[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10621
Non-Argument Calendar

D.C. Docket No. 2:18-cv-01112-JEO

HARTNEL LAMBERT,

Plaintiff-Appellant,

versus

BOARD OF TRUSTEES, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(November 25, 2019)

Before NEWSOM, GRANT, and TJOFLAT, Circuit Judges.

PER CURIAM:

Hartnel Lambert sued the University of Alabama at Birmingham (UAB) and a school official, Arline Savage, alleging that a failing grade that he received in an undergraduate accounting course was awarded in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Now proceeding *pro se*, Lambert appeals the district court's order granting UAB's and Savage's motions to dismiss his complaint against them and denying his motion for leave to amend.

On appeal, Lambert first restates an argument that he made to the district court—namely, that UAB and Savage, as sued in her official capacity, were not entitled to Eleventh Amendment immunity under *Ex parte Young*, 209 U.S. 123 (1908). He never, though, expressly argues that the district court's determination regarding Eleventh Amendment immunity was erroneous. Lambert also argues that the district court erred in dismissing his Fourteenth Amendment equal protection and due process claims for failure to state a claim—in particular, he contends that the material adverse action against him was motivated by his race and that there was no evidence that he was afforded his due process rights. Lastly, Lambert argues that the district court erred in denying him leave to amend his complaint.[1] UAB and Savage respond (1) that Lambert has abandoned his

[1] Lambert also attaches an affidavit to his initial brief on appeal, and the appellees argue that we should not consider it. We do not consider affidavits outside the record on appeal. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 609–10 (11th Cir. 1991). Accordingly, we will not consider Lambert's affidavit because it was not before the district court and is outside the record.

Eleventh Amendment and equal protection arguments, (2) that those arguments fail on the merits in any event, and (3) that the district court properly denied Lambert's motion to amend.

I

We ordinarily review *de novo* a district court's order dismissing a complaint on Eleventh Amendment grounds. *In re Emp't Discrimination Litig. Against State of Ala.*, 198 F.3d 1305, 1310 (11th Cir. 1999). In doing so, we view the facts in the light most favorable to the plaintiff. *Parise v. Delta Airlines, Inc.*, 141 F.3d 1463, 1465 (11th Cir. 1998). We also liberally construe *pro se* pleadings. *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998) (per curiam). Issues not briefed on appeal by a *pro se* litigant, however, are deemed abandoned. *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008) (per curiam). An issue may be abandoned where a party makes only a passing reference to it in his brief, does not discuss the district court's analysis of the issue, and does not make any legal or factual argument as to why the district court's decision was in error. *See Denney v. City of Albany*, 247 F.3d 1172, 1182 (11th Cir. 2001).

"[F]ederal courts lack jurisdiction to entertain claims that are barred by the Eleventh Amendment." *McClendon v. Ga. Dep't of Cmty. Health*, 261 F.3d 1252, 1256 (11th Cir. 2001). Accordingly, Eleventh Amendment immunity bars suits brought in federal court against state actors sued in their official capacities.

Manders v. Lee, 338 F.3d 1304, 1308 (11th Cir. 2003) (en banc). State officers may still be sued in their individual capacities, or under the doctrine of *Ex parte Young*. *See id.* at n.7; *McClendon*, 261 F.3d at 1255–56.

Under the *Ex parte Young* doctrine—which can be understood as an exception to Eleventh Amendment sovereign immunity—federal courts may "entertain suits against state officers seeking prospective equitable relief to end continuing violations of federal law." *McClendon*, 261 F.3d at 1255–56. This narrow exception applies only to prospective, not retrospective, relief, and only to suits against state officers, not the state or its agencies. *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). "In other words, a plaintiff may not use the doctrine to adjudicate the legality of past conduct." *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1337 (11th Cir. 1999).

We reject Lambert's Eleventh Amendment argument for two reasons. As an initial matter, Lambert has failed to adequately preserve any argument that the district court erred in dismissing several of his claims on Eleventh Amendment grounds. The only mention of *Ex parte Young* in his opening brief is an excerpt from his response in opposition to the motion to dismiss before the district court, which addresses only declaratory and injunctive relief. Lambert has therefore abandoned any argument that the district court erred in dismissing his claims for

damages against the defendants in their official capacities. *See Timson*, 518 F.3d at 874.

