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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Tucson Division

Daniel Grossenbach,

Plaintiff,

v.

Arizona Board of Regents; Douglas Goodyear, in his official capacity as Chair of the Arizona Board of Regents; The University of Arizona; Suresh Garimella, in his official capacity as President of the University of Arizona,

Defendants.

No. CV-25-00477-TUC-JGZ (MAA)

PLAINTIFF'S RESPONSE TO DEFENDANTS' OBJECTIONS TO REPORT AND RECOMMENDATION (ECF 20)

Pursuant to LRCiv 7.2(c), Plaintiff Daniel Grossenbach ("Plaintiff" or "Grossenbach") hereby files this Response to Defendants' Objections (Doc. 22) to the Magistrate Judge Report and Recommendation. Doc. 20.

ARGUMENT

"A district judge 'may accept, reject, or modify, in whole or in part, the findings or recommendations' made by a magistrate judge." *Toomey* v. *Arizona*, 2019 WL 7172144, *2 (D. Ariz. Dec. 20, 2019) (quoting 28 U.S.C. 636(b)(1)). "The district judge must 'make a de novo determination of those portions' of the magistrate judge's 'report or specified proposed findings or recommendations to which objection is made.'" *Id.* (quoting 28 U.S.C. 636(b)(1)). The Magistrate Judge's conclusions were sound and supported by binding precedent. Defendants' objections must be overruled. Notably, Defendants have repeatedly advanced – and consistently lost – the same arguments they raise now. *See Arizona Students' Ass'n. v. Arizona Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016); *Lewis* v. *Smith*, 255 F. Supp. 2d 1054, 1064–65 (D. Ariz. Apr. 2003); *Toomey*, 2019 WL 7172144 at *4. Defendants' efforts here fair no better and their objections should be overruled.

I. Defendants' objections should be overruled because they misunderstand what Plaintiff has pleaded against whom.

A. Professor Grossenbach properly named the entity Defendants under Title VII.

First, "[t]he Ninth Circuit has broadly held that Congress abrogated Eleventh Amendment immunity with respect to Title VII claims." *Lewis*, 255 F. Supp. 2d at 1065; see also *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456-57 (1976). Thus, the entity Defendants are proper Defendants for Professor Grossenbach's Title VII claims for damages, and the entity Defendants are not shielded by Eleventh Amendment immunity.

B. Professor Grossenbach properly named the official-capacity Defendants for his constitutional claims.

Second, as the Magistrate Judge properly recognized, "'over a century ago, *Ex parte Young* held that Eleventh Amendment-linked sovereign immunity is not a barrier to suits against state officers where the relief sought is prospective in nature and is based on an ongoing violation of the plaintiff's federal constitutional or statutory rights.'" Doc. 20, at 9 (quoting *Jensen* v. *Brown*, 131 F.4th 677, 696 (9th Cir. 2025)). Defendants' contention that the Eleventh Amendment forecloses claims for relief against state officials simply finds no support in the law. In fact, it is directly contrary to binding precedent from the Ninth Circuit against these very Defendants. *See Arizona Students' Ass'n* 824 F.3d at 865 (holding that "the President, Chair, or other members of ABOR in their official capacities are proper defendants under *Ex parte Young*). Therefore, official capacity Defendants are proper defendants for purposes of Professor Grossenbach's Prayer for Relief for prospective equitable relief for his constitutional claims.

C. Professor Grossenbach's Prayer for Relief differs as to each Defendant and is not redundant.

As demonstrated *supra*, each of Professor Grossenbach's claims and Prayers for Relief differ as to the entity Defendants and official capacity Defendants, and none are redundant. Moreover, Professor Grossenbach's Prayer for Relief regarding attorneys fees and costs is proper as to all Defendants for all claims. *Missouri* v. *Jenkins by Agyei*, 491 U.S. 274, 280 (1989) ("Congress ha[s] spoken sufficiently clearly *** that the Eleventh Amendment did not apply to an award of attorney's fees ancillary to a grant of prospective relief."); *Buffin* v. *California*, 23 F.4th 951, 959 (9th Cir. 2022)

(“When §1983 plaintiffs have prevailed against a state official in his official capacity, they may recover attorney’s fees under 42 U.S.C. §1983.”).

The Magistrate Judge properly reviewed the allegations and prayers for relief against each Defendant and properly concluded that Professor Grossenbach’s claims may go forward with respect to each claim and each Defendant. Doc. 20, at 8. And the Magistrate Judge also properly concluded that because different forms of relief pertained to different Defendants, there is “no authority tending to show that being unnecessarily repetitive” is a legitimate reason for dismissing a claim under Fed. R. Civ. P. 12(b)(6).” Doc. 20, at 9. Defendants’ objections to the contrary should be overruled.

