

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

THE NATIONAL ASSOCIATION OF
BOARDS OF PHARMACY,

Plaintiff,

v.

THE BOARD OF REGENTS OF THE
UNIVERSITY SYSTEM OF
GEORGIA, *et. al.*,

Defendants.

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CIVIL ACTION NO. 3:07-CV-84 CDL

DEFENDANT FLYNN WARREN, JR. 'S REPLY BRIEF IN SUPPORT OF HIS
RENEWED SPECIAL LIMITED APPEARANCE MOTION TO DISMISS

INTRODUCTION

Subject matter jurisdiction is a threshold matter and a case may not proceed if the court lacks jurisdiction to hear it. *Phillips v. U.S.*, 77 Fed. Cl. 513, 516-17 (Fed. Cl. 2007). The burden is on the plaintiff to establish subject matter jurisdiction. *Id.* When a court lacks the statutory and constitutional power to adjudicate a case, it lacks subject matter jurisdiction and the case must be dismissed. *Social Aid and Pleasure Club Task Force v. City of New Orleans*, 2007 WL 763241, *1 (E.D.La. 2007). As discussed in Professor Warren's principal brief, the statutory power plaintiff invokes in its amended complaint for subject matter jurisdiction has been declared unconstitutional in every case that has considered it and should be declared unconstitutional in this case as well. The Eleventh Amendment of the Constitution embodies the

principle of State sovereignty and expressly discourages subjecting States to suits and liability in the federal courts.

ARGUMENT AND CITATION OF AUTHORITIES

I. Professor Warren is entitled to sovereign immunity on the plaintiff's copyright claim

- A. The allegations against Professor Warren are in his official capacity and as such, despite the language in the caption, Professor Warren is entitled to sovereign immunity

“Where an action names only individual defendants, but in effect is an effort to get around the Eleventh Amendment and collect from a state for the authorized actions of its agents and employees, the Eleventh Amendment applies.” *Wilson v. Beebe*, 770 F.2d 578, 587 (6th Cir. 1985). While the caption indicates Professor Warren is named in his individual capacity, the copyright infringement claim in the Amended and Restated Verified Complaint (the “Amended Complaint”), in fact alleges that the actions upon which liability is premised were undertaken by Professor Warren in the scope of his employment and were state-authorized actions. (Amended Complaint, pg. 13, ¶¶27, 28, 29 & Pl. Brief, pg. 34-35). Therefore, Professor Warren urges this Court to analyze the copyright infringement claim as if brought against Professor Warren in his official capacity.

Even when the caption reads, “individual capacity,” where the allegations in a complaint do not allege a claim against a state employee in his individual capacity, but rather in an official capacity, and the parties have not litigated the case as an individual capacity case, the court may treat the case as an official capacity case. *Marsh v. Butler Co.*, 268 F.3d 1014, 1024 (11th Cir. 2001). Plaintiff added “individual capacity” to the caption, yet continued to allege an official capacity claim against Professor Warren under the copyright infringement claim. The caption of

a complaint is not controlling. *Marsh*, 268 F.3d at 1024. “The caption is chiefly for the court’s administrative convenience.” *Id.* “To use the Rule 10 caption to create an ambiguity when the statement of claim is itself not ambiguous is incorrect.” *Id.* Therefore, Professor Warren urges this court to look to the allegations of the pleading itself and the history of the litigation to date as an aid in ultimately concluding that the Amended Complaint is a suit against Professor Warren in his official capacity with respect to the copyright infringement claim.

All indications from the briefings of plaintiff to date have been that Professor Warren was sued in his official capacity because he was acting within the scope of his employment, with the issue of sovereign immunity being principally addressed. Clearly, plaintiff has proceeded in this matter as if Professor Warren were being sued in his official capacity. It is well settled law that although a suit is brought against an individually-named state employee, where the state is the real party in interest, the Eleventh Amendment works to bar the lawsuit for damages. *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 277 (1997); *Regents of the University of California v. Doe*, 519 U.S. 425, 429 (1997); *Edelman v. Jordan*, 415 U.S. 651, 680-81 (1974).

Among the allegations, plaintiff alleges a need for permanent injunction because the conduct is continuing. (Amended Complaint, pg. 14, ¶33). However, Professor Warren is a retired professor and there is no need for injunction against a retired professor individually. The fact that the Amended Complaint seeks injunctive relief from Professor Warren supports the contention that Plaintiff’s suit is truly a suit against Professor Warren in his official capacity with regard to the copyright claim because “deprivation of a constitutional right **can only be remedied by the government.**” *Hatfill v. Gonzales*, 519 F.Supp.2d 13, 26 (D.D.C. 2007).

Plaintiff chose to plead against “Defendants,” including all defendants in its allegations of copyright infringement. The Amended Complaint does not name Professor Warren as an

individual in its copyright infringement claim, but instead addresses him together with the State of Georgia and other administrators and board members, as if he were only sued in his official capacity. (Amended Complaint, pg. 14-15, ¶35, 38 & Count I).

