

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 24-cv-03390-RMR

JOSHUA ABRAMS

Plaintiff,

v.

DIVISION OF UNEMPLOYMENT INSURANCE
JOE BARELA
JEFF FITZGERALD
JOHN & JANE DOE(S)

Defendants.

STATE DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT [ECF 7, 7-2]

Defendants Division of Unemployment Insurance (the "Division") and Colorado Department of Labor and Unemployment ("CDLE") Executive Director Joe Barela (the "Executive Director") (collectively, "State Defendants"),¹ through counsel, move to dismiss the Amended Complaint, ECF Nos. 7 and 7-2, pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

INTRODUCTION

Plaintiff Joshua Abrams is currently receiving unemployment benefits through the Division. Plaintiff alleges his benefits were miscalculated and he has been unable to receive the correct benefits amount due to the Division's communication and appeal processes. He alleges the Division, and the Executive Director in his official and individual capacities, violated constitutional provisions and federal and state law. The

¹ A return of service was filed for Jeff Fitzgerald indicating the Amended Complaint was left with an administrative assistant at the CDLE. ECF No. 20. However, because Mr. Fitzgerald is no longer employed by CDLE, this attempt at service was not effective.

Eleventh Amendment and the Colorado Governmental Immunity Act, § 24-10-101, et seq., C.R.S. (2024) (“CGIA”), bar Plaintiff’s claims against the Division and the Executive Director in his official capacity, depriving the Court of subject matter jurisdiction. Plaintiff also fails to state claims against the Executive Director in his individual capacity. Therefore, the claims against State Defendants must be dismissed.

BACKGROUND FACTS

The Division received Plaintiff’s first unemployment benefits claim on March 5, 2023. App’x at 9 (Ex. C, ¶ 10, Diaz Declaration). Plaintiff received benefit payments from April 2023 through mid-June 2023. *Id.* at 10, ¶ 19; *id.* at 20-21 (Ex. F, Abrams’ Benefits Payments, reflecting payments from 4/3/2023 through 6/17/2023). Plaintiff attempted to withdraw the claim, but the request was denied by a Division deputy. App’x at 9, ¶ 15. Plaintiff appealed to a hearing officer, and later, to a panel of the Industrial Claims Appeals Office (“ICAO”), but the decision was affirmed. *Id.* at ¶¶ 15-17.

The Division received Plaintiff’s second claim on February 2, 2025, and he began receiving benefits on March 20, 2025. *Id.* at 11, ¶¶ 20, 24; *id.* at 16-17 (Ex. E, Plaintiff’s MyUI+ Home Page); *id.* at 20-21. As of this filing, Plaintiff has received unemployment benefits by direct deposit from February 8, 2025, through at least the week ending April 12, 2025. App’x at 11, ¶ 25. On April 21, 2025, the Division received a request for payment from Plaintiff for the week ending April 19, 2025. *Id.* He has not appealed any decision about his 2025 claim to a hearing officer. *Id.* at ¶ 27.

An unemployment benefits claimant can contact the Division by phone, U.S. mail, online through the MyUI+ portal, or in person. App’x at 12-13 (Ex. D, ¶ 2, Kimball Declaration). The call center is open on weekdays during normal business hours and has 102 agents and 9 supervisors. *Id.* at ¶¶ 3-4. The Division’s phone system allows up to 120 people to be on hold in active queues and another 150 in a separate queue. *Id.*

at ¶ 5. Once this separate queue reaches 150 callers, new callers are notified that the queue is full and will be invited to speak with a virtual assistant, which can answer basic questions about claims. *Id.* Claimants can contact the Division online through the MyUI+ claims portal, and through the “document submission form.” *Id.* at ¶¶ 8-9; App’x at 5 (Ex. B, ¶¶ 8-10, McClure Declaration). Kiosks are available at the Division for claimants who lack computer access, and staff can assist with questions. App’x at 14, ¶ 13. A secure dropbox located in the Division’s lobby may be accessed during regular weekday business hours. *Id.* at ¶ 14. Claimants may schedule in-person appointments through an online form. *Id.* at ¶ 15.

