

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION**

RAJIN PATEL,

§

Plaintiff,

§

v.

§

§

§

TEXAS TECH UNIVERSITY; DUANE

§

JONES, individually and in his official

§

capacity as adjunct professor; WILLIAM

§

PASEWARK, INDIVIDUALLY and in his

§

official capacity as TTU Rawls College of

§

Business Associate Dean of Graduate

§

Programs and Research; ROBERT

§

RICKETTS, individually and in his

§

official capacity as Area Coordinator in

§

Accounting; and BRITTANY TODD,

§

individually and in her individual capacity

§

as Associate Director of the Office of

§

Student Conduct;

§

Defendants.

§

CIVIL ACTION NO. 5:17-cv-174-C

**BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION OF DEFENDANTS’
MOTION TO DISMISS**

TO THE HONORABLE JUDGE SAMUEL RAY CUMMINGS:

Pursuant to FED. R. CIV. P. 12(b)(1) and FED. R. CIV. P.12(b)(6), Defendants Texas Tech University (“TTU”), and Duane Jones, William Pasewark, Robert Ricketts, and Brittany Todd (collectively, the “Individual Defendants”), file this Motion for Reconsideration of their Motion to Dismiss against Plaintiff Rajin Patel (“Plaintiff”). Defendants incorporate their Motion to Dismiss and brief in Support thereof (collectively, the “Motion”) by reference as if fully set forth herein.

I. SUMMARY OF THE ARGUMENT

1. Pursuant to Local Rule 7.1(f), Defendants’ Reply to Plaintiff’s Opposition to

Defendants' Motion to Dismiss was due September 27, 2017.¹ Defendants were in the process of filing their Reply on September 26, 2017 when the Court issued its Order on Defendants' Motion to Dismiss (Doc. #25) (the "Order") and corresponding Judgment (Doc. #26). The Order states that TTU "did not seek to file any reply to Patel's arguments" and that "[t]he Court reserves the right to revisit this jurisdictional issue if...TTU can later produce evidence...." Doc. #25 at p. 5. Accordingly, TTU respectfully requests that the Court consider and grant this Motion.

2. Plaintiff's Complaint (the "Complaint") and Opposition to Defendants' Motion to Dismiss (the "Response") are marred with inconsistent allegations based on conclusory, speculative, and unsubstantiated assertions. Plaintiff's Response does not even attempt to properly address any of Defendants' sovereign immunity arguments. Instead, Plaintiff conclusively asserts that because he has sued TTU and the individual defendants in their official capacities for injunctive relief, sovereign immunity does not apply. However, Plaintiff has not and cannot cite to any authority to substantiate his argument because no such authority exists. Further, Plaintiff has failed to establish that TTU waived sovereign immunity as it relates to Plaintiff's breach of contract claim. Plaintiff has not cited any authority—statutory or otherwise—which shows legislative consent to waiver of sovereign immunity relating to breach of contract claims based on school catalogs or any other agreements between state schools and their students. Moreover, Plaintiff offers only speculative, conclusory allegations in support of his § 1983 and substantive due process claims. Finally, granting Plaintiff the opportunity to file an amended complaint would be a mere exercise in futility and undue delay, as Plaintiff's pleadings thus far have clearly demonstrated that no facts exist that will enable him to escape the sovereign immunity bar, or that

¹ Plaintiff's Brief in Support of Opposition to Defendants' Motion to Dismiss (Doc. #20) was filed on September 13, 2017.

link any of the Defendants to the alleged harm he claims to have suffered.

II. ARGUMENT & AUTHORITIES

A. Plaintiff misconstrues injunctive relief as an exception to Defendants' sovereign immunity.

3. "The Eleventh Amendment bars suits by private citizens against a state in federal court, irrespective of the nature of the relief requested." *Okpalobi v. Foster*, 244 F.3d 405, 411 (5th Cir. 2001) (citing *Hutto v. Finney*, 437 U.S. 678, 700, 98 S. Ct. 2565 (1978)). The Eleventh Amendment does not foreclose claims in federal court against a state official insofar as a party seeks prospective injunctive relief against such officials on the grounds that they are allegedly acting in their official capacities in a manner inconsistent with federal constitutional restraints. See *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100-102, 104 S. Ct. 900, 908-09 (1984); *Edelman v. Jordan*, 415 U.S. 651, 654, 94 S. Ct. 1347, 1356 (1974); *Ex Parte Young*, 209 U.S. 123, 155-56, 28 S. Ct. 441, 452 (1908). However, the Supreme Court has held that states and state agencies are also immune as entities for suits for prospective injunctive relief. See *Duncan v. University of Texas Health Science Center at Houston*, 469 Fed. Appx. 364, 366-67 (5th Cir. 2012) (neither the state nor its agencies may be sued for injunctive relief in federal court). Accordingly, Plaintiff's claims against TTU, a state agency, are barred by sovereign immunity.