Moreover, even if Lambert had properly briefed the Eleventh Amendment issue, the district court was correct to dismiss all claims for damages against the defendants in their official capacities. Lambert's claims for declaratory and injunctive relief are also barred by sovereign immunity insofar as they are directed at the defendants in their official capacities. Those claims would redress only a past harm and are no different from damages in that respect. Lambert's claims all seek redress for one instance of government conduct—the issuance an "F" grade, which he claims was motivated by racial considerations. But that one instance cannot constitute "an ongoing and continuous violation of federal law." *Pryor*, 180 F.3d at 1338. Lambert makes no allegation that UAB is continuing to evaluate him based on his race, or that the process by which he continues to be evaluated is inherently defective. As a result, "the Eleventh Amendment prohibit[s] the issuance of a declaratory judgment" here because there is "no threat of state officials violating the . . . law in the future." *Id.* (quoting *Green v. Mansour*, 474 U.S. 64, 73 (1985)). The only claims not barred by sovereign immunity are those against Savage in her individual capacity, to which we now turn.

II

"We review *de novo* the district court's grant of a motion to dismiss under [Federal Rule of Civil Procedure] 12(b)(6) for failure to state a claim." *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003) (per curiam). In doing so, we view the complaint in the light most favorable to the plaintiff, accepting the plaintiff's well-pleaded facts as true. *Id.*. Stating a plausible claim for relief requires "plead[ing] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege facts showing that he was deprived of a constitutional right "by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). "Absent the existence of an underlying constitutional right, no section 1983 claim will lie." *Wideman v. Shallowford Cmty. Hosp., Inc.*, 826 F.2d 1030, 1032 (11th Cir. 1987).

A

The Equal Protection Clause of the Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. As a general matter, it prohibits state

officials from engaging in race discrimination in the context of discipline and adverse actions in higher education. *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003). To prevail on an equal-protection-based race discrimination claim, the plaintiff must establish a discriminatory motive or purpose behind the challenged conduct, not just a discriminatory effect. *See Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 413 (1977).

We reject Lambert's equal protection claim for two reasons. As an initial matter, Lambert abandoned his equal protection claim by failing to raise it in his first brief on appeal. His only mention of equal protection in that brief is an excerpt from the magistrate judge's memorandum opinion granting the defendant's motion to dismiss. Unsurprisingly, this passage contains no argument that the district court was wrong to dismiss Lambert's equal protection claims. *See Timson*, 518 F.3d at 874.

Moreover, even had Lambert not abandoned the issue, the district court was right to dismiss the equal protection claim. Lambert alleges no facts from which a racial motive for his treatment can be inferred. Lambert merely points to the fact that the four men who met with him to discuss his alleged academic misconduct were white, while he is black. This fact alone is insufficient to state an equal protection claim. *Cf. Brinkman*, 433 U.S. at 413 (explaining that the racial makeup of schools, "standing by itself, is not a violation of the Fourteenth Amendment in

the absence of a showing that this condition resulted from intentionally segregative actions.").

B

The Due Process Clause of the Fourteenth Amendment provides: "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Section 1983 allows a plaintiff to seek relief for the government's failure to comply with the Due Process Clause. *See Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003).

The procedural component of the Due Process Clause requires, at a minimum, notice and the opportunity to be heard incident to deprivation of a life, liberty, or property interest. *Id.* To sustain a procedural due process claim under § 1983, a plaintiff must prove "three elements: (1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process." *Id.*

A flexible, "informal give-and-take" between the student and the school's administrative body may constitute constitutionally-adequate process for a disciplinary decision in an academic context. *See Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 85–86, 89–90 (1978). Moreover, when state law provides an adequate means to remedy the alleged procedural deprivation, there is no due process violation regardless of whether the plaintiff availed himself of that

remedy. *See Horton v. Bd. of Cty. Comm'rs of Flagler Cty.*, 202 F.3d 1297, 1300 (11th Cir. 2000). In Alabama, a party may seek relief from the state courts, which hear lawsuits involving claims by public university students relating to arbitrary, capricious, or bad-faith grading. *See, e.g.*, *Burch v. Moulton*, 980 So. 2d 392, 398 –99 (Ala. 2007) (recognizing "that [public university officials] have discretion in determining a student's academic status"); *Hartman v. Bd. of Trustees of Univ. of Ala.*, 436 So. 2d 837, 840–41 (Ala. 1983).