Plaintiff called the Division several times in 2023 and 2025. *Id.* at ¶ 19; App’x at 22-24 (Ex. G, Inbound Calls from Abrams’ Phone Number). Plaintiff also used MyUI+ to manage his claims in 2023 and 2025. App’x at 6, ¶¶ 16-17. Plaintiff uploaded documentation to MyUI+ on March 15, 2025, and used the portal to update his contact information this month. *Id.* at ¶ 17. The Division has not received any request from Plaintiff to accommodate a disability. App’x at 2 (Ex. A, ¶ 10, Newcomb Declaration).

THE AMENDED COMPLAINT’S ALLEGATIONS

Plaintiff alleges he applied for unemployment benefits on March 7, 2023. ECF No. 7-2, p. 5. He alleges he was eligible for a Combined Wage Claim under 20 C.F.R. § 616.7 because he also earned wages in North Carolina. *Id.* According to Plaintiff, the Division improperly excluded the North Carolina wages when it calculated his unemployment benefits, resulting in a reduced weekly benefit. *Id.* He alleges that despite multiple attempts to correct the miscalculation, including providing documentation, the Division engaged in “systemic obstruction, misinformation, and deliberate misdirection.” *Id.*; *see also id.* at 5-7 (alleging Plaintiff repeatedly called the Division, faxed documentation to the Division, and visited the Division in person).

Plaintiff further alleges that on March 24 and April 10, 2023, he filed formal appeals of unspecified Division decisions. *Id.* at 7. He alleges a “magistrate” ruled against him on May 24, 2023, citing a failure to timely appeal. *Id.* Plaintiff alleges State Defendants’ actions violated the First Amendment petition clause; the Fourteenth Amendment procedural due process guarantee; Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 (“ADA”); the Ninth and Tenth Amendments; and the Colorado Administrative Procedures Act (“State APA”), § 24-4-106, C.R.S. (2024). ECF No. 7, p. 5-6. Plaintiff also brings state law negligence and intentional or negligent infliction of emotional distress claims. *Id.* at 6.

STANDARDS OF REVIEW

Pursuant to Fed. R. Civ. P. 12(b)(1), a court may dismiss a complaint for lack of subject matter jurisdiction. Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction generally take one of two forms: a facial attack on the complaint’s allegations or an attack on the facts upon which subject matter jurisdiction depends. *Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir. 1995), *abrogated on other grounds by Cent. Green Co. v. United States*, 531 U.S. 425, 437 (2001). A party mounting a factual attack may go beyond the four corners of the complaint, and district courts have wide discretion to consider affidavits and other documents. *Id.* “When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint’s factual allegations.” *Id.* Eleventh Amendment immunity is an issue of subject matter jurisdiction. *Fent v. Okla. Water Res. Bd.*, 235 F.3d 553, 559 (10th Cir. 2000). The plaintiff has the burden to establish subject matter jurisdiction. *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002).

A court may dismiss a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). While a complaint does not need detailed factual

allegations, the factual allegations the plaintiff asserts must raise the right to relief above the speculative level. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). To survive a Rule 12(b)(6) motion to dismiss, a party's allegations must "plausibly" support a legal claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008). The plausibility standard "asks for more than a sheer possibility a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

Courts take a two-pronged approach to the plausibility standard. *Id.* at 678-79. The first prong requires the court to identify which allegations "are not entitled to the assumption of truth" because they state legal conclusions or merely recite the elements of a claim. *Id.* at 679. The second requires the court assume the truth of well-pled factual allegations "and then determine whether they plausibly give rise to an entitlement to relief." *Id.* Thus, courts must "disregard conclusory statements and look only to whether the remaining, factual allegations plausibly suggest the defendant is liable." *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012).

Because Plaintiff is pro se, the Court must liberally construe his pleadings. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court must not advocate on his behalf. *Id.* Further, the Court need not "imagine or assume facts in order to permit a claim to survive." *Wright v. Alexander*, No. CIV-13-1213-C, 2013 WL 12069072, at *1 (W.D. Okla. Dec. 12, 2013) (citing *Hall*, 935 F.2d at 1109-10).