4. Dismissal is also appropriate under the Eleventh Amendment because Plaintiff has not demonstrated the existence of an ongoing violation of federal law that could be remedied by a prospective injunction. To avoid an Eleventh Amendment bar by means of *Ex parte Young*, "a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Va. Office of Protection and Advocacy v. Stewart*, 563 U.S. 247, 255 (2011) (quoting *Verizon Md. Inc. v. Pub. Svc. Comm'n.*, 535 U.S. 635, 645 (2002) (internal citation and quotation marks omitted). "Relief

that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant.” *Papasan v. Allain*, 478 U.S. 265, 278 (1986). Plaintiff’s Complaint seeks judgment “for Injunctive Relief to reinstate [Plaintiff] as a student in good standing....” Doc. #1 at p. 26. But all Plaintiff alleges is a one-time, past event, which is insufficient to establish an ongoing violation of federal law. Nor has Plaintiff properly tied any of the Individual Defendants to the purported harm. Plaintiff’s claims against the Defendants should therefore be dismissed in their entirety pursuant to FED. R. CIV. P. 12(b)(1).

B. Plaintiff has failed to show the Individual Defendants are capable of redressing the alleged harm.

5. Plaintiff’s Complaint fails to show that any of the Individual Defendants, in any capacity, have the ability to redress the alleged harm claimed by Plaintiff through Plaintiff’s requested injunctive relief or otherwise. “To establish Article III standing, a plaintiff must show ‘an injury-in-fact caused by a defendant’s challenged conduct that is redressable by a court.’” *White v. Spikes*, No. 3:14-CV-389-M-BN, 2015 WL 3504524, at *3 (N.D. Tex. May 28, 2015) (quoting *Dep’t. of Tex., Veterans of Foreign Wars of U.S. v. Tex. Lottery Comm’n*, 760 F.3d 427, 432 (5th Cir. 2014); see also *K.P. v. LeBlanc*, 627 F.3d 115, 122 (5th Cir. 2010). To show injury-in-fact, a plaintiff must demonstrate an injury that is “‘concrete,’ ‘distinct and palpable,’ and ‘actual or imminent.’” *Id* (citation omitted). To establish a causal connection between the injury and the conduct complained of, the injury must be “fairly trace[able] to the challenged action of the defendant **and not . . . the[e] result [of] the independent action of some third party not before the court.**” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (emphasis added). Finally, the injury must be “likely”, as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.” *Id*. “Failure to establish any of these three elements

deprives the federal court of jurisdiction to hear the suit.” *Rivera v. Wyeth-Ayerst Labs*, 283 F.3d 315, 319 (5th Cir. 2002); *see also Okpalobi v. Foster*, 244 F.3d 405, 425 (5th Cir. 2001) (en banc) (standing assessed as to each claim independently.)

6. Plaintiff’s claims fail because Plaintiff has made no factual allegations of what, if any, connection the Individual Defendants had to the February 10, 2017 panel decision or to Plaintiff’s subsequent appeal—both of which were independent actions taken by third parties who are not before the Court. *See* Doc. ## 1, 3; *see also Lujan* at 560-61. Nor has Plaintiff asserted any facts that show any of the Individual Defendants have the power to redress his alleged injuries. *See Okpalobi*, 244 F.3d at 427 (“Because the defendants have no powers to redress the injuries alleged, the plaintiffs have no case or controversy with these defendants that will permit them to maintain this action in federal court...[A] state official cannot be enjoined to act in any way that is beyond his authority to act in the first place.”). Plaintiff vaguely states that he seeks injunctive relief “to reinstate his status as an active student”. Doc. #1 at ¶ 98. However, Plaintiff remains an active student at TTU. As asserted in the Complaint, Plaintiff was taking concurrent baccalaureate and graduate classes in 2016. *Id.* at ¶ 14. As a result of his cheating and plagiarism, Plaintiff was dismissed from TTU’s Rawls College of Business Master of Science **accounting graduate program**—he was not dismissed from his TTU undergraduate classes or from the Rawls College of Business. *See* Doc. #3 at p. 8, ¶1; Doc. #20 at p. 14.

7. Moreover, Plaintiff has not shown that any of the Individual Defendants, in their official capacities, have the authority in their respective official capacities to provide the kind of injunctive relief he has requested. *See White*, 2015 WL at *5; *see also Decker v. McDonald*, No. 5:09cv27, 2010 WL 1424322, at *8 (E.D. Tex. Jan. 11, 2010) (granting summary judgment with respect to plaintiff’s request for prospective injunctive relief because plaintiff presented nothing

more than vague requests for injunctive relief without showing that any of the defendants are in a position to grant such relief). Simply put, because Plaintiff has sued state officials that are powerless to redress the prospective injunctive relief that he seeks, Plaintiff lacks article III standing, and Texas' Eleventh Amendment immunity remains a bar to this action. *See White* at *5.

