see also Ingram v. Sch. Bd. of Miami-Dade Cty.*, 167 F. App'x 107, 108 (11th Cir. 2006) (*per curiam*). Thus, the Court may dismiss Plaintiff's tort claims against DHS on jurisdictional grounds rather than the grounds raised in DHS's motion. For the same reason, the Court may dismiss Plaintiff's tort claims against Owens in such a manner notwithstanding the fact that DHS generally does not have standing to move for their dismissal on her behalf.

Sears Roebuck & Co., 556 F.2d 1305 (5th Cir. 1977), *overruled on other grounds by Holt v. Ford*, 862 F.2d 850 (11th Cir. 1989) (*en banc*). The Court may consider "(1) the plaintiff's financial inability to retain counsel; (2) the plaintiff's efforts in obtaining counsel; (3) the plaintiff's inability to understand the relevant substantive and procedural issues; and (4) the merits of the action, including the EEOC's evaluation of [the plaintiff's] claims." *Shepard v. Sec'y, U.S. Dep't of Veterans Affairs*, No. 1:18-mi-36-CAP-AJB, 2018 WL 7077075, at *4 (N.D. Ga. Oct. 23, 2018) (citing *Hunter v. Dep't of Air Force Agency*, 846 F.2d 1314, 1317 (11th Cir. 1988); *Donohoe v. Food Lion Stores, Inc.*, 253 F. Supp. 2d 1319, 1321 N.D. Ga. 2003).

In denying Plaintiff's first motion to appoint counsel, the Court determined that, notwithstanding Plaintiff's financial indigence, her lack of attempts at obtaining counsel on her own and the lack of substantial merit to her allegations warranted denial of her motion. *See* Order [9]. Upon unsuccessfully seeking representation from several attorneys, Plaintiff again seeks court-appointed counsel. However, court appointment of counsel would be futile, given that Plaintiff's claims are due for dismissal. Thus, although Plaintiff's indigence and efforts to obtain counsel are factors in favor of appointing counsel, the above conclusions that Plaintiff's claims should not proceed before this Court militate a second denial of Plaintiff's request.

See Reed v. Potter, No. 1:08-CV-3426-CC-AJB, 2009 WL 10668519, at *2 (N.D. Ga. Feb. 27, 2009).

C. *Motion to Stay*

In its Motion to Stay, DHS seeks "a stay of the discovery period and all preliminary deadlines required by Federal Rules of Civil Procedure 16 and 26, including initial disclosures and planning conferences," pending the Court's final resolution of its Motion to Dismiss [14] and Plaintiff's Motion to Appoint Counsel [15]. Mot. [19] at 4 ¶ 10.

The Local Rules of this Court provide that the discovery period commences thirty days after the first defendant appears by filing an answer. LR 26.2, NDGa. In this case, because no defendant has filed an answer, DHS's request to stay discovery is premature and thus, moot. Accordingly, DHS's request to stay the discovery period must be denied. However, in light of the deficiencies in Plaintiff's claims identified above, the Court finds that DHS has shown good cause for a stay of other pretrial deadlines, including those for initial disclosures, planning conferences, and joint reports required under Rules 16 and 26 of the Federal Rules of Civil Procedure.

III. CONCLUSION AND RECOMMENDATION

For the reasons discussed above, the undersigned **RECOMMENDS** that the Motion to Dismiss [14] be **GRANTED in part**. Plaintiff's claims against both

defendants under the ADA should be **DISMISSED WITH PREJUDICE**; Plaintiff's "unfair termination/tort" claims against both defendants should be **DISMISSED WITHOUT PREJUDICE** for lack of jurisdiction.

Further, Plaintiff's Motion to Appoint Counsel [15] is **DENIED**. DHS's Motion to Stay [19] is **GRANTED in part** to the extent it seeks a stay of preliminary deadlines for proceedings required under Rules 16 and 26 of the Federal Rules of Civil Procedure but **DENIED in part as moot** to the extent it seeks a stay of discovery in this action. As such, all pre-discovery deadlines related to Rules 16 and 26 of the Federal Rules of Civil Procedure are **STAYED** pending the District Court's final adjudication of DHS's Motion to Dismiss [14].

As this is a Final Report and Recommendation, there is nothing further in this action pending before the undersigned. Accordingly, the Clerk is **DIRECTED** to terminate the reference of this matter to the undersigned.

IT IS SO ORDERED AND RECOMMENDED this 6th day of April, 2021.