II. Defendants’ objections should be overruled because the Eleventh Amendment provides no refuge for Defendants’ violations of federal law.

Defendants contend that the Eleventh Amendment bars Professor Grossenbach’s claims against them. Doc. 22, 2–5. This is incorrect.

A. Defendants’ contentions concerning sovereign immunity are without merit and have been rejected many times.

As a threshold matter, Defendants are well aware that their sovereign immunity contentions are without merit. Defendants have routinely been defendants in cases raising constitutional and statutory claims for which the Eleventh Amendment provides no refuge. *Alozie* v. *Az. Bd. of Regents*, 2017 WL 11537899 (D. Ariz. Sept. 21, 2017) (denying motion to dismiss premised on immunity grounds involving both Title VII and First Amendment claims); *Toomey*, 2019 WL 7172144 (rejecting state’s identical Eleventh Amendment arguments and denying motion to dismiss on constitutional and Title VII claims); *Kim* v. *Az. Bd. of Regents*, 293 Fed. Appx. 477, *1 (9th Cir. 2008) (constitutional and Title VII claims allowed to proceed to discovery and

dispositive motions without any sovereign immunity bar); *Kievit* v. *Az. Bd. of Regents*, 2010 WL 749927, *1 (D. Ariz. Mar. 4, 201) (noting that sovereign immunity does not bar "official capacity actions for prospective relief" against Arizona Board of Regents members); *Ukpanah* v. *Az. Bd. of Regents*, 2010 WL 4537043 (D. Ariz. Nov. 3, 2010) (permitting Title VII actions to proceed against Arizona Board of Regents); *Arizona Student Assoc.* 824 F.3d at 863 ("sovereign immunity . . . does not bar claims seeking prospective injunctive relief against state officials"); *Lewis*, 255 F.Supp.2d at 1068 ("Congress validly abrogated the State of Arizona's Eleventh Amendment immunity when enacting Title VII and the EPA, and the Court has jurisdiction to proceed on the merits of Plaintiff's claim."). The Magistrate Judge's conclusions concerning the Eleventh Amendment were plainly correct.

B. Professor Grossenbach plainly satisfied *Ex parte Young*'s straightforward inquiry.

Separate and apart from the long history of rejection of Defendants' contentions here, Defendants' objections fail on the merits. "[A] federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law." *Quern* v. *Jordan*, 440 U.S. 332, 337 (1979) (internal citations omitted). Defendants' argument to the contrary obfuscates this "important limit on the sovereign immunity principle." *Virginia Office for Protection & Advocacy* v. *Stewart*, 563 U.S. 247, 254 (2011). "To ensure the enforcement of federal law, however, the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law." *Frew ex rel. Frew* v. *Hawkins*, 540 U.S. 431, 437 (2004) (citing *Ex parte Young*, 209 U.S. 123 (1908)). The reason is simple: Defendants' purported cloak of immunity has been stripped from them on the basis of their violations of federal law. See *Ex parte Young*,

1 209 U.S. at 159. Indeed, when a state official "seeks to enforce be a violation
2 of the Federal Constitution, the officer *** comes into conflict with the
3 superior authority of that Constitution, and he *is in that case stripped of his*
4 *official or representative character* and is subjected in his person to the
5 consequences of his individual conduct." *Id.* at 159–60 (emphasis added). "The
6 *Young* doctrine allows individuals to pursue claims against a state for
7 prospective equitable relief, including any measures ancillary to that relief,"
8 and this exception *requires* officials be named in their official capacity to
9 effectuate this exception. *Az. Student Assoc.*, 824 F.3d at 865. It does not, as
10 Defendants argue, exclude them from this lawsuit.

11 "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh
12 Amendment bar to suit, a court need only conduct a straightforward inquiry
13 into whether the complaint alleges an ongoing violation of federal law and
14 seeks relief properly characterized as prospective." *Verizon Md., Inc.* v. *Public*
15 *Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002).