C. Plaintiff misinterprets case law to avoid sovereign immunity's bar of his breach of contract claim.

8. There was never a contract between TTU and Plaintiff. Even assuming, *arguendo*, that such contract did in fact exist, Plaintiff's breach of contract claim is wholly barred by Eleventh Amendment immunity. As set forth in detail in the Motion, Plaintiff has failed to show legislative consent to his breach of contract claim. *See* Doc. # 10 at ¶¶13-15. In addition, the cases cited by Plaintiff are inapposite—they do not discuss or even mention the issue of sovereign immunity, nor do they suggest that the legislature has waived sovereign immunity as it relates to contracts between a school and its students. *See University of Texas health Science Center at Houston v. Babb*, 646 S.W.2d 502 (Tex. App.—Houston [1st Dist.] 1982); *Burnett v. College for the Mainland*, 994 F.Supp.2d 823 (S.D. Tex. 2014). Plaintiff's breach of contract claim must therefore be dismissed.

D. The Response fails to point to any facts in the Complaint that support Plaintiff's claims against the Individual Defendants.

9. Recognizing that the Complaint fails to tie any of the Individual Defendants to the alleged harm (as discussed in the Motion), the Response merely refers to and re-asserts conclusory, speculative, and unsubstantiated allegations which are wholly insufficient to state a claim upon which relief may be granted and even contradicts certain allegations set forth in the Complaint. Specifically, without citing to the Complaint or any supporting facts, the Response is a mere

collection of speculation, inferences, and conclusions devoid of any facts, which purportedly assert what the Individual Defendants knew. *See* Doc. #20, at pp. 7 (“the Individual Defendants, as TTU officials, knew that he was entitled to equal access....”) 8 (“These Defendants knew.... Defendant Jones knew...Defendant Todd knew....”), 10-15. Further, the citations in the Response merely refer to paragraphs in the Complaint that are also conclusory and wholly devoid of factual support. *See, e.g., id.* at pp. 8, 11-14.

10. Plaintiff incorporates the facts section from his Motion for Preliminary Injunction (the “Preliminary Injunction”) (Doc. # 3) into his Response. *See* Doc. #20 at p. 3, section II. Curiously, the allegations in the Complaint, the Preliminary Injunction, and the Response are inconsistent. For example, the Complaint and the Preliminary Injunction allege that Defendant Todd refused to include Plaintiff’s evidence for consideration by the hearing panel (Doc. #1 at ¶ 35; Doc. #3 at p. 6), whereas the Response alleges that it was Defendant Jones who refused to consider or include the evidence (Doc. #20 at p. 12). Even more perplexing is the fact that Plaintiff admits in the Complaint, the Preliminary Injunction, and the Response that he had the opportunity to submit, and did submit, evidence for consideration by the hearing panel. *See* Doc. #1 at ¶¶ 46, 48 (“the Student Conduct Office found [Plaintiff] guilty by a preponderance of the evidence standard on February 15, 2017, **after considering the...available documentation, evidence, reports received from a faculty member, and [Plaintiff’s] statement.**”; Doc. #3 at p. 6 (“[Plaintiff]...was able to assemble some facts and logical inferences thereof in his defense.”); Doc. #20 at p. 12 (“**[Plaintiff] scrambled for facts to include in Defendant Todd’s ‘Final Investigation Report’ report in the scant two days she proscribed.**”). Similarly, as discussed in the Motion, Plaintiff rebuts his own equal protection claim by admitting there was a rational basis for the difference in treatment between him and the two other students accused of cheating,

which proves the other two students were not similarly situated comparators who were *prima facie* identical in all factors relevant to the case. See Doc. #10 at ¶¶ 25-27; Doc. #20 at p. 15; see also *Lindquist v. City of Pasadena Texas*, 669 F.3d 225, 233-34 (5th Cir. 2012) (In considering who is similarly situated, comparators must be *prima facie* identical in all factors relevant to the case).

E. Allowing Plaintiff to amend his Complaint after his repeated failure to cure its deficiencies would be an exercise in futility and undue delay.

11. Under Federal Rule of Civil Procedure 15(a), “[d]enial of leave to amend may be warranted for undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies, undue prejudice to the opposing party, or futility of a proposed amendment.” *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 270 (5th Cir. 2010). A proposed amendment is futile if “the amended complaint would fail to state a claim upon which relief can be granted.” *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 873 (5th Cir. 2000). “[T]he same standard of legal sufficiency as applies under Rule 12(b)(6)” applies to determining futility. *Id.* (internal quotations omitted). Plaintiff has had three separate attempts—the Complaint, the Motion for Injunction, and the Response—to provide the Court and Defendants with factual support for the claims he asserts in this litigation. Clearly, despite his three attempts and repeated failure to cure such deficiencies, Plaintiff has wholly failed to provide any facts, much less consistent allegations, in support of his claims against the Defendants. Nor has Plaintiff provided the Court with a copy of his proposed amendment to the Complaint to show he is capable of pleading facts which would state a claim upon which relief can be granted. Accordingly, Plaintiff’s motion for leave to file an amended complaint would be futile in that it would only waste the Court’s time and unduly delay the inevitable—dismissal of Plaintiff’s claims; it must therefore be denied.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendants Texas Tech University, Duane Jones, William Pasewark, Robert Ricketts, and Brittany Todd respectfully request that this Court grant their Motion to Dismiss, thereby dismissing with prejudice all claims asserted by Plaintiff against them. Defendants further request all other relief to which they are justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served electronically through the electronic-filing manager on this the 27st day of September, 2017, to:

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/s/ Rola Daaboul
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