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U.S. DISTRICT COU
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

JANE DOE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Civil Action No. CV-17-S-1344-NW**
	)	
THE UNIVERSITY OF NORTH ALABAMA, *et al.*,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Plaintiff, Jane Doe, claims that she was sexually harassed and assaulted by a professor while she was a student at the University of North Alabama ("the University"). Her Second Amended Complaint asserts claims against: (1) the University; (2) Dr. Kenneth Kitts, the University's President; (3) Dr. David Shields, the University's Vice President of Student Affairs; (4) Dr. Jana Beaver, the Chair of the University's Department of Management and Marketing, and the Associate Dean for the College of Business; (5) Dr. Jerome Gafford, the Director of the Center for Professional Selling at the University and an Assistant Professor in the Management and Marketing Department; (6) Tammy W. Jacques, the University's Title IX Coordinator; (7) Catherine White, the University's Assistant Vice President for Human Resources and Chief Human Resources Officer; (8) Gregory A. Carnes, the

Dean of the University's College of Business; and (9) John Thornell, the University's Provost and Vice President for Academic Affairs. All of the individual defendants are sued in both their individual and official capacities. Plaintiff asserts a claim against the University for violations of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX"). She asserts claims against the individual defendants for violations of the Equal Protection Clause of the Fourteenth Amendment, as well as a state law claim for negligent and/or malicious retention, supervision, training, and hiring. *See* doc. no. 32 (Second Amended Complaint).

The following motions are pending: (1) the University's motion to dismiss the Second Amended Complaint or, in the alternative, to join a required party pursuant to Federal Rule of Civil Procedure 19 (doc. no. 46); (2) a motion to dismiss the Second Amended Complaint filed by the individual defendants — *i.e.,* Dr. Kenneth Kitts, David Shields, Dr. Jana Beaver, Jerome Gafford, Tammy Jacques, Catherine White, Dr. Gregory Carnes, and John Thornell (doc. no. 48); (3) plaintiff's motion for additional discovery pursuant to Federal Rule of Civil Procedure 56(d) (doc. no. 59); and (4) plaintiff's motion for a status conference (doc. no. 61).

For the reasons set forth below, this court concludes that the University's motion to dismiss (which has been converted to a motion for summary judgment)[1]

[1] See note 49, *infra*, and accompanying text.

should be denied. The University's alternative motion to join David Dickerson as a required party will be held in abeyance pending further briefing. The individual defendants' motion to dismiss (which also has been converted to a motion for summary judgment)[2] will be granted in part and denied in part. Plaintiff's motion for additional discovery will be granted, and her request for a status conference will be denied.

I. PLAINTIFF'S ALLEGATIONS AND THE PROCEDURAL BACKGROUND

During the Fall semester of 2015, plaintiff, Jane Doe, was a full-time student majoring in Marketing at the University.[3] She was required to take a class on sales that was taught by Professor David Dickerson, who is not a party to this case.[4] At some unspecified time prior to Dickerson's employment at the University, he was accused of sexual abuse and sexual assault by his then-nineteen-year-old wife.[5]

Four students, including plaintiff, were selected to attend an International Sales Conference and Competition in Orlando, Florida, in early November 2015.[6] Two professors, Dickerson and Jerome Gafford, were scheduled to chaperone the trip, but

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[2] *Id.*

[3] Doc. no. 32 (Second Amended Complaint), ¶ 19.

[4] *Id.* ¶¶ 20-22.

[5] *Id.* ¶ 21.

[6] *Id.* ¶ 23.

Gafford was unable to go, so Dickerson chaperoned the trip alone.[7] During the trip, plaintiff went swimming alone at the hotel pool.[8] Dickerson joined plaintiff at the pool and allegedly began to touch, sexually harass, and assault her.[9] Plaintiff exited the pool, but Dickerson followed her, sat beside her on the pool deck, and "continued to grope and paw at [her] against her will."[10] Dickerson grabbed plaintiff, pulled her onto his lap, and began kissing her against her will.[11] Plaintiff pulled away, but Dickerson attempted to kiss plaintiff a second time.[12] Plaintiff walked from the pool area to the hot tub area, because two other people were there, and she thought that would keep her safe from Dickerson's advances. Dickerson was not deterred. He followed plaintiff to the hot tub, climbed in, and continued to "paw at and grope" plaintiff.[13] Plaintiff left the hot tub, but two other University students who were on the trip saw the incident from their hotel balconies and captured parts of the encounter between plaintiff and Dickerson with pictures and video.[14]

At some point later in the trip, plaintiff and another female student traveled by

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[7] *Id.* ¶¶ 24-25.

[8] *Id.* ¶¶ 27-28.

[9] Doc. no. 32 (Second Amended Complaint), ¶ 29.

[10] *Id.* ¶¶ 30-31 (alteration supplied).

[11] *Id.* ¶ 32.

[12] *Id.* ¶ 33.

[13] *Id.* ¶¶ 34-36.

[14] *Id.* ¶¶ 37-38.