JUSTIN S. ANAND
UNITED STATES MAGISTRATE JUDGE

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

DETRICH BATTLE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION NO. 5:20-cv-63 (MTT)**
	)	
GEORGIA DEPARTMENT OF CORRECTIONS,	)	
	)	
Defendant.	)	

ORDER

On January 8, 2021, the Court granted in part and denied in part Defendant Georgia Department of Corrections's motion to dismiss. *See generally* Doc. 36. The Court granted the motion as to the claims against the individual defendants and the claims under Title I of the Americans with Disabilities Act (ADA), but denied the motion as to the retaliation claim against GDC. Defendant GDC now moves for judgment on the pleadings on the retaliation claim. For the following reasons, that motion (Doc. 50) is **GRANTED**.

I. STANDARD

Pursuant to Fed. R. Civ. P. 12(c), "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." "Judgment on the pleadings is appropriate when there are no material facts in dispute and the moving party is entitled to judgment as a matter of law." *Douglas Asphalt Co. v. Qore, Inc.,* 541 F.3d 1269, 1273 (11th Cir. 2008) (citing *Cannon v. City of W. Palm Beach,* 250 F.3d 1299, 1301 (11th Cir. 2001)). A motion for judgment on the pleadings is governed

by the same standard as a Rule 12(b)(6) motion. *See Mergens v. Dreyfoos*, 166 F.3d 1114, 1117 (11th Cir. 1999) ("When reviewing judgment on the pleadings, we must take the facts alleged in the complaint as true and view them in the light most favorable to the non-moving party.").

To avoid dismissal pursuant to Fed. R. Civ. P. 12(b)(6), a complaint must contain sufficient factual matter to "'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). At the motion to dismiss stage, "all well-pleaded facts are accepted as true, and the reasonable inferences therefrom are construed in the light most favorable to the plaintiff." *FindWhat Inv'r Grp. v. FindWhat.com.*, 658 F.3d 1282, 1296 (11th Cir. 2011) (internal quotation marks and citations omitted). But "conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Wiersum v. U.S. Bank, N.A.,* 785 F.3d 483, 485 (11th Cir. 2015) (internal quotation marks and citation omitted). The complaint must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (internal quotation marks and citation omitted). Where there are dispositive issues of law, a court may dismiss a claim regardless of the alleged facts. *Patel v. Specialized Loan Servicing, LLC*, 904 F.3d 1314, 1321 (11th Cir. 2018) (citations omitted).

II. DISCUSSION

A. Exhaustion

GDC first argues that claim is barred by failure to exhaust remedies with the Equal Employment Opportunity Commission (EEOC) and by Eleventh Amendment immunity. Doc. 50-1 at 1. Plaintiffs proceeding under the ADA must exhaust their

administrative remedies by filing a charge with the EEOC before bringing their claims in federal court. *See* 42 U.S.C. § 12117(a) (incorporating 42 U.S.C. § 2000e-5); *Duble v. FedEx Ground Package Sys., Inc.*, 572 Fed. App'x 889, 892 (11th Cir. 2014) (applying the Title VII exhaustion requirement to an ADA claim) (citations omitted). The defense of failure to exhaust non-judicial remedies raises a matter in abatement. *Bryant v. Rich*, 530 F.3d 1368, 1374–75 (11th Cir. 2008) (citations omitted). As in the case of other matters in abatement, *e.g.* jurisdiction, venue, and service of process, a district court may—indeed, necessarily must—consider facts outside the pleadings and resolve factual disputes to determine whether an exhaustion defense has merit "so long as the factual disputes do not decide the merits and the parties have sufficient opportunity to develop a record." *Id.* at 1376 (citations omitted). *See also*, *e.g.*, *Snow v. Cirrus Educ. Grp.*, No. 5:17-CV-208, 2017 WL 6001502, at *3 (M.D. Ga. Dec. 4, 2017); *Akkasha v. Bloomingdale's, Inc.*, 2019 WL 7480652, at *3 (S.D. Fla. Dec. 18, 2019). Plaintiffs who allege disability discrimination by their employers bear "the burden of proving all conditions precedent to filing suit...." *Maynard v. Pneumatic Prods. Corp.*, 256 F.3d 1259, 1262 (11th Cir. 2001). Thus, Battle must show that he exhausted his retaliation claim.

In its brief, GDC argues only that Battle "d[id] not allege retaliation in his October 19, 2018, EEOC charge number 410-2018-07697." Doc. 50-1 at 4. That is true. Charge number 410-2018-07697, attached to Battle's complaint, was filed in October 2018 and alleged discrimination that occurred in April 2018. Doc. 5-1 at 7. Based on a letter Battle attached to his complaint, that charge was prepared for him by the EEOC. Docs. 5-1 at 7, 23. Whoever prepared the charge checked the box for disability discrimination and alleged disability discrimination in violation of Title I of the ADA. *Id*.

at 7. That person did not check the box labeled "Retaliation" or describe protected activity or retaliatory conduct in the charge. *Id*.

