

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

JASMIN HERNANDEZ;
Plaintiff,

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v.

Civil Action No. 6:16-CV-00069-RP-JCM
(Oral Argument Requested)

BAYLOR UNIVERSITY BOARD OF
REGENTS; ART BRILES, in his official
capacity as head football coach; IAN
MCCAW, in his official capacity as
athletic director;
Defendants.

**MOTION TO DISMISS FOR PLAINTIFF'S FAILURE TO
STATE A CLAIM AGAINST DEFENDANT ART BRILES, SUED
IN HIS OFFICIAL CAPACITY AS HEAD FOOTBALL COACH**

TO THE HONORABLE UNITED STATES DISTRICT COURT:

Defendant, Art Briles, named and sued in his former official capacity as Head Football Coach at Baylor University (hereinafter, "Coach Briles") moves to dismiss Plaintiff Jasmin Hernandez's suit for failure to state a claim against Coach Briles on which relief can be granted as authorized by Federal Rule of Civil Procedure 12(b)(6) and in support thereof, would show the Court as follows:

I.

Introduction and Summary of Motion

1. This is a Title IX Civil Rights Lawsuit filed by a former Baylor University adult student who was sexually assaulted on April 15, 2012 by another Baylor University adult student at an off-campus private apartment complex during a social gathering and party, that was not sponsored or organized in any respect by Coach Briles or Baylor University.¹ Plaintiff, Jasmin Hernandez (hereinafter, “Plaintiff”), named and sued Coach Briles in his official capacity as Head Football Coach, asserting a sexual harassment claim under Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 and alleged state law negligence claims.

2. Co-Defendants are the former Athletic Director, in his capacity as Athletic Director, and the “University Board of Regents,” a non-jural entity, that is the governing body of Baylor University. Plaintiff has not sued Baylor University, a Texas non-profit corporation and private university, and the only entity that receives federal financial assistance, and therefore, possibly subject to the requirements of Title IX.²

3. In her complaint, Plaintiff did not state a claim upon which relief can be granted against Coach Briles. Title IX claims are not cognizable against individual employees and in this instance are barred by limitations based on the face of the complaint. Moreover, Plaintiff asserted state law negligence claims against Coach Briles that fail as a matter of law, as Coach Briles had no legal duty recognized by the Texas state appellate courts under the factual allegations of

¹ *Tevin Elliott v. State of Texas*, 215 WL 18 77052 (Tex. App. Waco April 23, 2015, discretionary review refused) (not designated for publication).

² Unless Plaintiff’s attempt to name non-jural entities such as “Baylor University Board of Regents,” “Head Football Coach,” and “Athletic Director” are claimed by Plaintiff to be a misnomer and mistaken attempt to name Baylor University, Baylor University is not named as a Defendant or otherwise before the Court. Regardless, federal and state law tort claims brought against Coach Briles, the Athletic Director, and the Board of Regents should be dismissed on grounds of redundancy in that a suit against an individual defendant in his or her official capacity is simply another way of pleading a claim against Baylor University.

Plaintiff's complaint. Therefore, the Court should dismiss Plaintiff's suit pursuant to Federal Rule of Civil Procedure 12(b)(6).

II.

Argument and Authorities

A. Standard of Review and "Factual Allegations"

4. This Court has authority to dismiss a suit for failure to state a claim on which relief could be granted if the complainant does not provide fair notice of the claim and does not state factual allegations showing that the right to relief is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corporation v. Twombly*, 550 U.S.544, 555-556 & n.3.(2007). The plausibility standard "asks for more than a sheer possibility that a Defendant has acted unlawfully." *Iqbal, Id.* at 678. When a complaint pleads acts that are "merely consistent with" a Defendant's liability, "it stops short of the line between possibility and plausibility." *Id.* (citation omitted). "A claim has facial plausibility when the Plaintiff pleads factual content that allows the Court to draw the reasonable inference that Defendant is liable for the misconduct alleged." *Id.* at 662 (citation omitted). Although the Court must accept well-pleaded facts as true, and indulge in favorable inferences to the Plaintiff, conclusory allegations are not entitled to a presumption of truth. *Id.* at 678-79. Nor do courts accept as true legal conclusions such as recitals of a cause of action, or any elements of that cause of action, supported by conclusory statements. *Twombly* at 555-556.

