

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' REPLY IN SUPPORT OF 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"), through counsel, file this Reply in Support of Motion to Dismiss Amended Complaint, ECF No. 33.

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.

In the Motion to Dismiss, State Defendants asserted that the Eleventh Amendment bars the § 1983 and state law claims against the Division and the Executive Director in his official capacity. ECF No. 33, pp. 5-8. Plaintiff's Opposition to the Motion raises the *Ex parte Young* doctrine and clarifies that he is seeking monetary

relief only as to his individual capacity claims against the Executive Director, making *Ex parte Young* applicable. ECF No. 36, pp. 2, 10. This argument falls short.

First, the *Ex parte Young* doctrine does not apply to the Division at all or to the state law claims against the Executive Director. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); *Gorenc v. Klaassen*, 421 F. Supp. 3d 1131, 1146 (D. Kan. 2019) (“The *Ex parte Young* exception ‘does not apply to suits against the States and their agencies, which are barred regardless of the relief sought.’”).

Second, despite claiming to seek monetary relief only for the individual capacity claims, Plaintiff has not alleged any *ongoing* constitutional violation for which prospective relief could issue, taking the claims outside of the *Ex parte Young* exception to sovereign immunity. *See Elephant Butte Irrigation Dist. v. Dep’t of Interior*, 160 F.3d 602, 607-08 (10th Cir. 1998). Instead, because Plaintiff is currently receiving unemployment benefits. ECF No. 33-1, p. 5 at ¶ 15; *id.* at p. 11, ¶¶ 20-25. Plaintiff’s only alleged harm is that he has not received all the benefits he was due in 2023. *Ex parte Young* cannot apply because the harm alleged occurred entirely in the past and the only available relief is monetary. That Plaintiff alleges he still has not received all of what was due in 2023 does not make the alleged violations ongoing. Because the Eleventh Amendment applies, the Court lacks subject matter jurisdiction over the § 1983 and state law claims and they 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 Motion to Dismiss also asserted that the Eleventh Amendment bars the Title II failure to accommodate and discrimination claims against the Division and the Executive Director in his official capacity because Plaintiff cannot establish Title II violations, as required by *United States v. Georgia*, 546 U.S. 151, 159 (2006), and

Guttman v. Khalsa, 446 F.3d 1027, 1035-36 (10th Cir. 2006). ECF No. 33, pp. 8-11.

Plaintiff responds with two points: (1) that he attempted to request an accommodation, but the request was ignored, and (2) that he uploaded “disability-related documents” into the MyUI+ portal “between 2023 and 2025.”¹ ECF No. 36, p. 6. Neither point renders the Title II claims viable.

As to the failure to accommodate claim, Plaintiff provides no evidence that he attempted to request an accommodation or that he uploaded any disability-related documents into the online portal. Even assuming such documents were uploaded, that is not enough to constitute a request for accommodation. Unless the need for accommodation is obvious, evidence of an actual request is required to state a claim for a failure to accommodate, *see Robertson v. Las Animas Cnty. Sheriff’s Dep’t*, 500 F.3d 1185, 1197-98 (10th Cir. 2014), the first piece of the *Georgia/Guttman* analysis. Moreover, even if Plaintiff had shown he requested an accommodation but was refused, the alleged lack of accommodation did not deny him access to his unemployment benefits. ECF No. 33-1, pp. 17, 21. Plaintiff merely takes issue with the available avenues for requesting accommodation—by phone and in person. Yet the record shows those methods were not inaccessible to him, as he was able to speak with call center agents and visit the Division in person. ECF No. 7-2, pp. 6-7; ECF No. 33-1, pp. 14-15 at ¶ 19; *id.* at pp. 23-24. Thus, the failure to accommodate claim fails and is barred by

¹ Plaintiff also attempts to bring the Title II claims against additional persons in their official capacities. ECF No. 36, p. 9 (ostensibly naming Jeff Newcomb, David Kimball, and Brandon McClure as new defendants). However, he cannot amend his complaint through a response to a motion to dismiss. *Earles v. Cleveland*, 418 F. Supp. 3d 879, 893 (W.D. Okla. 2019) (a plaintiff cannot effectively amend their complaint by alleging new facts in response to a motion to dismiss); *In re Qwest Commc’ns Int’l, Inc.*, 396 F. Supp. 2d 1178, 1203 (D. Colo. 2004) (same). Additionally, claims against Division employees in their official capacities are no different than claims against the Division itself, making the official capacity claims legally duplicative. *See Kentucky v. Graham*, 473 U.S. 159, 165 (1985).

the Eleventh Amendment. *Grider v. City & Cnty. of Denver*, No. 10-CV-00722-MSK-MJW, 2011 WL 721279, at *5 (D. Colo. Feb. 23, 2011).

The discrimination claim fares no better. The new allegations Plaintiff attempts to add in his Opposition still do not meet the demanding burden to show anyone intentionally discriminated against him, a necessary element of a disability discrimination claim. *Meyers v. Colo. Dep't of Hum. Servs.*, 62 F. App'x 831, 833 (10th Cir. 2003) (plaintiff must show intentional discrimination); *Tenorio v. Pitzer*, No. CV 12-01295 MCA/KBM, 2014 WL 12650972, *1 (D.N.M. Mar. 31, 2014) ("Discriminatory intent is an extremely demanding state of mind requirement.").

