

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

JOHNATHAN S. HOLMES,)
Plaintiff,) <u>REPORT AND</u>
) <u>RECOMMENDATION</u>
)
v.) Case No: 1:09cv00059
)
VIRGINIA COMMUNITY COLLEGE) By: PAMELA MEADE SARGENT
SYSTEM, VIRGINIA HIGHLANDS) UNITED STATES MAGISTRATE JUDGE
COMMUNITY COLLEGE (together as)
“VHCC”), et al.)
Defendants.)

In this case, the plaintiff, Johnathan S. Holmes, seeks a judgment against the defendants based on his discharge from Virginia Highlands Community College, (“VHCC”). Holmes sues the “Virginia Community College System, Virginia Highlands Community College, Beth Page and Paul Conco. This matter is before the undersigned on the Defendants’ Motion To Dismiss The Complaint Pursuant To Federal Rule of Civil Procedure 12(b)(6), (Docket Item No. 12), (“Motion”). The Motion is before the undersigned magistrate judge by referral, pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons stated in this report and recommendation, the undersigned is of the opinion that the Motion should be granted.

I. Facts

Holmes began his employment with VHCC on October 11, 1994, as an Educational Specialist for the Talent Search Program. In February 2000, Holmes

accepted the position of academic coordinator for the Upward Bound Program. This position required Holmes to work with high school students that were involved with VHCC's Upward Bound Program, including making weekly trips to high school campuses.

Holmes has suffered from urethral stricture disease since age 18, which, among other things, causes severe pain. As a result, Holmes had been prescribed hydrocodone. On October 11, 2007, in a meeting with his direct supervisor, Beth Page, Holmes stated that he intended to enter an outpatient drug treatment program to treat his hydrocodone use. What was said during the meeting is greatly debated between the parties. Holmes asserts in his Amended Complaint, (Docket Item No. 2), and Plaintiff's Brief In Opposition To Defendants' Motion To Dismiss The Complaint, (Docket Item No. 16), ("Plaintiff's Brief"), that he informed Page that after viewing an HBO documentary he decided to pursue treatment for his hydrocodone use. Holmes claims that the documentary compared hydrocodone addiction to that of heroine addiction, and could potentially be worse than heroine addiction.¹ The defendants assert through the Motion that Page was informed by Holmes that he was addicted to heroine. Page alleged that Holmes informed her, that while he had never used drugs during working hours, he had snorted heroin every evening for the past four months.

Subsequent to the meeting, Page drafted a memorandum, (Docket Item No. 13, Attachment No. 2, Exhibit B), which was sent to Deborah Clear, a vice president at VHCC, and also provided to the human resources manager, Deborah

¹ It is Holmes's contention that at no point in time did he ever state that he used heroine, and it is still his contention that he has never used the drug.

Hale, relaying the events as set forth by the defendants. Upon receiving the memorandum, Clear advised Page that Holmes was not to return to campus and he was not to perform any of his employment duties. However, through conflicting accounts, Holmes was not aware that he was not to return to work, and on October 15, 2007, Holmes attempted to go to his office. Defendant VHCC Vice President Paul Conco instructed campus security to escort Holmes off the VHCC campus. Holmes was informed by Hale, on October 16, 2007, of the services available through the Employee Assistance Program, (“EAP”), and options from the Virginia Sickness and Disability Program.

Defendant Conco, Clear and Hale had a meeting with Holmes on November 6, 2007, in which the parties discussed the situation, and Holmes attempted to convince Conco that Page had misunderstood their conversation. Holmes contends that Conco advised him that he was obligated to participate in the EAP. Hale provided Holmes with information about filing for short-term disability and encouraged that he do so. The following day, Conco reiterated to Holmes that he was not to be on campus while the issues were pending.

Holmes was approved for short-term disability, with his start day being October 16, 2007, and his end date being April 22, 2008, due to the finding that he experienced mental health difficulties stemming from his discharge. VHCC informed Holmes on December 20, 2007, that he had not been discharged from his position, and could return to work after submitting a drug test from an “approved medical source.” After providing the results of a drug test, Holmes was not contacted by VHCC to return to work. The defendants contend that Holmes was not contacted because his test was performed by his treating physician, not an

“approved medical source.” On April 29, 2008, Holmes was approved for long-term disability through the Virginia Sickness and Disability Program.

