IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

KYLEE MCLAUGHLIN Plaintiff, v. THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a constitutional state agency, LINDSEY GRAY-WALTON, in her official and individual capacities, and KYLE WALTON, in his official and individual capacities, Defendants.	)	Case No. CIV-21-0539-HE

MOTION TO DISMISS OF THE DEFENDANT, UNIVERSITY AND UNIVERSITY OFFICIALS IN THEIR OFFICIAL CAPACITY, AND BRIEF IN SUPPORT

Defendant, State of Oklahoma, ex rel., Board of Regents of the University of Oklahoma, Lindsey Gray-Walton, in her official capacity, and Kyle Walton, in his official capacity (the "University"), hereby moves to dismiss Plaintiff's class action claims pursuant to Fed. R. Civ. P. 12(b)(1) and, in the alternative, 12(b)(6) because this Court lacks jurisdiction over the University and Plaintiff fails to state a claim for which relief can be granted. Grounds for dismissal appear more fully in the following brief in support.

STATEMENT OF THE CASE

Plaintiff's Amended Complaint (the "Complaint") amounts to nothing more than an inimical rant targeting several characters—parties and nonparties alike—for difficult conversations that followed the murder of George Floyd and the nationwide discussions of social injustice and inequality in America. Plaintiff states that she has been branded a racist

and a homophobe by the Defendants. It was only after the Complaint was filed that Plaintiff received the attention complained about: in other words, Plaintiff caused her own harm. Further, and more importantly, the Complaint frames the freedom of speech privileges as limitless and absolute. As shown below, even Oklahoma's curiously broad statute is not without bounds.

It is important to remember that "[n]either clever legal labels nor the pleader's ingenious strategy choices should be allowed to obscure the true sweep of the law's command." *McCracken v. City of Lawton*, 1982 OK 63, 648 P.2d 18, 20. Plaintiff alleges two causes of action against the University: (1) an alleged violation of 70 O.S. § 2120 [Doc. 5 at ¶¶ 1, 116-122][1]; and (2) intentional infliction of emotional distress ("IIED") [Doc. 5 at ¶¶ 1, 106-109]. With respect to the alleged violation of 70 O.S. § 2120, the Complaint does not mention any violations on-campus speech as required by 70 O.S. § 2120. Instead, Plaintiff alleges that her free speech on ESPN's website was violated. Plaintiff alleges a "wide swath of conduct" without pleading enough to show a violation of her on-campus speech rights. *VanZandt v. Oklahoma Dep't of Human Servs*., 276 Fed. Appx. 843, 846 (10th Cir. 2008).

Further, Plaintiff's allegations and claims against the University and its officials in their official capacity are governed by the Oklahoma Governmental Tort Claims Act (the

[1] This cause of action is purportedly brought against Lindsey Gray-Walton and Kyle Walton in their official capacities. As discussed below, this claim should be dismissed in its entirety against all parties.

"GTCA").[2] "The GTCA does not, however, constitute a blanket waiver of Oklahoma's Eleventh Amendment immunity to suit in federal court." *Asojo v. Oklahoma ex rel. Bd. of Regents of Univ. of Oklahoma*, CIV-11-333-D, 2012 WL 3679539, at *5 (W.D. Okla. Aug. 24, 2012).

Therefore, because there is no waiver of the University's immunity, both the IIED claim and the §2120 claim against the University are subject to dismissal for lack of subject matter jurisdiction.

BRIEF IN SUPPORT

I. STANDARD FOR DISMISSAL

Rule 12(b)(1) allows a party to move for dismissal of an action for lack of subject matter jurisdiction. If at any time a court determines it lacks subject matter jurisdiction, the court must dismiss the action. Fed. R. Civ. P. 12(h)(3). Further, the party seeking to invoke federal jurisdiction has the duty to establish that such jurisdiction is proper, and because federal courts have limited jurisdiction, there is a presumption against jurisdiction. *Basso v. Utah Power & Light Co.*, 495 F. 2d 906, 909 (10th Cir. 1974).

Here, the Court lacks subject matter jurisdiction because the University is an arm of the state of Oklahoma and immune from suit in federal court based on Eleventh Amendment immunity. U.S. Const. amen. XI. The issue of immunity under the Eleventh Amendment is a jurisdictional one and must be resolved at the outset. See *Fent v. Oklahoma Water Res. Bd.*, 235 F.3d 553, 558 (10th Cir. 2000) ("[W]e have held that 'the

[2] Plaintiff acknowledges her claims are governed by the GTCA in the Complaint. [Doc. 5 at ¶ 122].

State's assertion of Eleventh Amendment immunity must be resolved before a court may address the merits.'" (internal quotation omitted)).