Because Plaintiff cannot establish any Title II ADA violations, the claims are barred by the Eleventh Amendment. *Block v. Texas Bd. of Law Exam'rs*, 952 F.3d 613, 617 n.11 (5th Cir. 2020); *Guttman*, 446 F.3d at 1036. Thus, the Court lacks subject matter jurisdiction over the claims, and they must be dismissed.

C. The CGIA bars Claims Six and Seven.

State Defendants also raised immunity under the Colorado Governmental Immunity Act ("CGIA"), §§ 24-10-101, et seq., C.R.S. (2024), as to Claims Six and Seven. ECF No. 33, p. 11. Plaintiff argues the CGIA does not apply where federal rights are at stake. ECF No. 36, p. 2. But Claims Six and Seven seek to vindicate state common law interests, not federal rights. ECF No. 7, p. 6. Because these claims sound in tort and do not fall into the limited waived areas of immunity, the CGIA bars them. § 13-80-102(1)(a), C.R.S. (2024); § 24-10-106(1), C.R.S. (2024); *Goodson v. Am. Standard Ins. Co. of Wis.*, 89 P.3d 409, 416 (Colo. 2004).

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.” *Id.*

The Amended Complaint alleges CDLE erroneously excluded wages Plaintiff earned in North Carolina, which diminished his weekly benefit determination for the 2023 claim. 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 p. 7. The Amended Complaint acknowledges the appeal rights granted to unemployment claimants. *Id.* at pp. 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). A claimant may the hearing officer’s decision to a panel of the Industrial Claims Appeals Office (“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); see § 8-74-106, C.R.S. (2024) (time limits and procedure for appeals).

Here, Plaintiff cannot establish that 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. Instead, the Opposition argues the Division “failed to issue any appealable decision” regarding “Plaintiff’s underpayment of benefits in 2023” or the second integrity hold. ECF No. 36, p. 12. But Plaintiff did receive a determination as to the amount of benefits awarded on the 2023 claim. And he spoke with Division representatives by phone nine days after the second hold was placed. ECF 32-3, p. 5 (second hold was placed on June 26, 2023); ECF No. 32-7, p. 2 (8 minute, 28-second inbound call from Plaintiff’s number on July 5, 2023). The 2023 claim became inactive only after Plaintiff began reporting employment income again. And Plaintiff cannot amend his complaint through a response to a motion to dismiss. *Earles*, 418 F. Supp. 3d at 893; *In re Qwest Commc’ns Int’l, Inc.*, 396 F. Supp. 2d at 1203.

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, and Plaintiff’s Opposition fails to address the deficiency. *Estate of Blodgett v. Correct Care Sols., LLC*, No. 17-cv-2690-WJM-NRN, 2018 WL 6528109, *7 (D. Colo. Dec. 12, 2018) (arguments plaintiff

failed to respond to were deemed admitted); *Kissing Camels Surgery Ctr., LLC v. Centura Health Corp.*, No. 12-CV-3012-WJM-NYW, 2016 WL 8416760, at *10 (D. Colo. July 13, 2016) (same).

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. Plaintiff’s single-sentence response to this argument is entirely conclusory, conceding the point. 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 just once, ECF No. 7-2, p. 4, and 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). Again, Plaintiff's Opposition fails to address both issues.

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.

In the Motion to Dismiss, the Executive Director explained that he could not be individually subject to suit under Title II of the ADA and that Plaintiff alleged no actions by the Executive Director. ECF No. 33, p. 14. Plaintiff's Opposition does not address this argument, so it should be deemed admitted. *Estate of Blodgett*, 2018 WL 6528109, at *7; *Kissing Camels*, 2016 WL 8416760, at *10. And the failure to respond effectively abandons the claim. *Cl. G ex rel. C.G. v. Siegfried*, 38 F.4th 1270, 1282 (10th Cir. 2022); *Poole v. Sw. Bell Tel. L.P.*, 86 F. App'x 372, 374 (10th Cir. 2003). Because the Title II claim against the Executive Director in his individual capacity is not legally viable, and because Plaintiff has abandoned the claim, it should be dismissed for failure to state a claim for relief.

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

The Executive Director also explained that neither the Ninth nor the Tenth Amendments provide rights enforceable through § 1983. ECF No. 33, p. 15. As with the Title II individual capacity claim, Plaintiff's Opposition fails to respond to this argument,

thereby abandoning the claims. *Siegfried*, 38 F.4th at 1282; *Poole*, 86 F. App'x at 374. Claims Four and Five must therefore 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 Administrative Procedures Act ("APA"), § 24-4-106, C.R.S. (2024). First, the Amended Complaint contains no factual allegations against the Executive Director. Second, the Amended Complaint does not allege 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 a panel of the ICAO and 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.

Second, "the 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. Moreover, he fails to address the arguments for dismissal of this claim, so he has abandoned it. *Siegfried*, 38 F.4th at 1282; *Poole*, 86 F. App'x at 374. Because Plaintiff fails to state a claim for violation of the Colorado APA against the Executive Director, the claim should be dismissed.

CONCLUSION

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

Respectfully submitted this 23rd day of May 2025,

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **REPLY IN SUPPORT OF
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 23rd day of May 2025, addressed as
follows:

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s/ Denise Munger