ARGUMENT

- I. The Court lacks subject matter jurisdiction over most of Plaintiff's claims.**
 - A. The Eleventh Amendment bars the § 1983 and state law claims against the Division and the Executive Director in his official capacity.**

The Eleventh Amendment to the United States Constitution bars federal jurisdiction over private claims for money damages against a state, its instrumentalities,

and state officials acting in their official capacity. *Tennessee v. Lane*, 541 U.S. 509, 517-18 (2004). Eleventh Amendment immunity presents an issue of subject matter jurisdiction. *Fent*, 235 F.3d at 559. Unless a state has waived its Eleventh Amendment immunity, or Congress has abrogated it, such absolute immunity applies regardless of the relief sought. See *Higginbotham v. Okla. Transp. Comm'n*, 328 F.3d 638, 644 (10th Cir. 2003). Colorado has not waived its immunity. See *Griess v. Colorado*, 841 F.2d 1042, 1044 (10th Cir. 1988). And Congress did not abrogate such immunity in enacting § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989).

The Division exists within the CDLE, an arm of the state. § 8-71-101, C.R.S. (2024); § 24-1-121(1), C.R.S. (2024). Thus, the Division is entitled to Eleventh Amendment immunity. *Echenique v. Dep't of Labor & Emp't*, No. 12-CV-00880-BNB, 2012 WL 2590474, at *3 (D. Colo. July 5, 2012) (finding CDLE immune from suit). Similarly, a plaintiff bringing claims against a state employee in his official capacity essentially brings claims against the State itself. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Plaintiff has sued the Executive Director in his official capacity, meaning Plaintiff brings his claims against the State. ECF No. 7-2, p. 4.² Thus, the Eleventh Amendment bars Plaintiff's § 1983 claims against the Division and this Court lacks subject matter jurisdiction over them.

Eleventh Amendment immunity also bars Plaintiff's state law claims against the Division and Executive Director in his official capacity. Where a defendant is entitled to such immunity, "neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 465

² Moreover, states and government employees acting in their official capacities are not "persons" that can be sued under § 1983. *Will*, 491 U.S. at 64-66.

U.S. 89, 121 (1984); *see also Griess*, 841 F.2d at 1044-45 (CGIA does not waive Eleventh Amendment immunity). Therefore, the state law claims are barred.

Plaintiff raises the *Ex parte Young* doctrine, ECF No. 7-2, p. 1, which “creates a narrow exception to [the] general rule” of Eleventh Amendment sovereign immunity. *Elephant Butte Irrigation Dist. v. Dep’t of Interior*, 160 F.3d 602, 607-08 (10th Cir. 1998). Under *Ex parte Young*, “the Eleventh Amendment generally does not bar a suit against a state official in federal court which seeks *only* prospective equitable relief for violations of *federal* law, even if the state is immune.” *Id.* (emphases added).

The exception does not apply here. It does not apply to the Division at all or to Plaintiff’s state law claims against the Executive Director. *Pennhurst*, 465 U.S. at 106; *Gorenc v. Klaassen*, 421 F. Supp. 3d 1131, 1146 (D. Kan. 2019). And the doctrine’s requirements are not met as to Plaintiff’s federal claims against the Executive Director because Plaintiff does not seek *only* injunctive relief for ongoing constitutional violations; rather, he seeks \$150,000 in compensatory damages. ECF No. 7-2, p. 29. *Edelman v. Jordan*, 415 U.S. 651, 665-67 (1974) (relief that includes retroactive payments, even if brought against a state official, is actually a suit against the state barred by the Eleventh Amendment). Plaintiff also is not suffering ongoing harm, as he is currently receiving benefits. App’x at 5, ¶ 15; *id.* at 11, ¶¶ 20-25.

The *Ex parte Young* doctrine also does not permit the Court to exercise jurisdiction over Plaintiff’s non-monetary claims, as Plaintiff has not demonstrated his suit seeks to redress only ongoing violations, as opposed to alleged past wrongs. *Hill v. Kemp*, 478 F.3d 1236, 1259 (10th Cir. 2007) (“[I]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a ‘straightforward inquiry into whether [the] complaint alleges an ongoing violation of the law and seeks relief properly characterized as prospective.’”). Because the Eleventh

Amendment bars the § 1983 and state law claims against the Division and Executive Director in his official capacity, and the *Ex parte Young* exception does not apply, the Court lacks subject matter jurisdiction over them and the claims must be dismissed.