Alternatively, Plaintiff fails to state a claim under 12(b)(6): "Now, the Plaintiff has the burden to frame a 'complaint with enough factual matter (taken as true) to suggest' that he or she is entitled to relief." *VanZandt*, 276 Fed. Appx. at 846. Further, "[i]n order for a complaint to satisfy this new standard, a plaintiff must do more than generally allege a wide swath of conduct." *VanZandt*, 276 Fed. Appx. at 846. Plaintiff's rambling Complaint does not amount to viable claims against the University because it does not allege she is entitled to any relief.

II. THE UNIVERSITY IS ENTITLED TO ELEVENTH AMENDMENT IMMUNITY.

Plaintiff cannot establish subject matter jurisdiction. The University is an arm-of-the-state of Oklahoma and immune from suit in federal court based on Eleventh Amendment immunity. *Steadfast Ins. Co. v. Agric. Ins. Co*., 507 F.3d 1250, 1253 (10th Cir. 2007); *Cornforth v. Univ. of Okla. Bd. of Regents*, 263 F.3d 1129, 1131 n. 1 (10th Cir. 2001); *Hensel v. Office of Chief Admin. Hearing Officer*, 38 F.3d 505, 508 (10th Cir. 1999). *See also* Okla. Const. Art. XIII-A, XIII-B (2006); Okla. Stat. tit. 70, §§ 3301-3005 (2005). The Eleventh Amendment immunity also bars suit against those officials in their official capacity. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312 (1989) "Unless a State has waived its Eleventh Amendment immunity or Congress has overridden it, however, a State cannot be sued directly in its own name regardless of the relief sought." *Kentucky v. Graham*, 473 U.S. 159, 167 n.14, 105 S. Ct. 3099, 3106 (1985).

There are "two primary circumstances in which a citizen may sue a state without offending Eleventh Amendment immunity. Congress may abrogate a state's Eleventh Amendment immunity … [or a] state may also waive its Eleventh Amendment immunity and consent to be sued." *Ruiz v. McDonnell*, 299 F.3d 1173, 1181 (10th Cir. 2002). Neither exception applies here. Plaintiff has not alleged a Congressional abrogation with respect to the two state law claims brought against the University. Neither has Plaintiff alleged the University has waived its sovereign immunity and consented to suit in federal court on the state law claims. The Supreme Court requires "that **the State's consent be unequivocally expressed.**" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99, 104 S. Ct. 900, 907 (1984)(emphasis added). Further:

> We have long recognized that a State's sovereign immunity is "a personal privilege which it may waive at pleasure." *Clark v. Barnard*, 108 U.S., at 447, 2 S.Ct. 878. The decision to waive that immunity, however, "is altogether voluntary on the part of the sovereignty." *Beers v. Arkansas*, 20 How. 527, 529, 15 L.Ed. 991 (1858). Accordingly, our "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). Generally, we will find a waiver either if the State voluntarily invokes our jurisdiction, *Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 273, 284, 26 S.Ct. 252, 50 L.Ed. 477 (1906), or else if the State makes a "clear declaration" that it intends to submit itself to our jurisdiction, *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54, 64 S.Ct. 873, 88 L.Ed. 1121 (1944). See also *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, at 99, 104 S.Ct. 900 (State's consent to suit must be "unequivocally expressed"). Thus, a State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation. *Smith v. Reeves*, 178 U.S. 436, 441–445, 20 S.Ct. 919, 44 L.Ed. 1140 (1900). Nor does it consent to suit in federal court merely by stating its intention to "sue and be sued," *Florida Dept. of Health and*

> *Rehabilitative Servs. v. Florida Nursing Home Assn*., 450 U.S. 147, 149–150, 101 S.Ct. 1032, 67 L.Ed.2d 132 (1981) (per curiam), or even by authorizing suits against it " 'in any court of competent jurisdiction,' " *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577–579, 66 S.Ct. 745, 90 L.Ed. 862 (1946). We have even held that a State may, absent any contractual commitment to the contrary, alter the conditions of its waiver and apply those changes to a pending suit. *Beers v. Arkansas*, supra.

Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675–76, 119 S. Ct. 2219, 2226 (1999). Plaintiff has not alleged any waiver, because none exists to show the University has unequivocally consented to suit in federal court.

Plaintiff has brought two tort claims based on state law.[3] "The GTCA is the exclusive remedy for an injured plaintiff to recover against a governmental entity in tort." *Tuffy's Inv. v. City of Oklahoma City*, 212 P.3d 1158.

> The GTCA does not, however, constitute a blanket waiver of Oklahoma's Eleventh Amendment immunity to suit in federal court." Okla. Stat. tit. 51 § 152.1(A). Instead, "[t]he state, only to the extent and in the manner provided in this act, waives its immunity and that of its political subdivisions. In so waiving immunity, it is not the intent of the state to waive any rights under the Eleventh Amendment to the United States Constitution." Id. § 152.1(B).