Uber to Universal Studios.[15] Dickerson called and "insisted" that he pick up the girls from Universal Studios and take them to dinner.[16] Plaintiff did not know how to react, so she "kept quiet" and went to dinner, which was in a restaurant across the street from the hotel.[17] During dinner, Dickerson purchased alcoholic beverages for plaintiff and the other student.[18] At some point, the other student left the restaurant and did not return, leaving plaintiff alone with Dickerson.[19] Plaintiff "remembers being in and out of consciousness and being walked back to the hotel by Dickerson."[20] She believes Dickerson drugged her. She also "remembers being undressed by Dickerson and not having the physical strength [to] fight Dickerson off of her."[21] When she regained consciousness, she was naked in Dickerson's hotel room.[22] She put on her clothes and left the room.[23] After she left, Dickerson called her to say he hoped the two of them could still be "good friends."[24]

After returning from the trip, plaintiff stopped attending Dickerson's class and

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[15] Doc. no. 32 (Second Amended Complaint), ¶ 40.

[16] *Id.* ¶ 41.

[17] *Id.* ¶ 42.

[18] *Id.* ¶ 43.

[19] *Id.* ¶ 45.

[20] *Id.* ¶ 46.

[21] Doc. no. 32 (Second Amended Complaint), ¶ 47.

[22] *Id.* ¶ 48.

[23] *Id.* ¶ 49.

[24] *Id.* ¶ 50.

was afraid to be on campus because she might have to see Dickerson.[25] "Shortly after" the trip, the students who had taken photos and videos of plaintiff and Dickerson at the pool showed them to Professor Gafford.[26] Gafford reported the incident to Dr. Beaver, the Associate Dean and Chair of the Management and Marketing Department.[27] Beaver apparently informed Jacques, the Title IX Coordinator, because Jacques contacted plaintiff to request a meeting. Plaintiff initially agreed to meet with Jacques, but then she cancelled the meeting because she was afraid of Dickerson and the University.[28] Beaver then contacted plaintiff and urged her to talk, so plaintiff told Beaver about both the incident at the pool and the incident in the hotel room.[29] Beaver told plaintiff not to attend class, to stay away from campus, to avoid the area of town near campus, and to not go out alone.[30] Neither Beaver nor anyone else took plaintiff's written statement or reported the incident to University or local police, and no one from the University followed up with plaintiff after her initial meeting with Beaver.[31]

Plaintiff sought counseling from Jennifer Berry with the University's Office

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[25] *Id.* ¶¶ 52-53.

[26] *Id.* ¶ 54.

[27] Doc. no. 32 (Second Amended Complaint), ¶ 55.

[28] *Id.* ¶ 56.

[29] *Id.* ¶ 57.

[30] *Id.* ¶ 58, 61.

[31] *Id.* ¶ 59, 62.

of Student Counseling Services, and was diagnosed with Post-Traumatic Stress Disorder as a result of Dickerson's assault.[32] Berry told plaintiff she would approve plaintiff's "medical withdrawal" from school, but defendant Shields, the Vice President for Student Affairs, told plaintiff the University would "just call it an Academic Leave" instead.[33] At the same time, Dickerson "continu[ed] to receive the benefit of his contract with UNA and remained a paid employee."[34]

Seven months later, in August of 2016, Dickerson sent plaintiff an email stating:

> It has been over six months since we spoke, so I am sorry. Much to my dismay, I was compelled by UNA not to speak with anyone! What crazy, stupid and parochial minded people. Either way, I just want to say that aside from childish behavior, I command a great respect for you, and will be happy now to keep in touch with you! Friends forever! Feel free to contact me! Your friend, David.

Doc. no. 32 (Second Amended Complaint), ¶ 70. Based upon that email, plaintiff formed the belief that the University had issued Dickerson a "No-Contact Directive," but had done "nothing further to investigate the assault or protect [plaintiff]."[35]

At some unspecified later time, plaintiff learned that Dickerson had been charged with (but not convicted of) rape and assault before he was employed by the

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[32] *Id.* ¶¶ 63-64.

[33] Doc. no. 32 (Second Amended Complaint), ¶¶ 65-67.

[34] *Id.* ¶ 69 (alteration supplied).

[35] *Id.* ¶ 71.

University.[36] She talked with Gafford, who informed her that the University "had failed to properly investigate and failed to do a thorough background search on Dickerson prior to offering him an employment contract."[37] Gafford also showed plaintiff a news article from an unspecified date, discussing the prior charge that Dickerson had raped and assaulted his wife.[38]

Plaintiff claims that she suffered bodily harm and mental anguish because of defendants' failure to protect her before the assault, and because of their response to the assault.[39] She seeks to hold the University liable under Title IX for its employees' deliberate indifference to the sexual harassment she suffered.[40] She seeks to hold the individual defendants liable under the Equal Protection Clause of the Fourteenth Amendment because their actions deprived her of her right to be free from gender discrimination.[41] She also hopes to hold defendant White liable for negligence in failing to perform a sufficient background check before hiring Dickerson.[42] She seeks to hold defendant Gafford liable for negligence in consenting to the continuation of the field trip with Dickerson as the only chaperone, and in withholding information

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[36] *Id.* ¶ 72.