5. Plaintiff's complaint includes few factual allegations against Coach Briles and those factual allegations do not show a right to relief that is plausible. Specifically, Plaintiff

made the following arguably factual allegations against Coach Briles who is named in the complaint “in his official capacity as Head Football Coach,” only.³

6. The complaint states:
 - a. Defendant Art Briles (“Briles”) is, and was at all times relevant, the Head Football Coach at Baylor. Briles is responsible for overseeing all football related activities, and has the authority to discipline any and all Baylor football players. As Head Football Coach, Briles is an agent of Baylor” (DOC. #1, p.1, ¶2).

The first reference to Coach Briles under the section of the complaint headed “background facts relevant to all counts” is at Paragraph 28 of the complaint, which is tellingly conditioned “based on information and belief,” and sets forth an alleged conversation between “Jane Roe and her mother” and Baylor’s Chief Judicial Officer, Bethany McCraw. Jane Roe and her mother “on information and belief” allegedly were told by Dean McCraw that “Briles was aware of the reports regarding student-athlete Teven Elliott.” Further, at Paragraph 30, the complaint again alleges “based on information and belief, Baylor, Briles and McCraw were aware that in November of 2011, Elliott had been cited for misdemeanor sexual assault, stemming from allegations that he had trapped a community college student in her room, held her against her will and touched her inappropriately.” (DOC. #1, p.5, ¶s 27, 28, and 30).

7. These so-called factual statements “based on information and belief,” presumably from media accounts, describing hearsay conversations between unidentified parties and a Dean at Baylor University are the type of conclusory and self-serving allegations that are not entitled to an assumption of truth and should be disregarded in determining whether Plaintiff has stated a claim upon which relief can be granted.

³ Coach Briles is no longer Head Football Coach at Baylor University, having been replaced by Jim Grobe prior to or on the date of the filing of this complaint, May 30, 2016.

8. The only other so-called factual allegations directed at Coach Briles appear at Paragraphs 42 and 43, wherein, Plaintiff alleges that her mother “called Briles to inform him about what Elliott, one of Briles’ football players had done.” Plaintiff alleges that her mother “received a return phone call from Briles’ secretary informing mother that her office had heard of the allegations and were looking into it.” (DOC. #1, p.7, ¶42). The final so-called “factual allegation” against Coach Briles appears at Paragraph 43 wherein Plaintiff alleges that her father “also called Briles’ office several times to follow up” and that the father allegedly “never received a returned phone call from Briles, or anyone in his office.” (DOC. #1, p.7, ¶43).

9. The remaining allegations against Coach Briles set forth the state court claim of negligence asserted against all Defendants including the “Board of Regents,” “Athletic Director,” and Coach Briles (DOC. #1, pp.10-13, ¶s61-68). These paragraphs are replete with erroneous legal conclusions, and a formulaic recitation of the elements of a negligent cause of action and are insufficient to show grounds for the Plaintiff to be entitled to relief based on the absence of factual contentions which give rise to a legal duty recognized in Texas. The gravamen of Plaintiff’s complaint of negligence is that Defendants had a duty to take reasonable measures to protect Plaintiff as an adult student at Baylor University and to supervise, discipline, or control the conduct of other adult university students, including one accused of prior multiple sexual assaults or incidents of sexual harassment, while socializing at a non-university organized or sponsored party and gathering, held off-campus at a private apartment complex. (DOC. #1, p.6 ¶s33-37; pp.10-11, ¶ 62).

B. Individuals May Not Be Sued Under Title IX

10. Plaintiff seeks damages for alleged violation of Title IX, a federal statute that prohibits gender discrimination in education programs that receive federal aid. 20 U.S.C. §1681

(DOC. #1, p.2, ¶5; pp. 2-10, ¶s8-60). Title IX applies only to entities that receive federal funds, like Baylor University. Because individual employees of the university do not receive federal grant money, a Plaintiff cannot state a claim against individual defendants under Title IX. *See Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009); *A.W. v. Humble Independent School District*, 25 F.Supp.3d 973, 986 (S.D. Tex. 2015) (holding the Title IX claims asserted against individual employees of the school district are not actionable under Title IX). To the extent asserted against Coach Briles, Plaintiff's Title IX claims should be dismissed.