On the other hand, the Eleventh Circuit has held that claims not explicitly presented to the EEOC—as Battle's retaliation claim was not explicitly presented—can still be "exhausted" under certain circumstances. It is not clear to the Court, however, exactly what those circumstances are.

The Circuit has held that "judicial claims are allowed if they amplify, clarify, or more clearly focus the allegations in the EEOC complaint, but has cautioned that allegations of new acts of discrimination are inappropriate." *Gregory v. Georgia Dep't of Hum. Res.*, 355 F.3d 1277, 1279–80 (11th Cir. 2004) (internal quotation marks and citation omitted); *Batson v. Salvation Army*, 897 F.3d 1320, 1327 (11th Cir. 2018). Battle's retaliation claim does not amplify, clarify, or more clearly focus his disability discrimination claims. Nothing in the charge is amplified, clarified, or focused by Battle's retaliation claim. It is a different theory of liability alleging a different discriminatory motive.

The Circuit has also held that a "plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Gregory*, 355 F.3d at 1280 (internal quotation marks and citation omitted). The Court has little expertise on the scope of EEOC investigations in response to a particular charge. Still, it seems that an EEOC investigation into the circumstances alleged in Battle's charge would have revealed the factual basis of Battle's retaliation claim: Both the charge and the retaliation claim concern the circumstances of his termination.

The Circuit has also held that "[t]he proper inquiry" for this issue "is whether [the] complaint was like or related to, or grew out of, the allegations contained in [the] EEOC charge." *Id.*; *Batson*, 897 F.3d at 1328. Unquestionably Battle's retaliation claim is "related to" the allegations in his charge—at least to some degree—and therefore seems to satisfy that particular version of the standard.

In short, it is far from clear what the appropriate standard is for determining when claims not explicitly presented to the EEOC were nonetheless exhausted. GDC's briefs do not adequately develop the issue. GDC has not shown it is entitled to judgment on this defense.

B. Sovereign Immunity

GDC also argues it is entitled to sovereign immunity. Doc. 50-1 at 5-6. Congress may abrogate state sovereign immunity when it acts pursuant to a valid grant of constitutional authority.[1] *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 363 (2001). The Supreme Court has concluded that "Congress may subject nonconsenting States to suit in federal court when it does so pursuant to a valid exercise of its § 5 power. . . . Accordingly, the ADA can apply to the States only to the extent that the statute is appropriate § 5 legislation." *Id*. at 364. In *Garrett* the Supreme Court clearly held that Title I of the ADA does not abrogate state sovereign immunity. *Garrett*, 531 U.S. at 360 ("such suits are barred by the Eleventh Amendment").

As to Title V, "[n]o controlling authority has addressed the issue of whether Eleventh Amendment immunity extends to Title V retaliation claims. However, courts in this circuit have been unanimous in extending the reasoning of *Garrett* to Title V, so

[1] In addition, a statute must express a clear intent to abrogate state sovereign immunity. In the ADA, Congress expressed a clear intent to abrogate. *United States v. Georgia*, 546 U.S. 151, 154 (2006).

long as the underlying allegation concerns Title I." *Defee v. Allen*, 2018 WL 11251598, at *5 (M.D. Ga. May 24, 2018) (quotation marks and citation omitted); *see also Marx v. Georgia Dep't of Corr.*, 2013 WL 5347395, at *3 (M.D. Ga. Sept. 23, 2013); *Nelson v. Jackson*, 2015 WL 13545487, at *11 (N.D. Ga. Mar. 31, 2015), *report and recommendation adopted*, 2015 WL 13546505 (N.D. Ga. Apr. 21, 2015); *Lucas v. State of Alabama Dep't of Pub. Health*, 2016 WL 335547, at *4 (M.D. Ala. Jan. 7, 2016), *report and recommendation adopted,* 2016 WL 344965 (M.D. Ala. Jan. 27, 2016); *Marsh v. Georgia Dep't of Behav. & Health Developmental Disabilities*, 2011 WL 806423, at *4 (S.D. Ga. Feb. 14, 2011), *report and recommendation adopted,* 2011 WL 806658 (S.D. Ga. Mar. 2, 2011). Here, the underlying allegation concerns Title I, so sovereign immunity bars Battle's claim.[2]

III. CONCLUSION

For the reasons noted above, GDC's motion for judgment on the pleadings (Doc. 50) is **GRANTED**.

SO ORDERED, this 26th day of August, 2021.

S/ Marc T. Treadwell
MARC T. TREADWELL, CHIEF JUDGE
UNITED STATES DISTRICT COURT

[2] Battle does not seek injunctive relief. Doc. 5 at 8.