[37] *Id.* ¶ 73.

[38] *Id.*

[39] Doc. no. 32 (Second Amended Complaint), ¶¶ 74-77.

[40] *Id.* ¶¶ 78-89 (Count One).

[41] *Id.* ¶¶ 90-101 (Count Two).

[42] *Id.* ¶ 104(a) (Count Three).

about the past allegations of sexual assault against Dickerson.[43] Finally, she seeks to hold individual defendants White, Jacques, Beaver, Carnes, Thornell, Shields, and Kitts liable for negligent actions and/or omissions in connection with the investigation of plaintiff's allegations of sexual assault.[44]

The University moved pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) to dismiss all of plaintiff's claims, asserting that plaintiff failed to state a claim for deliberate indifference under Title IX, and that the University is entitled to sovereign immunity from any constitutional claims. Alternatively, the University asserts that Dickerson should be joined as a required party under Federal Rule of Civil Procedure 19.[45] The individually named defendants (Kitts, Shields, Beaver, Gafford, Jacques, White, Carnes, and Thornell) filed a separate motion to dismiss the Second Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).[46] They argue that they are entitled to sovereign immunity from plaintiff's Fourteenth Amendment claim against them in their official capacities, and to qualified immunity from plaintiff's Fourteenth Amendment claim against them in

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[43] *Id.* ¶ 104(g) (Count Three).

[44] *Id.* ¶¶ 102-104 (Count Three).

[45] *See* doc. no. 46 (Motion of the University of North Alabama to Dismiss the Second Amended Complaint, or in the Alternative, to Join a Required Party Pursuant to Rule 19(a)); doc. no. 47 (Brief in Support of the University of North Alabama's Motion to Dismiss Second Amended Complaint).

[46] Doc. no. 48 (Motion of Individual Defendants to Dismiss Second Amended Complaint).

their individual capacities. They also argue that the court cannot grant the injunctive relief plaintiff seeks, that plaintiff's negligence claims against supervisors and co-employees are not recognized by Alabama law, and that they are entitled to sovereign immunity and state-agent immunity.[47]

The individual defendants each filed a declaration in support of their motion to dismiss.[48] Accordingly, this court converted *both* motions to dismiss into motions for summary judgment.[49] *See* Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion."). Plaintiff responded to the substantive arguments raised in the motions, but also argued that the motions were premature and requested an opportunity to conduct additional discovery before the court ruled on either the motions to dismiss or the motion to join Dickerson as a required party under Rule 19.[50] Because she had not yet done so, the court provided plaintiff the opportunity

[47] *See* doc. no. 50 (Brief of Individual Defendants in Support of Renewed Motion to Dismiss Second Amended Complaint).

[48] *See* doc. no. 51 (Defendants' Submission of Evidence in Support of Motion to Dismiss).

[49] Doc. no. 58 (Order).

[50] *See* doc. no. 55 (Motion of the Plaintiff, Jane Doe, in Opposition to Defendants' Motion to Dismiss the Second Amended Complaint & Motion to Stay Ruling on Defendant's Motion to Join a Required Party Pursuant to Rule 19(a) Until After the Parties Have Conducted Discovery), at 4 ("The parties have not conducted Discovery and there is not an adequate record at this stage of the

to file an affidavit pursuant to Federal Rule of Civil Procedure 56(d).[51]

Plaintiff then filed a "Motion & Affidavit for the Court to Allow Time for Discovery Under Rule 56(d) in Opposition to Defendant's Motion to Dismiss."[52] She asked the court to deny defendants' motions to dismiss (which have been converted to motions for summary judgment) and allow her time to complete discovery. Defendants oppose plaintiff's request for additional discovery.[53]

II. DISCUSSION

A. Rule 56(d) Motion for Additional Discovery

The first issue that must be addressed is whether plaintiff is entitled to additional discovery pursuant to Federal Rule of Civil Procedure 56(d), which provides:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
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> (1) defer considering the motion or deny it;

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case."); doc. no. 56 (Plaintiff's Response Brief in Opposition to Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint), at 2 ("Defendants' motion to dismiss is premature and arguments are untimely as there has been no discovery conducted and therefore this Court should deny the motion.").

[51] *See* doc no. 58 (Order) ("Plaintiff has not submitted an affidavit or declaration, but will be afforded the opportunity to do so.").

[52] Doc. no. 59.

[53] *See* doc. no. 60 (Defendants' Opposition to Plaintiff's Motion and Affidavit for Discovery Under Rule 56(d)).

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

Fed. R. Civ. P. 56(d).