C. Plaintiff's Official Capacity Claims Duplicate Claims That Can Only Be Brought Against Baylor University

11. Plaintiff's federal and state law tort claims against Coach Briles, in his official capacity as Head Football Coach, should be dismissed on grounds of impermissible duplication and redundancy and no legal duty recognized under Texas State Law. It is well settled that a suit against an individual defendant in his official capacity is simply another way of pleading a claim against the entity that employs the official. *See Kentucky v. Graham*, 473 U.S. 159, 165 (1985); *Leitch v. Hornsby*, 935 SW 2d 114, 117-118 (Tex. 1996) (corporation officer acting on the corporation's behalf does not owe a corporate employee individual duty to provide that employee with a safe workplace; employer alone owes that duty); *Jenkins v. Board of Educ.*, 937 F.Supp. 608, 613 (S.D.Tex. 1996) (Jenkin's claims against the HISD defendants in their official capacity should be dismissed, as their presence in this case is merely redundant").⁴ Because Baylor University is the only entity receiving federal money that can be sued for alleged gender discrimination in educational programs that receive federal aid, there is absolutely no legal

⁴ Based on the number of press releases and other media statements issued by Plaintiff's attorneys, it is readily apparent that Coach Briles, the "Athletic Director," and the "Board of Regents" were named as Defendants in this case in their official capacities for media and pre-trial publicity attention or value only, as Plaintiff's complaint fails to specifically name Baylor University as a named Defendant which is the only entity that Plaintiff can claim against for an alleged violation of Title IX and pendent State Court claims.

reason to assert claims against the individual Defendants in their official capacities. Accordingly, Coach Briles moves to dismiss all claims brought against him.

D. Plaintiff's Claims Are Barred by the Statute of Limitations

12. Coach Briles also moves to dismiss Plaintiff's Title IX claims because they are untimely on their face. A Rule 12 (b)(6) motion to dismiss based on limitations may be granted where it is evident from the Plaintiff's pleading that the action is barred and there is no basis for tolling. *See Jones v. ALCOA, Inc.*, 339 F.3d 359, 356 (5th Cir. 2003).

13. Plaintiff filed this lawsuit on May 30, 2016. Plaintiff describes a sexual assault that occurred on April 15, 2012. (DOC. #1 p.6 ¶35). Plaintiff's Title IX claims are governed by the two (2) year statute of limitation set forth in Tex. Civ. Prac. & Rem. Code §16.003(a). *See King-White v. Humble Independent School District*, 803 F.3d 754 (5th Cir. 2015) (affirming District Court's 12(b)(6) dismissal of Title IV claims based on Texas two (2) year statute of limitations for personal injury actions). Because the sexual assault occurred more than two (2) years prior to May 30, 2016, Plaintiff's claims under Title IX are barred and should be dismissed.

E. Liability for Negligence Cannot Be Imposed If No Duty Exists

14. Plaintiff asserts a state law negligence claim against Coach Briles. To prove an action for negligence, the Plaintiff must establish the Defendant had a legal duty. *Nabors Drilling U.S.A., Inc., v. Escoto*, 288 S.W. 3d 401,404 (Tex. 2009). Without a legal duty, a Defendant cannot be held liable in tort. Whether a legal duty exists is a threshold question of law for the Court to decide from the facts surrounding the occurrence in question. *Thapar v. Zezulka*, 994 S.W. 2d 635, 637 (Tex. 1999). It is well established in Texas that as a general rule, a person has no legal duty to protect another from the criminal acts of a third person. *Walker v.*