B. The Eleventh Amendment bars the Title II ADA claims against the Division and the Executive Director in his official capacity.

The Eleventh Amendment “constitutes a bar to the exercise of federal subject matter jurisdiction” absent waiver by the state or abrogation by Congress. *Fent*, 235 F.3d at 559. To abrogate states’ sovereign immunity, Congress’ intent must be clear and unmistakable, and it must be acting pursuant to a valid exercise of power under Section 5 of the Fourteenth Amendment. *Guttman v. Khalsa*, 669 F.3d 1101, 1112 (10th Cir. 2012). Plaintiff bears the burden to establish Eleventh Amendment immunity does not bar his claims. *Havens v. Colo. Dep’t of Corr.*, 897 F.3d 1250, 1260 (10th Cir. 2018).

Title II of the ADA provides, “no qualified individual with a disability³ shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.” 42 U.S.C. § 12132. Although Congress provided for money damages against public entities for Title II ADA violations, such authorization did not provide a blanket abrogation of states’ sovereign immunity under the Eleventh Amendment, and courts must engage in a claim-by-claim analysis, as described below. See 42 U.S.C. § 12133; *Guttman v. Khalsa*, 446 F.3d 1027, 1035-36 (10th Cir. 2006) (describing claim-by-claim Eleventh Amendment immunity analysis for Title II ADA claims).

To determine whether a state may be sued for money damages under Title II, the Court must first identify the conduct at issue and determine whether such conduct

³ For purposes of this Motion only, Defendants do not dispute Plaintiff is an individual with a disability.

violates Title II. *Guttman*, 446 F.3d at 1035-36. If the conduct at issue does not violate Title II, the inquiry ends. *Block v. Texas Bd. of Law Exam'rs*, 952 F.3d 613, 617 n.11 (5th Cir. 2020) ("If a plaintiff alleges *no conduct* that violates Title II, the inquiry ends."); *Guttman*, 446 F.3d at 1036. Second, if any alleged conduct violates Title II, the Court must next determine whether that conduct also independently violates the Fourteenth Amendment. *Guttman*, 446 F.3d at 1036. If the answer to this second inquiry is yes, sovereign immunity does not bar claims arising from that conduct. *Id.* If the answer is no, the Court must determine "whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." *Id.* at 1035.

1. Plaintiff cannot establish a failure to accommodate claim.

To state a claim for Title II ADA discrimination under a failure to accommodate theory, Plaintiff must allege: (1) he is otherwise entitled to a public benefit, service, or program also available to similarly situated persons without disabilities; (2) he requires a reasonable accommodation to access that benefit, service, or program; and (3) the public entity refused to provide such accommodation, thereby denying access. *Grider v. City & Cnty. of Denver*, No. 10-CV-00722-MSK-MJW, 2011 WL 721279, *5 (D. Colo. Feb. 23, 2011). Here, Plaintiff cannot meet the second or third elements. First, the record shows Plaintiff was able to access his unemployment benefits both in 2023 and currently. App'x at 17, 21. He apparently did not require accommodation to do so. Second, Plaintiff does not allege he requested, and in fact he did not request, any accommodations, *Id.* at 2, ¶ 10, making it impossible for the Division to have refused to provide accommodations. *Robertson v. Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185, 1197-98 (10th Cir. 2014) (public entity has no obligation to provide accommodation absent notice through a request or obvious need for accommodation). Because Plaintiff cannot establish the second or third elements, he cannot state a

failure to accommodate claim. Because the conduct at issue did not violate Title II, the Division and Executive Director in his executive capacity are immune from suit for this claim. *Block*, 952 F.3d at 617 n.11; *Guttman*, 446 F.3d at 1036.