Plaintiff's attorney filed a six-page affidavit, describing plaintiff's need for discovery on topics such as "Defendant's Policy and Procedure for investigating allegations of Sexual Assault by a Teacher on a Student," the various individual defendants' job duties and responsibilities, and defendants' responses to plaintiffs' allegations of assault. Plaintiff anticipates taking the depositions of each of the individual defendants to explore those topics, as well as to "inquire about the statements contained in [their affidavits] in support of Defendants['] Motion to Dismiss Plaintiff's Second Amended Complaint," and to authenticate and explain documents related to the investigation.[54]

> "District judges are accorded wide discretion in ruling upon discovery motions, and appellate review is accordingly deferential." *Harris v. Chapman*, 97 F.3d 499, 506 (11th Cir. 1996), *cert. denied*, 520 U.S. 1257, 117 S. Ct. 2422, 138 L. Ed. 2d 185 (1997). A Rule 56(f)[55] motion must be supported by an affidavit which sets forth with

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[54] Doc. no. 59-1 (Rule 56(d) Affidavit of Terrinell Lyons in Support of Plaintiff's Motion in Opposition to Defendant's Motion to Dismiss Second Amended Complaint Pursuant to 12(b)(1) and 12(b)(6)) (alterations supplied).

[55] Rule 56(f) is the precursor to the present Rule 56(d). "Current Rule 56(d) 'carries forward without substantial change the provisions of former subdivision (f).' Fed. R. Civ. P. 56 advisory committee notes 2010 amendments. The Court therefore considers precedents decided under former Rule 56(f)." *Collar v. Austin*, 86 F. Supp. 3d 1294, 1303 n.17 (S.D. Ala. 2015).

> particularity the facts the moving party expects to discover and how those facts would create a genuine issue of material fact precluding summary judgment. *See* Fed. R. Civ. P. 56(f); *Walters v. City of Ocean Springs*, 626 F.2d 1317, 1321 (5th Cir. Unit A 1980). Whether to grant or deny a Rule 56(f) motion for discovery requires the court to balance the movant's demonstrated need for discovery against the burden such discovery will place on the opposing party.
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> In qualified immunity cases, the Rule 56(f) balancing is done with a thumb on the side of the scale weighing against discovery. Qualified immunity provides "'an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal [immunity] question.'" *Behrens v. Pelletier*, 516 U.S. 299, 306, 116 S. Ct. 834, 838-39, 133 L. Ed. 2d 773 (1996) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985)). For that reason, once a defendant raises the defense, "the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense. It must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings." *Crawford-El v. Britton*, [523] U.S. [574] , [597-98], 118 S. Ct. 1584, 1596, 140 L. Ed. 2d 759 (1998).

Harbert International, Inc. v. James, 157 F.3d 1271, 1280 (11th Cir. 1998) (first alteration in original, other alterations supplied). The primary consideration is whether the additional discovery sought is relevant to the issue of qualified immunity. *See Garner v. City of Ozark*, 587 F. App'x 515, 518 (11th Cir. 2014); *Collar v. Austin*, 86 F. Supp. 3d 1294, 1306 (S.D. Ala. 2015).

> Qualified immunity offers complete protection for individual government officials performing discretionary functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed.2d 396

> (1982). "Qualified immunity balances two important interests — the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. [223, 231], 129 S. Ct. 808, 815, 172 L. Ed.2d 565 (2009). In *Saucier v. Katz*, the Supreme Court mandated a two step analysis for resolving qualified immunity claims. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001). First, a court must decide whether the facts that a plaintiff has alleged "show the [defendant's] conduct violated a constitutional right." *Id*. Second, the court must decide "whether the right was clearly established." *Id.*

Randall v. Scott, 610 F.3d 701, 714-15 (11th Cir. 2010) (first alteration supplied, second alteration in original).[56]

Here, the individual defendants argue that they are entitled to qualified immunity because, at all relevant times, "they were each engaged in discretionary functions that do not clearly violate the Constitution."[57] Each of the individual defendants relies upon his or her declaration to support that argument, as follows:

- Jacques and White acted within their discretionary authority as UNA's Title IX Coordinator and Deputy Title IX Coordinator respectively in permitting Beaver to interview Plaintiff (Jacques decl. ¶¶ 1-3, 10, 17; White decl. ¶¶ 1, 3, 9);

- White acted within her discretionary authority as Deputy Title IX Coordinator in interviewing Dickerson, and issuing a verbal No Contact Order to Dickerson, followed by a written No Contact

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[56] The Court later "gave courts the discretion to decide which step they address first." *Randall,* 610 F.3d at 715 n.9 (citing *Pearson,* 129 S.Ct. at 818).

[57] Doc. no. 50 (Brief of Individual Defendants in Support of Renewed Motion to Dismiss Second Amended Complaint), at 4.

Order (White decl. ¶ 8, 11, Ex. B);

- White also acted within her discretionary authority as Assistant Vice President for Human Resources in conducting Dickerson's criminal background check through the company holding the contract with UNA for purposes of such criminal background checks; and in informing Dickerson of Kitts' decision regarding Dickerson's employment (White decl. ¶ 2, Ex. A ¶ 14).