On November 27, 2007, Holmes filed a grievance claim with the Virginia Department Of Employee Dispute Resolution, (“EDR”), claiming that he had been discriminated against in violation of the Americans With Disabilities Act, (“ADA”). EDR held a grievance hearing on May 29, 2008, and the Hearing Officer submitted a decision on July 17, 2008, determining that Holmes was protected by the ADA, and he had been discriminated against based upon his disability. VHCC appealed the Hearing Officer’s decision to both the EDR and the Department of Human Resource Management, (“DRHM”), both of whom upheld the ruling. Subsequently, VHCC appealed to the Washington County, Virginia, Circuit Court, (“State Court”), where the Hearing Officer’s decision was upheld by written ruling on January 22, 2009. The State Court ordered that Holmes be reinstated and awarded him back pay, which was to be offset by his disability payments.

The defendants contend that Holmes was reinstated on February 10, 2009, while Holmes argues that he was never permitted to return. Regardless, on February 13, 2009, Holmes was officially terminated from his position with VHCC. The defendants state that this termination resulted from Holmes being convicted of six felonies for prescription drug fraud on August 8, 2008. Holmes, however, states that while he has pleaded guilty to the charges, there has been no final conviction by a court.

After filing a charge, Holmes received a right to sue letter from the Equal Employment Opportunity Commission on April 23, 2009, and filed his complaint on July 28, 2009, followed by his Amended Complaint on July 30, 2009. Holmes's Amended Complaint claims that the defendants violated the ADA, his liberty and property rights, his procedural and substantive due process rights and asserted a claim for intentional infliction of emotion distress and/or negligent infliction of emotional distress. Holmes is seeking to be awarded both compensatory and punitive damages. The defendants move to dismiss the claims on grounds of res judicata, eleventh amendment immunity, sovereign immunity and failure to allege sufficient facts to state or support a claim.

II. Analysis

A. Legal Standard

A motion to dismiss made under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a complaint. In considering such a motion, the court should accept as true all well-pleaded allegations and view the complaint in the light most favorable to the plaintiff. *See e.g., De Sole v. United States*, 947 F.2d 1169, 1171 (4th Cir. 1991) (citing *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969)). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

For quite some time, this court has cited *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), for the proposition that in order to grant a motion to dismiss, it must

appear certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief. *See also Edwards v. City of Goldsboro*, 178 F.3d 231, 243-44 (4th Cir. 1999). However, the Supreme Court recently revisited the proper standard of review for a motion to dismiss and stated that the “no set of facts” language from *Conley* has “earned its retirement” and “is best forgotten” because it is an “incomplete, negative gloss on an accepted pleading standard.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

In *Twombly*, the Supreme Court stated that “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” 550 U.S. at 555. The “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555 (citations omitted). Additionally, the Court established a “plausibility standard” in which the pleadings must allege enough to make it clear that relief is not merely conceivable but plausible. *See Twombly*, 550 U.S. at 555-63.

The Court further explained the *Twombly* standard in *Ashcroft v. Iqbal*, No. 07-1015, 556 U.S. ____, 129 S.Ct. 1937, 1949-50 (2009):

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. ... Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. ...

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because

they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief.

(Internal citations omitted.)

B. Res Judicata

In the Motion, the defendants assert the doctrine of res judicata as a ground to dismiss Holmes's claims. Holmes, on the other hand, asserts res judicata in his Amended Complaint and the Plaintiff's Brief as proof of the sufficiency of his claims. Thus, the parties agree that the doctrine applies, although they assert that its application will result in different outcomes. Therefore, a discussion of the doctrine is necessary for a proper analysis.

The doctrine of res judicata encompasses two separate and distinct concepts – issue preclusion and claim preclusion. *See Taylor v. Sturgell*, ___ U.S. ___, 128 S.Ct. 2161, 2171 (2008). Claim preclusion prevents “successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.” *Taylor*, 128 S.Ct. at 2171 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001)). Issue preclusion, sometimes referred to as collateral estoppel, precludes the litigation of an issue litigated and resolved in a valid, final court judgment “even if the issue recurs in the context of a different claim.” *Taylor*, 128 S.Ct. at 2171 (citing *New Hampshire*, 532 U.S. at 748). The Court in *Taylor* further explained that res judicata protects against the expense of multiple

lawsuits, preserves judicial economy and prevents inconsistent court decisions. *Taylor*, 128 S.Ct. at 2171 (quoting *Montana v. United States*, 440 U.S. 147, 153-54 (1979)).