16 Importantly, the relevant inquiry here—as with all motions to dismiss—
17 is whether Professor Grossenbach's *allegations* suffice to satisfy the
18 straightforward inquiry. *E.g.*, *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S.
19 261, 281 (1997) ("An *allegation* of an ongoing violation of federal law where
20 the requested relief is prospective is ordinarily sufficient to invoke the *Young*
21 fiction." (emphasis added)); *Verizon Md.*, 535 U.S. at 646 (2002) ("An
22 *allegation* of an ongoing violation of federal law is ordinarily sufficient"
23 (quoting *Coeur d'Alene*, 521 U.S. at 281) (emphasis original)). Indeed, "[f]or a
24 suit to proceed under *Ex parte Young*, the plaintiff must *allege—not prove*—
25 an ongoing violation of federal law for which she seeks prospective injunctive
26 relief." *R.W.* v. *Columbia Basin Coll.*, 77 F.4th 1214, 1221 (9th Cir. 2023)
27 (emphasis added). Professor Grossenbach easily satisfies this inquiry.
28

1. Professor Grossenbach plainly and unquestionably alleged ongoing violations of federal law.

First, Professor Grossenbach's Complaint alleges ongoing violations of federal law. See Doc. 1, ¶¶213–226 (alleging violations of Title VII of the Civil Rights Act, 42 U.S.C. 2000e-2(a)); ¶¶227–244 (alleging violations of the Free Speech Clause of the First Amendment to the United States Constitution); ¶¶245–261 (alleging violations of the Free Speech Clause of the First Amendment to the United States Constitution); ¶¶262–286 (alleging retaliation under the Free Speech Clause of the First Amendment to the United States Constitution); ¶¶287–301 (alleging violations of the Fourteenth Amendment to the United States Constitution). Professor Grossenbach has alleged that each of these respective violations is ongoing. *E.g.*, Compl. ¶¶224, 242, 285, 300 (alleging ongoing harm). Professor Grossenbach has satisfied the first element of the straightforward inquiry.

Defendants' only contentions to the contrary are that termination is not an ongoing injury, and the Court cannot afford prospective relief for past violation. Doc. 22, at 3–4. This is incorrect as a matter of binding precedent. Where—as here—a public university employee has brought claims for reinstatement for alleged violations of the First Amendment, the Ninth Circuit has held that "reinstatement constitutes prospective injunctive relief because a wrongful discharge is a continuing violation" that is "not limited merely to remedy past violations, [but] serve the purpose of preventing present and future harm." *Flint* v. *Dennison*, 488 F.3d 816, 825 (9th Cir. 2007).

2. Professor Grossenbach's Prayer for Relief plainly and unquestionably seeks prospective equitable relief.

Second, Professor Grossenbach's Prayer for Relief requests, *inter alia*, declaratory judgment, permanent injunctive relief, and reinstatement. Doc. 1,

64–65. Each form of requested relief is prospective and equitable. Grossenbach's request for a permanent injunction is prospective and equitable. *Robinson* v. *Lamarque*, 581 F. App'x 695, 696 (9th Cir. 2014) (noting that a permanent injunction is prospective relief). Finally, Grossenbach's request for declaratory judgment is prospective and equitable. As the Ninth Circuit has held, "reinstatement . . . is clearly prospective in effect and thus falls outside the prohibitions on the Eleventh Amendment." *Jensen* v. *Brown*, 131 F.4th 677, 697 (9th Cir. 2025). Thus, the Magistrate Judge's analysis of the prospective nature of Professor Grossenbach's requested relief is correct, and Defendants' objections should be overruled.

III. Defendants' timeliness objections should be overruled because their intentional and fraudulent concealment of their unlawful actions tolled Professor Grossenbach's claims under federal law.

A. The Magistrate Judge properly concluded that Professor Grossenbach's Title VII claims were tolled because of Defendants' actions.

Defendants object to the Magistrate Judge's conclusion on equitable tolling by claiming that Professor Grossenbach was required to bring a charge after being fired for pretextual reasons, notwithstanding their own fraudulent concealment of their discrimination. Doc. 22, 5. This is not the law. Federal law governs when a claim accrues. *Fink* v. *Shedler*, 192 F.3d 911, 914 (9th Cir. 1999). "A claim accrues when the plaintiff knows, or should know, of the injury which is the basis of the cause of action." *Id.* (citing *Kimes* v. *Stone*, 84 F.3d 1121, 1128 (9th Cir. 1996)). This is known as the "discovery rule." *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 644 (2010). And the discovery rule applies to "toll the accrual of an action where the injury and the act causing the injury, or both, have been difficult for the plaintiff to detect." *Sohler* v. *Benjo*, 2021 WL

4355611, *3 (D. Az. Sept. 24, 2021). "A statute of limitations may be tolled if the defendant fraudulently conceals the existence of a cause of action in such a way that the plaintiff, acting as a reasonable person, did not know of its existence." *Hexcel Corp*. v. *Ineos Polymers, Inc*., 681 F.3d 1055, 1060 (9th Cir. 2012). This is precisely what occurred here.