- Beaver acted within the scope of her authority as a professor and head of the Marketing Department, and with the consent of the Title IX Coordinator, to speak to Plaintiff about Dickerson's alleged misconduct (Beaver decl. ¶¶ 9, 10, 12, 13);

- Beaver also acted within the scope of her authority as Chair of UNA's Marketing Department in immediately notifying Jacques upon learning of Dickerson's alleged misconduct from Gafford; in interviewing Dickerson about the allegations; and in providing recommendations regarding Dickerson's employment with UNA to Kitts (*Id.*, ¶¶ 4, 5, 8, 19);

- Gafford acted within the scope of his authority as an Associate Professor in reporting the news of potential misconduct by Dickerson to his department head, Jana Beaver (Gafford decl. ¶[¶] 1, 7, 8);

- Gafford also acted within the scope of his authority as Director of the Sales Program in deciding on the coaches for the Sales Teams for the Orlando competition (*Id.*, ¶¶ 2, 3);

- Gafford is not a Human Resources employee; was not Dickerson's supervisor; and had no hiring/firing authority over him (*Id.* ¶ 1; Beaver decl. ¶¶ 2, 3, 19; Kitts decl. ¶[¶] 2, 3, Ex. A);

- Carnes and Thornell acted within their respective authority as Dean of the College of Business, and Vice President of Academic Affairs and Provost in discussing the future of Dickerson's

employment at UNA, and making recommendations in that regard to Kitts (Carnes decl. ¶¶ 1, 3-6; Thornell decl. ¶¶ 2-5);

- Kitts acted within the scope of his authority as President of the University of North Alabama in hiring and non-renewing Dickerson's contract and placing him on administrative leave (Kitts decl. ¶¶ 1-3; Ala. Code § 16-51-6); and

- Shields acted within the scope of his authority as Vice President for Student Affairs in approving Plaintiff's request to withdraw from enrollment, and in following UNA's policy and procedures regarding that withdrawal (Shields decl. ¶¶ 5, 6, 9; Ex. C).

Doc. no. 50 (Brief of Individual Defendants in Support of Renewed Motion to Dismiss Second Amended Complaint), at 6-7 (alterations supplied). The declarations also contain detailed testimony about each defendant's role in the events that form the basis of plaintiff's claims.[58]

Defendants also argue that plaintiff's

allegations fail to demonstrate that it would clearly violate federal law for:

- Jacques and White to permit Beaver to interview Plaintiff about what happened in Orlando despite her lack of Title IX training;

- Beaver to interview Plaintiff as part of the investigation, but fail to get a written statement from her;

- Beaver to provide Title IX and reporting information to Plaintiff;

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[58] *See* doc. no. 51-1 (Declaration of Kenneth D. Kitts); doc. no. 51-2 (Declaration of David Shields); doc. no. 51-3 (Declaration of Jana Beaver); doc. no. 51-4 (Declaration of Jerome Gafford); doc. no. 51-5 (Declaration of Tammy Jacques); doc. no. 51-6 (Declaration of Catherine D. White); doc. no. 51-7 (Declaration of Greg Carnes); doc. no. 51-8 (Declaration of John Thornell).

- White to conduct a standard pre-employment background check on Dickerson;

- White to determine that after interviewing the other students and Dickerson, but before interviewing Plaintiff, that the matter was a policy issue and not a Title IX issue;

- White to issue a No Contact Order to Dickerson;

- Carnes and Thornell to make recommendations to Kitts regarding Dickerson's continued employment;

- Kitts to accept the recommendation to place Dickerson on administrative leave through the end of the Spring 2016 term, and to not renew his employment agreement when it expired in May of that year; or

- Shields to follow UNA policy regarding Plaintiff's request to withdraw from UNA.

Id. at 9.

It is clear that plaintiff's proposed additional discovery overlaps with the topics covered in defendants' declarations, including Dickerson's interview, witness statements and interviews, investigation policies and procedures, the results and effectiveness of the investigation, and defendants' awareness of any risk of inappropriate behavior by Dickerson. Plaintiff cannot reasonably be expected to formulate an adequate response to defendants' qualified immunity arguments with such a one-sided evidentiary record. Moreover, it cannot be ignored that the

individual defendants are the ones responsible for the conversion of the motions to dismiss into motions for summary judgment, because they placed their own testimony at the center of the qualified immunity inquiry. If they wanted the issue of qualified immunity to be evaluated based solely upon the pleadings, they should not have filed declarations in support of their motion to dismiss. Now that the declarations have been filed, plaintiff must be allowed a meaningful opportunity to respond to them, and defendants' arguments about the burden that the discovery process will impose upon them carry less force.

Finally, it must be noted that the additional discovery plaintiff requests is not related *solely* to the claims for which the individual defendants claim qualified immunity. Plaintiff also requests discovery to support her Title IX and negligence claims, and there is no thumb on either side of the scale with regard to allowing additional discovery for those claims.