State court decisions are not only entitled to res judicata effect in other state courts, but also in federal courts as codified in 28 U.S.C. § 1738. This statute provides that state court judgments “shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken.” 28 U.S.C.A. § 1738 (West 2006). Thus, under this statute the preclusive effect of a state court judgment is determined by the law of the state issuing the decision. *See Dionne v. Mayor and City Council of Baltimore*, 40 F.3d 677, 682 (4th Cir., 1994). When making the determination of the preclusive effect of the state court judgment, the federal court uses a two-step process. *See In Re Genesys Data Tech., Inc.*, 204 F.3d 124, 128 (4th Cir. 2000). First, the court must determine whether state law would preclude the party from litigating the issue or claim. *See Genesys Data Tech.*, 204 F.3d at 128. Then, if the state court would preclude the action, the court must determine if Congress has created an exception to 28 U.S.C. § 1738. *See Genesys Data Tech.*, 204 F.3d at 128.

Virginia’s law on claim preclusion is found in Rule 1:6 of the Virginia Supreme Court Rules, which provides:

A party whose claim for relief arising from identical conduct, a transaction, or an occurrence is decided on the merits by a final judgment, shall be forever barred from prosecuting any second or subsequent civil action against the same opposing party or

parties on any claim or cause of action that arises from that same conduct, transaction or occurrence, whether or not the legal theory or rights asserted in the second or subsequent action were raised in the prior lawsuit, and regardless of the legal elements or the evidence upon which any claims in the prior proceeding depended, or the particular remedies sought.

VA. SUP. CT. R. 1:6. When Virginia enacted Rule 1:6, the previously used same-evidence and same-remedy requirement was replaced by the same “conduct, transaction, or occurrence” test. *See Martin-Bangura v. Virginia Dep’t. Of Mental Health*, 640 F. Supp. 2d 729, 738 (E.D.Va. 2009). Thus, in Virginia, claim preclusion is very broad and serves to bar *any* action that could have been brought in the prior proceeding, whether or not that action was actually brought, against the same opposing party or parties. *See Martin-Bangura*, 640 F. Supp. 2d at 738.

Here, Holmes chose to avail himself of the administrative grievance procedures and brought his case before the EDR, which rendered a favorable decision which was eventually reviewed and upheld by the state circuit court. While the Fourth Circuit has held that a state administrative decision that has not been judicially reviewed should not have any claim preclusive effect in a subsequent federal action, *see Dionne*, 40 F.3d at 682-85, it is undisputed by the parties that the prior decision was a valid, final judgment entitling it to res judicata effect. What the parties disagree on – and the issue for the court to determine – is whether the state court judgment bars Holmes’s present claims in their entirety or, rather, precludes the defendants from denying their conduct violated the ADA.

After thoroughly researching Virginia’s employee grievance procedure, I have found nothing to show, or even imply, that the use of this procedure is

mandatory. This includes a study of the statute providing the grievance procedure, VA. CODE ANN. § 2.2-3000 *et seq.*, the grievance procedure manual and the EDR website, *www.edr.virginia.gov*. Also, Holmes does not claim that use of the grievance procedure was required prior to filing suit. Thus, it does not appear that the EDR was the only forum in which Holmes could have originally brought his claims. *But see Dionne*, 40 F.3d at 683-684 (exhaustion requirement for administrative remedies precluding alternative forum for unitary adjudication of all claims weighs against application of claim preclusion).

Nonetheless, Holmes chose to pursue his claims through the EDR. By doing so, Holmes chose not only the forum in which he would pursue his claim, but he also chose to limit the remedies available to him and the parties from whom he could seek recovery. By Holmes's own admission in his Amended Complaint, he "grieved his termination." Holmes included among his grounds for the grievance that he was discriminated against in violation of the ADA. Virginia Code Annotated § 2.2-3004 allows a state employee to grieve "adverse employment actions" including "discrimination on the basis of race, color, religion, political affiliation, age, disability, national origin or sex." VA. CODE ANN. §2.2-3004(A) (Repl. Vol. 2008). Ultimately, Holmes was successful on this claim. Thus, at the very least, Holmes's claims against his employer, VHCC, stemming from violation of the ADA would be barred from relitigation under Rule 1:6.

Furthermore, it appears that Rule 1:6 would bar all of Holmes's current claims against VHCC. Rule 1:6 bars a party from "prosecuting any second or subsequent civil action against the same opposing party ... on any claim or cause of action that arises from that same conduct, transaction or occurrence." VA. SUP. CT.