2. Plaintiff cannot establish a disability discrimination claim.

To the extent Plaintiff asserts a disability discrimination claim, that claim also fails. Plaintiff must allege: (1) he is a qualified individual with a disability; (2) he was excluded from participation in a public entity's services, programs, or activities or was otherwise discriminated against by a public entity; and (3) such exclusion or discrimination was due to his disability. *Harrington v. Wilson*, No. 05-cv-01858-EWN-MJW, 2006 WL 2724094, at *14 (D. Colo. Sept. 21, 2006). Plaintiff must also show intentional discrimination. *Meyers v. Colo. Dep't of Hum. Servs.*, 62 F. App'x 831, 833 (10th Cir. 2003). "Discriminatory intent is an extremely demanding state of mind requirement"; intent as volition or knowledge of consequences cannot suffice. *Tenorio v. Pitzer*, No. CV 12-01295 MCA/KBM, 2014 WL 12650972, *1 (D.N.M. Mar. 31, 2014).

As explained above, Plaintiff has been able to access his unemployment benefits in both 2023 and 2025.⁴ Consequently, Plaintiff must allege facts showing he was subject to disparate treatment because of his disability. *Crane v. Utah Dep't of Corr.*, 15 F.4th 1296, 1313 (10th Cir. 2021) (Title II requires but-for causation). Plaintiff's allegations do not support a conclusion that the Division was aware of his disability. Absent that awareness, his disability could not be the but-for cause of any alleged disparate treatment. See *id.* Likewise, his allegations do not support a finding of discriminatory intent. See *Meyers*, 62 F. App'x at 833. Because Plaintiff has not alleged

⁴ The discrimination claim arguably fails for this reason alone. *Babcock*, 812 F.3d at 535 (noting Supreme Court indicated in *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600 (2015), that, Title II is "specifically intended to remedy interference with a disabled individual's participation in, or benefitting from, a public service, program, or activity").

facts showing causation or discriminatory intent, he fails to allege any violation of Title II and the Division and Executive Director in his official capacity are immune from that claim. *Block*, 952 F.3d at 617 n.11; *Guttman*, 446 F.3d at 1036.

C. The CGIA bars Claims Six and Seven.

The CGIA immunizes public entities and public employees against all claims that “lie in tort or could lie in tort.” § 24-10-106(1), C.R.S. (2024); *Glasser v. King*, 721 F. App’x 766, 769 (10th Cir. 2018) (court applies forum state’s substantive law to supplemental jurisdiction claims). Claims Six and Seven allege Defendants acted negligently, and either negligently or intentionally inflicted emotional distress on Plaintiff. ECF No. 7, p. 6. The claims are tort claims subject to the CGIA. § 13-80-102(1)(a), C.R.S. (2024) (setting negligence statute of limitations); *Goodson v. Am. Standard Ins. Co. of Wis.*, 89 P.3d 409, 416 (Colo. 2004) (intentional infliction of emotional distress is a type of tort). Public entities and employees are immune from tort suits except under the limited waivers of sovereign immunity listed in the CGIA. § 24-10-106(1). Plaintiffs’ claims, which arise in the context of unemployment benefits, do not fall under any of the waived categories. Therefore, the CGIA bars Claims Six and Seven.

D. To the extent Plaintiff seeks to recover allegedly wrongfully withheld unemployment benefits, he failed to exhaust his administrative remedies under state law.

“Under Colorado law, ‘[i]f complete, adequate, and speedy administrative remedies are available, a party must pursue these remedies before filing suit in district court.’” *Boulter v. Noble Energy, Inc.*, 521 F. Supp. 3d 1077, 1084 (D. Colo. 2021) (quoting *City & Cnty. of Denver v. United Air Lines, Inc.*, 8 P.3d 1206, 1212 (Colo. 2000)). “Failure to exhaust administrative remedies before seeking judicial relief is a jurisdictional defect.” 521 F. Supp. 3d at 1084.

The Amended Complaint alleges CDLE erroneously excluded wages earned in North Carolina,” which diminished his weekly benefit determination. ECF No. 7-2, p. 5. Plaintiff alleges he filed “formal appeals on March 24, 2023, and April 10, 2023,” because he was “[u]nable to secure an administrative resolution” *Id.* at 7. The Amended Complaint acknowledges the appeal rights granted to unemployment claimants. *Id.* at 10-11 (citing §§ 8-74-104, -106, -108, C.R.S. (2024)). A deputy designated by the Division Director makes initial determinations. § 8-74-102(1), C.R.S. (2024). A claimant may appeal the deputy’s decision to a hearing officer and “obtain a hearing covering any issue relevant to the disputed claim.” § 8-74-103(1), C.R.S. (2024). If dissatisfied with the hearing officer’s decision, a claimant may appeal to the ICAO. § 8-74-104(1). Only after following these procedures may a claimant obtain judicial review by the Colorado Court of Appeals. § 8-74-107(1)-(2), C.R.S. (2024).