Taking all of the above factors into consideration, the court finds that plaintiff has demonstrated a need for additional discovery that outweighs the burden that will be imposed upon the individual defendants, even in light of defendants' assertions of qualified immunity. Plaintiff's motion for additional discovery pursuant to Federal Rule of Civil Procedure 56(d) will be granted. Even so, some of the issues raised in defendants' motions to dismiss are not affected by plaintiff's Rule 56(d) motion and

must be addressed before the parties commence discovery.

B. Official Capacity Claims Against Individual Defendants

The individual defendants assert that plaintiff's Fourteenth Amendment claims against them, in their official capacities, are barred by Eleventh Amendment immunity. *See Lane v. Central Alabama Community College*, 772 F.3d 1349, 1351 (11th Cir. 2014) ("Generally speaking, the Eleventh Amendment bars civil actions against state officials in their official capacity 'when the state is the real, substantial party in interest.'") (quoting *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101 (1984)). Plaintiff does not seem to contest that point, at least with regard to her claims for money damages.[59] *See Carr v. City of Florence, Ala.*, 916 F.2d 1521, 1524 (11th Cir. 1990) ("In [suits against state officials in their official capacities], the state is considered the real party in interest because an award of damages would be paid by the state.") (citing *Edelman v. Jordan*, 415 U.S. 651, 663 (1974)) (alteration supplied).

Plaintiff does, however, continue to seek injunctive relief from the individual defendants in their official capacities.

> Pursuant to the exception established in *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), official-capacity suits against state

[59] *See* doc. no. 56 (Plaintiff's Response Brief in Opposition to Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint), at 15 ("**III. Plaintiff has Sufficiently Pled her § 1983 Official Capacity Claim for Injunctive Relief**.") (emphasis and capitalization in original).

> officials are permissible . . . under the Eleventh Amendment when the plaintiff seeks "*prospective* equitable relief to end *continuing* violations of federal law." *See Summit Med. Assocs*.[*v. Pryor*], 180 F.3d [1326,] 1336[(11th Cir. 1999)] (emphasis in original).

Lane, 772 F.3d at 1351 (alterations supplied). Thus, any official-capacity claims for *retrospective* injunctive relief are barred, but any official-capacity claims for *prospective* injunctive relief may remain.

Plaintiff phrases her demand for injunctive relief as follows:

> Doe seeks prospective relief to stop the current policies and procedures which discourage students who have been sexually assaulted or harassed from seeking justice through UNA's Title IX office. Doe seeks prospective relief to stop the policies and procedures that allowed the individually named defendants to choose their own self-interest over the interest of protecting Doe, other female students and violations for the equal protection of a female's right to be free from gender discrimination under the law. Doe requests the Court issue a mandatory injunction ordering UNA to refrain from unlawful discrimination and/or retaliation as described herein, ordering UNA to refrain from creating and condoning a hostile sexual harassment and/or discriminatory environment against individuals on the basis of sex by immediately ceasing deliberate indifference to sexual harassment and sexual assaults, cease supporting and/or maintaining employees accused of sexual harassment and sexual assault and rape upon their students and to stop fostering an environment which condones teacher on student sexual misconduct.

Doc. no. 32 (Second Amended Complaint), ¶ 101. She also asks for an "Order enjoining UNA, along with all of its agents, employees, and those acting in concert therewith, from unlawful discrimination on the basis of sex, including the failure to

address, prevent, and/or remedy sexual harassment."[60] The court agrees with defendants that some of plaintiff's requests blur the line between prospective and retrospective relief. Plaintiff also confusingly mentions the University in her demand for injunctive relief on the Fourteenth Amendment claim, even though the University is not a defendant to that claim. Even so, it is not necessary, at this preliminary stage, to place each of plaintiff's demands into the category of either "prospective" or "retrospective" relief. Instead, it will suffice to hold that requests for prospective relief from the individual defendants in their official capacities are permitted, but requests for retrospective relief are not. The boundaries of plaintiff's entitlement to equitable relief, if appropriate under governing legal principles, can be fixed at the conclusion of this case.

C. State Law Negligent and/or Malicious Retention, Supervision, Training, and Hiring Claims Against the Individual Defendants

Plaintiff has expressly stated her claims for negligent and/or malicious retention, supervision, training, and hiring against *only* the individual defendants; they are *not* asserted against the University as an entity. Those claims are not viable.

The Alabama Supreme Court has described the basis for the torts of negligent and/or wanton (or, as plaintiff phrases it, "malicious") hiring, supervision, training,

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[60] Doc. no. 32 (Second Amended Complaint), at ECF 22, ¶C.

and/or retention in the following manner:

> "'In the master and servant relationship, the *master* is held responsible for his servant's incompetency when notice or knowledge, either actual or presumed, of such unfitness has been brought to him. Liability depends upon its being established by affirmative proof that such incompetency was actually known by the *master* or that, had he exercised due and proper diligence, he would have learned that which would charge him in the law with such knowledge. It is incumbent on the party charging negligence to show it by proper evidence. This may be done by showing specific acts of incompetency and bringing them home to the knowledge of the *master*, or by showing them to be of such nature, character, and frequency that *the master*, in the exercise of due care, must have had them brought to his notice. While such specific acts of alleged incompetency cannot be shown to prove that the servant was negligent in doing or omitting to do the act complained of, it is proper, when repeated acts of carelessness and incompetency of a certain character are shown on the part of the servant to leave it to the jury whether they would have come to his knowledge, had he exercised ordinary care.'"