Harris, 924 S.W. 2d 375, 377 (Tex. 1996); *See also Greater Houston Transp. Co. v. Phillips*, 801 S.W. 2d 523, 525 (Tex. 1990). The Texas Supreme Court has recognized limited exceptions, none of which are factually asserted or apply here, to the general rule of non-liability. For example, a person who controls premises has a duty to protect an invitee from criminal acts of third persons under certain limited circumstances. *Trammell Crow Cent. Tex., Ltd. v. Gutierrez*, 267 S.W.3d 9, 12 (Tex. 2008). Here the sexual assault occurred off-campus at a private apartment complex premises, which premises was not owned or controlled by Coach Briles or Baylor University. Additionally, the existence of a special relationship may impose a duty upon a person to control a third party's conduct. These special relationships include employer and employee, parent and child, and under special circumstances, an employer of an independent contractor. *See Greater Houston Transp. Co. v. Phillips*, 801 S.W. 2d 523, 525 (Tex. 1999). Coach Briles was not the employer or parent of Tevin Elliot or Plaintiff, two adult students of Baylor University, who met off-campus at a private apartment complex during a party that was not organized or sponsored by Coach Briles or Baylor University. None of the limited exceptions to the general rule of non-liability for criminal acts of a third party apply here where a former Baylor University adult student was sexually assaulted by another Baylor adult student, who happened to be a Baylor football player, at an off-campus apartment complex during a social gathering and party, that was not sponsored or organized by Baylor University, much less Coach Briles. The case of *Boyd v. Texas Christian University, Inc.*, 8 S.W.3d 758 (Tex.app.-Fort Worth, 1999, no writ) supports dismissal of Plaintiff's state law negligence claims. In *Boyd*, the Texas Appellate Court squarely decided whether Texas Christian University (TCU) owed a duty to its other students to supervise, discipline, or control its adult scholarship football players at a non-university sponsored event held off the school campus. The

Fort Worth Court of Appeals held as a matter of law, that TCU had no duty to Plaintiff Boyd, who was seriously injured in a criminal assault committed by TCU football players, to control, supervise, or discipline its adult student athletes for conduct at an off-campus bar at an event not sponsored or organized by TCU. The no legal duty holding of the Fort Worth Court of Appeals under the facts of the *Boyd* case makes clear that Plaintiff has failed to assert a cognizable state court negligence claim against Coach Briles under the facts as alleged in Plaintiff's complaint. Accordingly, the Court should dismiss Coach Briles from this case without delay or further expense to Coach Briles.

III.

Conclusion and Request for Relief

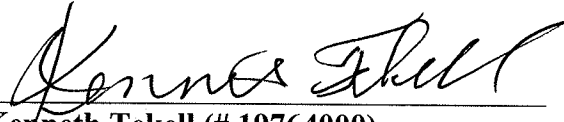
18. Based on the "factual allegations" of Plaintiff's complaint, this is a Title IX gender discrimination claim based on a sexual assault that occurred off-campus involving two Baylor University students, one of which was a student athlete, attending a social gathering and party at a private apartment complex, not controlled by Baylor University or Coach Briles. Individual school employees, like former Head Football Coach Art Briles, may not be sued under Title IX, and all Plaintiff's Title IX claims against the Board of Regents, the Athletic Director, and Coach Briles should be summarily dismissed. The remaining state law negligence claim against Coach Briles should be summarily dismissed as liability for negligence cannot be imposed if no duty exists and the Texas Appellate Courts have never recognized a legal duty under the circumstance of the "factual allegations" of Plaintiff's complaint here. To recognize a legal duty under the factual circumstances as alleged in this case would create an entirely new category of University and College employee Defendants, who heretofore, have never been considered by the Courts to have a legal duty under the circumstances of this case: Band Director, Debate Team Coach,

Greek Life Advisor, Mock Court Advisor, All Student-Athlete Team Coaches, ROTC Commanders, Academic Deans of all manner of subjects and disciplines, etc. Plaintiff's negligence claims against Coach Briles should be dismissed pursuant to Federal Rule 12(b)(6) for failure to state a claim for which relief may be granted.

WHEREFORE, Defendant Art Briles, sued only in his capacity as former Head Football Coach of Baylor University, prays that the Court dismiss all Plaintiff's claims against Coach Briles pursuant to Federal rule 12(b)(6) and for such other and further relief as Coach Briles shows himself justly entitled.

Respectfully submitted,

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***COUNSEL FOR DEFENDANT ART BRILES
IN HIS FORMER CAPACITY AS HEAD
FOOTBALL COACH***

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Dismiss for Plaintiff's Failure to State a Claim against Defendant Art Briles, in his Official Capacity as Head Football Coach on this 6th day of July 2016, via the Court's electronic filing system and mailed as follows:

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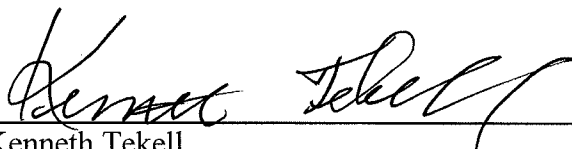
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