"The substantive component of the Due Process Clause protects those rights that are fundamental, that is, rights that are implicit in the concept of ordered liberty." *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc) (internal quotation marks and citation omitted). Substantive due process rights are created only by the Constitution, so "areas in which substantive rights are created only by state law . . . are not subject to substantive due process protection." *Id.* Accordingly, such state-law-based rights, including any rights to public education, are generally subject only to procedural due process protections. *See Doe v. Valencia Coll.*, 903 F.3d 1220, 1235 (11th Cir. 2018) ("[S]tudents at a public university do not have a fundamental right to continued enrollment."). In the absence of a fundamental right, executive action constitutes an actionable violation of substantive due process only if it shocks the conscience. *See Tinker v. Beasley*, 429 F.3d 1324, 1327 (11th Cir. 2005).

We first note that the district court simply assumed, without deciding, that the award of a grade implicates an interest in "liberty or property" within the meaning of the Due Process Clause. We similarly express no opinion as to whether Lambert had a cognizable liberty or property interest in his grade. We need not decide this question because Lambert received all process that may have been due, even assuming he had a cognizable interest in his grade.

Lambert does not complain that he was deprived of all process—merely that the process was inadequate. He was given an opportunity to explain himself at the initial informal meeting, and he took the opportunity to contest his grade through UAB's internal appeals system. Additional process in the state courts of Alabama was available to him, as noted above. No more process was due to Lambert than this combination of a pre-deprivation "opportunity to respond" and thorough post-deprivation process. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547 & n.12 (1985) (indicating that the availability of post-deprivation process is relevant to determine how much pre-deprivation process is required). An informal hearing is all the pre-deprivation process required in the context of most academic disciplinary decisions. *See Horowitz*, 435 U.S. at 86. Moreover, as the district court correctly observed, there is little danger in abbreviating pre-deprivation process in the context of grading. It is quite unlikely that any irreparable harm would result from a low grade before it could be reviewed by UAB internally. In

light of these considerations, Lambert has not stated a plausible claim that his procedural due process rights were violated.

Nor did any defendant violate Lambert's substantive rights under the Due Process Clause. Lambert had no "fundamental right to continued enrollment," much less to a particular grade in a particular course. *Valencia Coll.*, 903 F.3d at 1235. Nor does Lambert's "F" grade shock the conscience. Whether or not the punishment was exactly proportionate to Lambert's misconduct, UAB clearly had a plausible reason for issuing the failing grade—the uncontested fact that Lambert *sold* his service as a tax preparer in connection with a school program for providing *pro bono* tax preparation services.

III

We review the denial of a motion to amend for an abuse of discretion, although "we review *de novo* the underlying legal conclusion of whether a particular amendment to the complaint would be futile." *Chang v. JPMorgan Chase Bank, N.A.*, 845 F.3d 1087, 1093–94 (11th Cir. 2017) (internal quotation marks and citation omitted). "[A] district court may properly deny leave to amend the complaint under Rule 15(a) when such amendment would be futile, such as when the complaint as amended is still subject to dismissal." *Id.* at 1094 (internal quotation marks and citation omitted).

Lambert offered to amend his complaint only to add individual members of the board as defendants in their *official* capacities. Such an amendment would have been doubly futile. First, no viable claim for prospective relief would exist against the board members in their official capacities. These claims would therefore be barred by the Eleventh Amendment the same way all claims are barred against Savage in her official capacity. Furthermore, the amended complaint would still fail to state a claim under either the Equal Protection Clause or the Due Process Clause and so would still be subject to dismissal under Rule 12(b)(6).

AFFIRMED.