Here, Plaintiff cannot establish he exhausted his administrative remedies under state law before filing suit in federal court. He does not allege he appealed the “magistrate” ruling of May 24, 2023, or that he exercised his right to review by the ICAO or the Colorado Court of Appeals. §§ 8-74-104, -107. Because Plaintiff fails to allege facts to show he exhausted his administrative remedies under state law, the Court lacks jurisdiction to consider his claim for additional unemployment benefits.

II. Plaintiff fails to state claims for relief against the Executive Director in his individual capacity.

A. Plaintiff fails to state a First Amendment right to petition claim against the Executive Director.

Plaintiff fails to state a claim for a violation of his right to petition against the Executive Director in his individual capacity. First, the Amended Complaint mentions the Executive Director only once, see ECF No. 7-2, p. 4, and it contains no factual

allegations against him. To survive a Rule 12(b)(6) motion to dismiss, a party's allegations must "plausibly" support a legal claim for relief. *Iqbal*, 556 U.S. at 679. The Amended Complaint fails to meet this minimum threshold.

Second, the Executive Director is entitled to qualified immunity on the individual-capacity claim because Plaintiff fails to allege a violation of clearly established law. "The doctrine of qualified immunity 'protects government officials from suit for civil damages if their conduct does not violate clearly established statutory or constitutional rights.'" *Spiehs v. Armbrister*, No. 24-4005-JAR-BGS, 2025 WL 548423, at *4 (D. Kan. Feb. 19, 2025). "The Tenth Circuit requires the following before declaring a law to be clearly established: (1) 'a Supreme Court or Tenth Circuit decision on point,' or (2) a showing that 'the clearly established weight of authority from other courts [has] found the law to be as the plaintiff maintains.'" *Id.* at *7 (quoting *Fancher v. Barrientos*, 723 F.3d 1191, 1201 (10th Cir. 2013)). Here, the Amended Complaint alleges neither. Because Plaintiff fails to state a First Amendment right to petition claim against the Executive Director in his individual capacity, the claim should be dismissed.

B. Plaintiff fails to state a procedural due process claim against the Executive Director.

Plaintiff also fails to state a claim for violation of his right to procedural due process against the Executive Director in his individual capacity. First, as previously noted, the Amended Complaint mentions the Executive Director only once, ECF No. 7-2, p. 4, and it contains no factual allegations against him. Fed. R. Civ. P. 12(b)(6); *Iqbal*, 556 U.S. at 679. Second, qualified immunity applies because Plaintiff fails to allege a violation of clearly established law. *Spiehs*, 2025 WL 547423, at *7; *Gardner v. City of Riverton, Wyo.*, 529 F. Supp. 3d 1268, 1280-81 (D. Wyo. 2021). Third, as discussed in Section I.D. above, Plaintiff fails to allege facts sufficient to show he exhausted his

administrative remedies as to his benefits determination prior to filing this lawsuit.

“Failure to exhaust administrative remedies before seeking judicial relief is a jurisdictional defect.” *Boulter*, 521 F. Supp. 3d at 1084. The exhaustion requirement “applies with equal force when the party seeks declaratory relief.” *United Air Lines*, 8 P.3d at 1213. Because Plaintiff fails to state a procedural due process claim against the Executive Director in his individual capacity, the claim should be dismissed.