Armstrong Business Services, Inc. v. AmSouth Bank, 817 So. 2d 665, 682 (Ala. 2001) (emphasis supplied) (quoting *Big B, Inc. v. Cottingham*, 634 So. 2d 999, 1003 (Ala. 1993) (in turn quoting *Lane v. Central Bank of Alabama, N.A.*, 425 So. 2d 1098, 1100 (Ala. 1983) (in turn quoting *Thompson v. Havard*, 285 Ala. 718, 725, 235 So. 2d 853 (1970))). " 'Wanton supervision' requires that the employer wantonly disregard its agent's incompetence . . . ." *Armstrong Business Services*, 817 So. 2d at 682.

The existence of an employer-employee relationship is essential: "liability runs *to the employer* precisely because it is *the employer* who exercises the authority to

hire, retain, train, or supervise the alleged 'incompetent' employee. It is *the employer* who has the authority (and duty) to prevent the harm caused by the 'incompetent' employee." *Hill v. Madison County School Bd.*, 957 F. Supp. 2d 1320, 1342 (N.D. Ala. 2013), *rev'd on other grounds by Hill v. Cundiff*, 797 F.3d 948 (11th Cir. 2015) (emphasis supplied).

> The nature of the employment relationship also suggests that potential liability for the tort of negligent/wanton hiring, supervision, or training is limited to the employer of the "incompetent" employee. The employee owes a duty to follow the directions of the employer in carrying out his job responsibilities. It is the nature of the master-servant relationship that the master controls the manner in which the servant performs the work. The employer is liable for the negligence of the servant precisely because he retains the authority to direct the work of the servant in a way to avoid causing injury to others. When an employee is entrusted by the master with supervising the work of subordinate co-employees, his duty to do so runs to the master. It is his responsibility to supervise other employees as directed by the master. Imposing a separate and distinct duty to "supervise reasonably," running to other people outside the master-servant relationship, creates the possibility of a conflict of duties between what the master has directed and others claiming a right to the duty, ultimately stripping the master of the right to control the work of his employees. The master might believe that a certain type of training or supervision is best for his employees, but supervisory employees charged with carrying out the training might believe that other or additional training or supervision is "reasonably" necessary if they personally are to avoid being sued for the incompetence of the subordinate employee. This conflict of duties undermines the employer's authority in the workplace and the very legal basis on which the employer is held liable for the negligence of his employees — namely, that it is he who controls them. If supervisory personnel do a poor job of training or supervising subordinate employees, they must answer to their employer. If that poor job of

> training or supervision results in injury to another, it is the employer who must answer for it, not the supervisory co-employees who carried out the training or supervision, for it is the employer who remains responsible for assuring the competence of his employees. *For this reason, the tort of negligent hiring, supervision, and training necessarily runs against the employer only, in order to preserve the responsibility of employees to their employers.*

Hill, 957 F. Supp. 2d at 1344-45 (emphasis supplied).

Plaintiff has not alleged that any of the individual defendants were Dickerson's employer. Instead, it seems apparent that the University was his employer, and the individual defendants were plaintiff's co-workers and/or supervisors.[61] Moreover, plaintiff did not reply to this argument in her response brief.[62] For those reasons, summary judgment is due to be granted in favor of the individual defendants on plaintiff's state law claim for negligent and/or malicious retention, supervision, training, and hiring.

D. Motion to Join Dickerson as a Required Party

The University argues that, with regard to any remaining claims, Dickerson should be joined as a required party pursuant to Federal Rule of Civil Procedure 19,

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[61] *See* doc. no. 32 (Second Amended Complaint), ¶¶ 9-16 (identifying each of the individual defendants by reference to their positions at the University), ¶ 72 ("Doe eventually learned Dickerson had been charged with Rape and Assault **prior to his employment with UNA.**") (emphasis in original).

[62] *See* doc. no. 56 (Plaintiff's Response Brief in Opposition to Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint), at 22-23. Plaintiff only argued that her state law claims should not be dismissed because the individual defendants are not entitled to discretionary function immunity.

which provides, in pertinent part, that:

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> . . . .
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> . . . .
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1)(B)(ii).

There is no reason to anticipate any problems with effecting service of process upon Dickerson, and his joinder would not prevent this court's exercise of federal question subject matter jurisdiction pursuant to Title IX and the Fourteenth Amendment. Thus, the remaining question is whether adjudicating this action without Dickerson as a party would leave the University subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of an interest claimed by Dickerson.