R. 1:6. All of Holmes's claims stem from "the same conduct... or occurrence" – his termination. Under the language of Rule 1:6 it does not matter whether the claims raised in the second suit were asserted in the first. Nor does it matter what remedies were sought.

Holmes argues that the favorable state court decision should not be used defensively as a shield to prevent him from bringing another suit against his employer, but, rather, should be used offensively as a sword to force this court to find against his employer and in his favor on his ADA claim. Holmes has cited no authority for the proposition that the favorable state court judgment does not bar his claims in this court. Nor has the court been able to find any case law to support his argument. On the other hand, the court has found no case law holding that a second claim is barred by *res judicata* based a prior successful. It is important to note, however, that Rule 1:6 does not differentiate between those claims that are successful and those that result in an unfavorable decision. Thus, Virginia's claim preclusion doctrine gives a party one opportunity to assert all causes of action arising from the "same conduct, transaction, or occurrence," and, win or lose, a valid, final judgment from the case is entitled to *res judicata* effect. Thus, it would appear that Holmes is forever barred from bringing any additional claims against his employer based on his termination.

Next, the court must determine whether the prior grievance decision precludes Holmes from pursuing his claims against the individual defendants, Page and Conco. In the Plaintiff's Brief, Holmes states that "the individual defendants are not liable under the ADA, and not specifically excluding them in the complaint was plaintiff's error." (Plaintiff's Brief at 8.) Thus, Holmes concedes that the

ADA claims against Page and Conco should be dismissed. Each of Holmes's remaining claims against Page and Conco are based on the same conduct or occurrence as his claims against his employer – his termination from his employment. Rule 1:6, however, speaks in terms of preventing a subsequent suit against “the same opposing party or parties.” No one disputes that as individuals, Page and Conco were not named parties to the grievance proceedings. That does not, however, prevent the prior decision in the grievance proceedings from being used as a shield to prevent these subsequent claims against them, if it can be shown that they were in privity for *res judicata* purposes with their employer.

There is no single fixed definition of privity for purposes of *res judicata*. Whether privity exists is determined on a case by case examination of the relationship and interests of the parties. The touchstone of privity for purposes of *res judicata* is that a party's interest is so identical with another that representation by one party is representation of the other's legal right.

State Water Control Bd. v. Smithfield Foods, Inc., 542 S.E.2d 766, 769 (Va. 2001). In a recent similar case out of this district, District Judge Norman Moon held that individual Virginia Department of Corrections supervisors were in privity with the Department of Corrections and, therefore, a prior decision in an employee's grievance proceedings against the Department barred the employee from suing the individual supervisors in a subsequent suit. *See Brooks v. Arthur*, 611 F. Supp. 2d 592, 599-600 (W.D. Va. 2009). In reaching his decision, Judge Moon reasoned: “All of the allegations lodged against the Defendants ... arose out of their actions as supervisors employed by the Commonwealth, which may only act through its employees or its agencies.” *Brooks*, 611 F. Supp. 2d at 599. Judge Moon also referenced a recent unpublished Fourth Circuit case, *Davani v. Clement*, 263 F.

App'x. 296 (4th Cir. 2008), to support his decision. In *Davani*, the Fourth Circuit also held that a prior employee grievance decision precluded a subsequent suit against the employing agency, its Secretary and two individual supervisory employees. The court held that under Virginia law, an employee “may not bring successive suits on the same cause of action where each suit addresses only part of a claim.” *Davani*, 263 F. App'x. at 299.

While it is true that in both *Brooks* and *Davani* the prior grievance decision was unfavorable to the employees, I don't believe that should affect the preclusive effect to be given to the prior favorable grievance decision in this case. If that prior decision prevents any further litigation against the employer, as I have held it does, then it also should prevent any further litigation against any parties in privity with the employer. Here, as in *Brooks* and *Davani*, it is clear that the parties shared an identity of interests. The state agency at issue here, VHCC, could act only through and by its employees. Thus, when Holmes's challenged the actions of VHCC in his prior grievance procedure he was, in fact, challenging the actions taken by his supervisors, Page and Conco. Thus, the interests of VHCC, Page and Conco in the grievance proceedings and this action are effectively the same. That being the case, I find that Page and Conco were in privity with their employer, VHCC, and, thus, Holmes's claims against them would be barred under Rule 1:6

Next, the court must determine whether Congress has created any exception to 28 U.S.C. § 1738 for claims such as Holmes's. “A court will recognize an exception to § 1738 only if ‘a later [federal] statute contains an express or implied partial repeal’ of § 1738; an implied repeal requires an ‘irreconcilable conflict’ between the two federal statutes.” *Jaffe v. Accredited Surety and Casualty Co.*,