Asojo, CIV-11-333-D, 2012 WL 3679539, at *5. While it is unnecessary under Supreme Court precedent, the GTCA makes a reservation of Eleventh Amendment immunity to all claims that fall under it. Because the University has not waived its Eleventh Amendment

[3] The allegations under 70 O.S. § 2120 are governed by the GTCA: "'Tort' means a legal wrong, **independent of contract**, involving **violation of a duty imposed by** general law, **statute,** the Constitution of the State of Oklahoma, or otherwise…." 51 O.S. § 152(17)(emphasis added).

immunity, the claims against the University must be dismissed due to this Court's lack of subject matter jurisdiction.

Additionally, Plaintiff's suit against University employees in their official capacity is simply a suit against the University: "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312 (1989) (citations omitted). To the extent Lindsey Gray-Walton or Kyle Walton are sued in their official capacities, as is the case under 70 O.S. § 2120, then they are entitled to the protections of their employer's sovereign immunity, since this tort claim against them is essentially a claim against the University.

Without the University's consent, the claims against the University, and the Waltons when sued in their official capacity under 70 O.S. § 2120, must be dismissed from this lawsuit pursuant to its Eleventh Amendment privilege.

III. SUPPLEMENTAL JURISDICTION DOES NOT OVERRIDE THE UNIVERSITY'S ELEVENTH AMENDMENT IMMUNITY

The basis for jurisdiction over the University appears to be supplemental jurisdiction under 28 U.S.C.A. 1367 However, supplemental jurisdiction does not create subject matter jurisdiction over claims precluded by the Eleventh Amendment against nonconsenting state defendants. U.S. Const. amend. XI; 28 U.S.C.A. § 1367; *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 111 S.Ct. 999 (2002). Since there is not an independent basis for subject matter jurisdiction over the University or University employees in their official capacity, supplemental jurisdiction does not apply here. Because supplemental jurisdiction

does not override the Eleventh Amendment, this Court does not have jurisdiction to entertain the state law claims against the University or its officials. This suit must be dismissed against the University, and the claim under 70 O.S. § 2120 must be dismissed against Lindsey Gray-Walton and Kyle Walton who have been sued in their official capacities.

IV. ALTERNATIVELY, PLAINTIFF FAILS TO STATE A CLAIM PURSUANT TO 12(B)(6)

A. PLAINTIFF'S CLAIMS UNDER § 2120 MUST FAIL

Plaintiff alleges the University and its officials have violated her rights under Oklahoma's Protected Expressive Activities on Campus Act, 70 O.S. § 2120. However, Plaintiff's claim fails because Plaintiff does not allege violations of her on campus activity.

The statute relied upon by Plaintiff explicitly protects on campus expressions. Yet, Plaintiff alleges that her off campus expressions on ESPN's website resulted in retaliation. The statute provides the following:

> "Campus community" means students, administrators, faculty and staff at the public institution of higher education and their invited guests;
>
> "Outdoor areas of campus" means the generally accessible outside areas of campus where members of the campus community are commonly allowed, such as grassy areas, walkways or other similar common areas and does not include outdoor areas where access is restricted from a majority of the campus community;

Id. at (A)(1), (4). Further provides :

> The outdoor areas of campuses of public institutions of higher education in this state shall be deemed public forums for the campus community;

Id. at (C)(1). Plaintiff does not allege any violation of her protected speech by the University or its officials, which took place on campus as protected by § 2120. While the Complaint's digressive nature espouses instances of roommates, teammates, and third-level hearsay, Plaintiff can point to no conduct by the University or its officials in retaliation to ***on campus*** free expression.

B. PLAINTIFF FAILS TO STATE A CLAIM FOR IIED.

Plaintiff brings a claim against the University for IIED. [Doc. 5 at ¶¶ 1, 106-109]. Oklahoma courts have held that "[w]hen a tort cause of action sued upon requires proof of an element that necessarily excludes good faith conduct on the part of employees, there can be no liability against a political subdivision in a suit based on the GTCA." *Tuffy's*, 212 P.3d at 1164. The Plaintiff fails to state a claim against the University for IIED.

CONCLUSION

For the reasons set forth above, the University requests that the Court dismiss all of Plaintiff's claims against it and grant all relief deemed just and equitable. This Court does not have jurisdiction over the subject matter of the claims against the University and its officials, and Plaintiff failed to state a claim upon which relief may be granted.

Respectfully submitted,

s/ *Michael Burrage*

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2021, I electronically transmitted the attached document to the Clerk of Court using the Electronic Case Filing System for filing. Based on the records currently on file in this case, the Clerk of Court will transmit a Notice of Electronic Filing to those registered participants of the ECF System.

s/ *Michael Burrage*