The University argues that Dickerson must be joined because he is the perpetrator of all the actions that led to plaintiff's claims, but, as plaintiff points out,

she is not seeking to hold the University directly liable for Dickerson's sexual harassment and assault. Instead, her claims arise from the University's decision to hire Dickerson and the University's response to plaintiff's complaint about Dickerson. Dickerson might be called as a *witness* to give deposition or trial testimony related to those claims, but that does not make him a necessary *party*.

The University also asserts that Dickerson has claimed an interest related to the subject matter of plaintiff's complaint by filing

> a claim with the Board of Adjustment of the State of Alabama accusing UNA of "explicit bias towards only the protection of the student(s) and not of [Dickerson]," and he seeks damages for UNA's failure to renew his teaching contract. Dickerson has also filed a charge against UNA with the Birmingham District Office of the U.S. Equal Employment Opportunity Commission alleging that UNA failed to renew Dickerson's contract because he reported that Plaintiff was harassed by other students.

Doc. no. 47 (Brief in Support of the University of North Alabama's Motion to Dismiss Second Amended Complaint), at 15-16 (alteration in original). The University did not attach a copy of Dickerson's Board of Adjustment claim or EEOC charge. Moreover, more than a year has passed since the University filed the brief that asserted the arguments quoted above.[63] Any claims or charges asserted by Dickerson may have since been resolved. In any event, the University did not cite

[63] *See* doc. no. 47 (Brief in Support of the University of North Alabama's Motion to Dismiss Second Amended Complaint), filed January 4, 2018.

any authority or offer any substantive explanation of why Dickerson's complaints would expose it to double or inconsistent liability. The University will be required to update the record with current information about Dickerson's Board of Adjustment claim and EEOC charge, and to provide additional briefing and citation to legal authority to support its argument that Dickerson must be joined pursuant to Rule 19.[64]

III. CONCLUSION AND ORDER

In accordance with the foregoing, it is ORDERED as follows:

(1) The University's motion to dismiss the Second Amended Complaint, which has been converted to a motion for summary judgment, is DENIED.

(2) The University's alternative motion to join David Dickerson as a required party is held in abeyance. The University is ORDERED to file a supplemental brief on or before April 5, 2019. The University must address the current status of Dickerson's EEOC charge and claim with the State of Alabama Board of Adjustment, provide copies of any supporting documentation, and cite legal authority to support

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[64] Even though updated information is necessary, the court does not agree with plaintiff that the motion to join Dickerson as an indispensable party should be adjudicated *after* the completion of discovery. *See* doc. no. 56 (Plaintiff's Response Brief in Opposition to Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint), at 24 ("The Defendant's motion is premature as there has been no discovery in this action to determine facts which would require that David B. Dickerson be joined pursuant to Fed. R. Civ. P. 19(a). Therefore, Plaintiff asks the Court to stay Defendant's motion to join David B. Dickerson as a party defendant until after the parties engage in discovery."). If Dickerson is to be made a party, that should occur at the earliest possible stage, so that he can have the opportunity to participate in discovery.

its argument. Plaintiff must file a response brief on or before April 12, 2019.

(3) The motion to dismiss the Second Amended Complaint filed by the individual defendants (*i.e.,* Dr. Kenneth Kitts, David Shields, Dr. Jana Beaver, Jerome Gafford, Tammy Jacques, Catherine White, Dr. Gregory Carnes, and John Thornell) which has been converted to a motion for summary judgment, is GRANTED in part and DENIED in part. Plaintiff's state law claim against those defendants for negligent and/or malicious retention, supervision, training, and hiring is DISMISSED. Her Fourteenth Amendment claim against those defendants, in their official capacities, for money damages and retrospective injunctive relief, also is DISMISSED. Her Fourteenth Amendment claim against those defendants, in their official capacities, for prospective injunctive relief, and her Fourteenth Amendment claim against them, in their individual capacities, for all types of relief, remain pending.

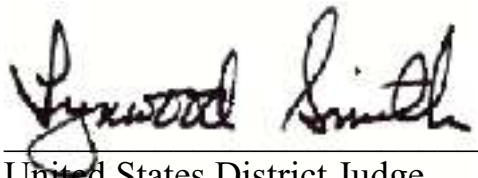
(4) Plaintiff's motion for additional discovery pursuant to Federal Rule of Civil Procedure 56(d) is GRANTED. Pursuant to the Federal Rules of Civil Procedure and this court's Uniform Initial Order,[65] the parties are ORDERED to immediately proceed to discovery on all remaining claims (*i.e.,* the Title IX claim against the University, the Fourteenth Amendment claim against the individual

[65] Doc. no. 20.

defendants, in their individual capacities, for all types of relief, and the Fourteenth Amendment claim against the individual defendants, in their official capacities, for prospective equitable relief only).[66]

(5) Plaintiff's motion for a status conference is DENIED.

DONE and ORDERED this 19th day of March, 2019.



United States District Judge

[66] Doc. no. 20.