Inc., 294 F.3d 584, 592 (4th Cir. 2002) (quoting *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 468 (1982)). Moreover, the Supreme Court has seldom found that a statute impliedly repeals § 1738, due to the “relatively stringent standard” for making such a finding. *See Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 380-81 (1996); *Jaffe*, 294 F.3d at 592. Here, “the second step of our analysis can be easily resolved” because Holmes has not asserted that there is an applicable exception to § 1738. *See Jaffe*, 294 F.3d at 592 (quoting *Genesys Data Tech.*, 245 F.3d at 314 (4th Cir. 2001) (“[Plaintiff] has identified no statute that explicitly or implicitly repeals § 1738 and so ‘the second step of our analysis can be easily resolved.’”) As such, there is no basis to hold that § 1738 is not applicable to the present case. *See Jaffe*, 294 F.3d at 592-93; *In Re Genesys Data Tech, Inc.*, 245 F.3d at 314.

As stated earlier, it was Holmes who chose to pursue a grievance against his employer. Holmes could have chosen to forgo the grievance process and filed suit in this court against his employer and the individual defendants. By choosing, instead, to file an employee grievance, he chose not only his forum, but he also chose the party against whom he could seek recovery and the remedies that he could recover. Accordingly, I am of the opinion that claim preclusion warrants that the defendants’ Motion be granted.

C. Eleventh Amendment Immunity

As an alternative to res judicata, the defendants also contend that Holmes’s claims against VHCC under the ADA for money damages are barred by the Eleventh Amendment to the United States Constitution. Holmes suggests that

VHCC is not entitled to Eleventh Amendment immunity because, as a community college, it is not a state agency, but more analogous to a county, or a likewise situated school district. However, the plaintiff's argument is unconvincing. When looking at Virginia Code Annotated § 23-214, *et seq.*, it is clear that the Virginia Community College System is a state agency. For instance, Virginia Code Annotated § 23-215(B) states, "The Virginia Community College System shall be the *state agency* with primary responsibility for workforce training...." VA. CODE ANN. § 23-215(B) (Repl. Vol. 2006). (Emphasis added.) Virginia Code Annotated §§ 23-214.1 and -216 state that the Virginia Community College System shall mean the State Board for Community Colleges and that the State Board shall consist of 15 members appointed by the Governor subject to confirmation by the General Assembly. *See* VA. CODE ANN. §§ 23-214.1 and -216 (Repl. Vol. 2006). As a state agency, it is entitled to the protection of the Eleventh Amendment when applicable. It is worth noting that the plaintiff does not dispute the applicability of the Eleventh Amendment if VHCC is determined to be a state agency. Thus, the Eleventh Amendment is applicable and also serves as a bar to the plaintiff's claims against VHCC. *See Board of Trs. of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001); *Allen v. College of William & Mary*, 245 F. Supp. 2d 777 (E.D.Va. 2003).

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. Virginia's claim preclusion statute applies the same "conduct, transaction, or occurrence" test, which bars any action against the

- same party or parties that could have been brought in the prior proceeding, even if the action was not actually brought;
2. By availing himself of the state's grievance procedure, Holmes chose his forum, which was not mandatory, and the judgment resulting therefrom is entitled to res judicata effect;
 3. Holmes's claims against VHCC are barred by res judicata;
 4. Holmes concedes that defendants Conco and Page are not liable under the ADA;
 5. The interests of the individual defendants, Page and Conco, and VHCC in Holmes's grievance proceedings were identical, therefore, Page and Conco were in privity with VHCC;
 6. Holmes's claims against Page and Conco are barred by res judicata; and
 7. VHCC is entitled to Eleventh Amendment immunity to Holmes's ADA claims.

RECOMMENDED DISPOSITION

For the reasons detailed in this Report and Recommendation, I hereby recommend that the court grant the Defendants' Motion.

Notice To Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636 (b)(1)(C):

Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed finding or recommendation to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence to recommit the matter to the magistrate judge with instructions.

Failure to file written objections to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14-day period, the Clerk is directed to transmit the record in the matter to the Honorable Glen M. Williams, Senior United States District Judge.

The Clerk is directed to send copies of this Report and Recommendation to all counsel of record.

DATED: This 1st day of February 2010.

/s/ *Pamela Meade Sargent*
UNITED STATES MAGISTRATE JUDGE