As the Magistrate Judge concluded, "If a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations for filing suit until the plaintiff can gather what information he needs." *Lukovsky* v. *City & Cnty. of San Francisco*, 535 F.3d 1044, 1051 (9th Cir. 2008). Here, because of Defendants' own actions, Professor Grossenbach did not have the information he needed to know that an unlawful employment practice had occurred. Doc. 20, at 5. And, despite his best efforts to timely obtain that information, Defendants concealed it from him. And, as the Magistrate Judge concluded, "a reasonably prudent person would not have known the existence of his claims" because of Defendants' own actions. Doc. 22, at 5.

B. The Magistrate Judge properly concluded that Defendants are estopped from raising timeliness objections that resulted from their own conduct and fraud.

Defendants object to the Magistrate Judge's sound conclusion that Defendants' own conduct equitably estopps them from raising timeliness objections. Doc. 22, at 8. The primary contention is that Professor Grossenbach did not allege any misrepresentation. Doc. 22, at 8. This is plainly incorrect, and Defendants' own authorities dispel their contentions. In *Lukovsky*, relied upon by Defendants here, Doc. 22, at 8, the Ninth Circuit noted only that a plaintiff must allege something more than the conduct alleged to constitute the cause of action. 535 F.3d at 1052. Specifically, "the

plaintiff must point to some fraudulent concealment, some active conduct by the defendant *above and beyond* the wrongdoing upon which the plaintiff's claim is filed, to prevent the plaintiff from suing in time." *Id.* (emphasis original). Professor Grossenbach has plainly and unquestionably alleged "active conduct" by the Defendants "above and beyond" their pretextual termination of his employment. *Id.*

Specifically, Professor Grossenbach alleges that Defendants ignored the requirements of their own records laws to conceal the true basis for their actions. Doc. 1, at ¶150, 151, 176. Professor Grossenbach has not alleged that their pretextual firing was the only thing that prohibited him from obtaining the information that he needed, but that Defendants took active measures beyond their discriminatory acts to preclude him from obtaining the information. As this Court has noted, equitable estoppel is appropriate where, as here, "a defendant misrepresents or conceals facts necessary to support a discrimination charge," *Millia Prom. Servs.* v. *Az. Dep't of Econ. Sec.*, 650 F. Supp. 3d 814, 826 (D. Az. 2023), such as "by justifying their actions with false, pretextual reasons." *Id.* Professor Grossenbach was diligent, pursuing every reasonable avenue for obtaining timely disclosure of public records. Compl. ¶¶151–191. Defendants' "active conduct," *Lubovsky*, 535 F.3d at 1052, and unlawful delay and concealment prevented Professor Grossenbach from bringing his claims any sooner. As the Magistrate Judge properly concluded, "[t]aking the allegations in the plaintiff's Complaint as true and drawing all reasonable inferences in his favor, the court concludes that a reasonably prudent person would not have known of the existence of his claims until July 26, 2024, when he received the documents pursuant to his public records request." Doc. 20, at 5 (citing *Pride* v. *Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013)). "The defendants cite no case law in support of their theory of equitable

tolling. And, the court finds it does not accord with the rationale behind the doctrine[.]" Doc. 20, at 8.

Defendants' reliance on *Coppinger-Martin* v. *Solis*, 627 F.3d 745 (9th Cir. 2010) is similarly misplaced. There, the Ninth Circuit specifically noted that equitable tolling is inapposite only when a plaintiff "does not allege that [defendant] hid evidence." *Id.* at 752. But equitable estoppel is plainly appropriate where, as here, Defendants' actions "preclude [a plaintiff] from knowing or discovering the requisite elements of her prima facie cases." *Id.* Professor Grossenbach alleges precisely that. And, as the Magistrate Judge properly concluded, Professor "Grossenbach would have known *what* happened but not *why* it happened. And without knowing *why* it happened, he would not have known that an 'unlawful employment practice [had] occurred' and could not have raised a meaningful administrative charge." Doc. 20, at 5 (quoting 42 U.S.C.A. 20000e-5(e)(1)) (emphasis in original).

CONCLUSION

Because the Magistrate Judge properly construed all Professor Grossenbach's allegations as true and properly drew all reasonable inferences in his favor, and because the Magistrate Judge's legal conclusions on the Eleventh Amendment, Title VII, and timeliness are all well-taken, Defendants' Objections should be overruled and the Report and Recommendation adopted in full.

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Respectfully submitted,

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