C. Title II ADA claims cannot be brought against individuals.

Plaintiff sues the Executive Director in both his official and individual capacities ECF No. 7-2, p. 4. As explained above, the Eleventh Amendment bars the official capacity Title II ADA claim. The individual capacity claim also fails because “individual defendants in their individual capacities are not properly subject to suit under . . .’ the ADA.” *Ebonie S. ex rel. Mary S. v. Pueblo Sch. Dist.* 60, 819 F. Supp. 2d 1179, 1191 (D. Colo. 2011); see also *Dudley v. Kan. Dep’t of Corr.*, No. 23-3074-JWL, 2023 WL 4623786, at *2 (D. Kan. July 19, 2023) (collecting cases). Even if the claim were legally viable, Plaintiff does not allege any action by the Executive Director at all. ECF No. 7-2, p. 4 (sole mention of the Executive Director makes no factual allegations). To survive dismissal, ADA claims require allegations to support personal participation. *Dudley*, 2023 WL 4623786, at *3 (citing *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *Trujillo v. Williams*, 465 F.3d 1210, 1227 (10th Cir. 2006); *Foote v. Spiegel*, 118 F.3d 1416, 1423-24 (10th Cir. 1997)). Because Plaintiff fails to allege the Executive Director personally participated in the conduct alleged to have violated the ADA, the claim cannot survive, and it must be dismissed for failure to state a claim for relief.

D. Neither the Ninth nor Tenth Amendments provide enforceable rights.

Claims Four and Five are premised on violations of the Ninth and Tenth Amendments, respectively. ECF No. 7, p. 5-6. “The Ninth Amendment is not an independent source of individual rights; rather, it provides a rule of construction that [courts] apply in certain cases.” *Holmes v. Town of Silver City*, 826 F. App’x 678, 681 (10th Cir. 2020). Like the Ninth Amendment, the Tenth Amendment does “not confer substantive rights on individuals for purposes of civil rights claims.” *Olseth v. Larson*, No. 2:02-CV-1122 CW, 2009 WL 44686, at *2 (D. Utah Jan. 5, 2009) (citing *Strandberg v. City of Helena*, 791 F.2d 744, 748-49 (9th Cir. 1986)). Because neither amendment provides enforceable rights, Claims Four and Five must be dismissed.

E. The Colorado APA does not create substantive legal rights on which a claim for relief may be based.

Plaintiff also fails to state a claim that the Executive Director violated the Colorado APA, § 24-4-106. First, the Amended Complaint contains no factual allegations against the Executive Director. Second, the Amended Complaint does not allege that Plaintiff sought administrative review under § 24-4-105 or judicial review under § 24-4-106. More to the point, Plaintiff fails to allege he sought review under Colorado’s unemployment statutes, which authorize review by the ICAO, and, if necessary, the Colorado Court of Appeals. §§ 8-74-104, -107. The Colorado APA does not authorize judicial review of state agency actions in federal district courts.

“[T]he APA does not create substantive legal rights on which a claim for relief can be based”; such rights “must exist either by statutory language, by the agency’s rules and regulations, or by some constitutional command.” *Romer v. Bd. of Cnty. Comm’rs of Cnty. of Pueblo*, 956 P.2d 566, 576 (Colo. 1998), *as modified on denial of reh’g* (Apr. 27, 1998). Plaintiff cites no statute, regulation, or constitutional command that creates a

right to relief. Because Plaintiff fails to state a claim for violation of the Colorado APA against the Executive Director, that claim should be dismissed.

CONCLUSION

For the reasons stated herein, and pursuant to the cited authorities, State Defendants respectfully request this Court dismiss Plaintiff's Amended Complaint.

Respectfully submitted this 28th day of April 2025,

PHILIP J. WEISER
Attorney General

s/ Lauren Davison

LAUREN DAVISON *
Senior Assistant Attorney General
Tort Litigation Unit
Civil Litigation & Employment Practices Section
STEPHEN WOOLSEY*
Assistant Solicitor General
Labor Unit
State Services Section
Attorneys for State Defendants
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, Colorado 80203
Telephone: (720) 508-6000
FAX: (720) 508-6032
E-mail: lauren.davison@coag.gov
stephen.woolsey@coag.gov

*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **STATE DEFENDANTS'**
MOTION TO DISMISS AMENDED COMPLAINT [ECF 7, 7-2] upon all parties herein by
e-filing with the CM/ECF system maintained by the court, by email and/or by causing same
to be deposited in the United States Mail, with First Class postage prepaid, at Denver,
Colorado, on this 28th day of April 2025, addressed as follows:

Joshua Abrams
1881 E 112th Place
Northglenn, CO 80233
abramslive@gmail.com

s/ Denise Munger