Plaintiff relies on three 1980's intellectual property cases from other jurisdictions.¹ These cases are easily distinguishable. In *Richard Anderson Photography v. Brown*, the court found that the relief sought against the state employee would not come from the state, but would come from the employee personally. This would not further the purposes of sovereign immunity. *Richard Anderson Photography v. Brown*, 852 F.2d 114, 122 (4th Cir. 1988). Here the relief sought would come directly from the State of Georgia. *Kersavage v. Univ. of Tenn.* is a case decided on qualified immunity of a state employee and not sovereign immunity. *Kersavage v. Univ. of Tenn.*, 731 F.Supp. 1327, 1330 (E.D. Tenn. 1989). Therefore, reliance on *Kersavage* is misplaced. Finally, *Lane v. First National Bank of Boston*, focused on whether Congress intended to subject states to liability under the copyright act by amending Section 501 to apply to "anyone" verses "any person." *Lane v. First Nat'l Bank of Boston*, 687 F.Supp. 11, 15 (D.Mass. 1988). The court found that Congress did not unequivocally abrogate the sovereign immunity of the states. *Id.* The *Lane* case is not only dated, but also inapplicable to plaintiff's analysis of a state employee being sued in an individual capacity.

One of the fundamental purposes of sovereign immunity is to provide the states with the respect owed them as joint sovereigns. *Federal Maritime Commission v. South Carolina State Ports*, 535 U.S. 743, 765 (2002). For public policy reasons and in keeping with one of the fundamental purpose of sovereign immunity, Professor Warren should be afforded the same sovereign immunity that the State of Georgia is afforded when acting within the scope of his

¹ *Richard Anderson Photography v. Brown*, 852 F.2d 114, 122 (4th Cir. 1988); *Kersavage v. Univ. of Tenn.*, 731 F.Supp. 1327, 1330 (E.D. Tenn. 1989); *Lane v. First Nat'l Bank of Boston*, 687 F.Supp. 11, 15 (D.Mass. 1988).

employment in this case. Georgia, under The Georgia Tort Claims Act, provides immunity for its state employees who act within the scope of their employment and the state does not waive any immunity with respect to actions in federal court. O.C.G.A. §50-21-21; §50-21-23.

As Professor Warren has made clear, despite plaintiff's assertion of individual capacity in the caption, sovereign immunity is applicable to him. The Amended Complaint does not allege a claim against Professor Warren individually in the copyright count. In fact, the Amended Complaint and Plaintiff's Brief allege that Professor Warren was acting within the scope of his employment and was not a rogue professor, and his activities were authorized by the state. (Amended Complaint ¶¶22, 23, 26, 27, 28, and Pl. Brief, pg. 34). All indications in the proceedings up to this point have been that Professor Warren was being sued in his official capacity. This is evident from the relief sought against Professor Warren on the copyright infringement claim including injunctive relief. Such relief is only available if Professor Warren were sued in his official capacity. Now, in an attempt to salvage its case before this court, plaintiff ignores the scope of employment allegations in the Amended Complaint and looks to the case caption to redirect its last minute argument.

- B. Even if this Court determines that the Amended Complaint sufficiently alleges copyright infringement against Professor Warren in his individual capacity, Professor Warren is still entitled to sovereign immunity because the judgment sought will, in fact, operate against the State of Georgia, with the effect being the same as if it were brought against the state.

“Regardless of the manner by which a plaintiff designates the action, a suit should be regarded as an official-capacity suit...when [the] judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or compel it to act.” *Hatfill*, 519

F.Supp.2d at 24, *quoting Howe v. Bank for Intern. Settlements*, 194 F.Supp.2d 6, 19 (D.Mass. 2002) (internal quotations omitted).

Another purpose of sovereign immunity is the “important function of shielding state treasuries and thus preserving ‘the States’ ability to govern in accordance with the will of their citizens.”” *Federal Maritime Commission*, 535 U.S. at 765. Though not in the Amended Complaint, Plaintiff’s Brief alleged that a judgment against Professor Warren would be paid from his personal assets and not paid from state funds. (Pl. Brief, pg. 2). This is untrue. The Amended Complaint and Plaintiff’s Brief allege that Professor Warren was acting within the scope of his employment and that his activities were authorized by the state. (Amended Complaint, pg. 13, ¶¶28, 29, and Pl. Brief, pg. 34-35). Under these facts, any relief obtained would come from the State of Georgia. Therefore, an allegation against a state employee for actions taken in the course of his employment is synonymous to a suit seeking relief from the State of Georgia. This Circuit has held that a claim against a state official should be considered as one in the defendant’s official capacity if the relief sought would in fact operate against the state. *Jackson v. Georgia Dept. of Transp.*, 16 F.3d 1573, 1577 (11th Cir. 1994). Therefore, if sovereign immunity applies to the State of Georgia on plaintiff’s copyright claim, sovereign immunity should likewise apply to Professor Warren.

Plaintiff has cited two 1980’s cases relating to §1983 claims from other jurisdictions in an attempt to overcome the application of sovereign immunity to Professor Warren.² Under Eleventh Circuit precedent a claim made against a state official should be considered as one in the defendant’s official capacity if the relief sought would **in fact** operate against the state. (emphasis added) *Jackson v. Georgia Dept. of Transp.*, 16 F.3d 1573, 1577 (11th Cir. 1994).

² *Duckworth v. Franzen*, 780 F.2d 645, 650-51 (7th Cir. 1985); *Wilson v. Beebe*, 770 F.2d 578, 588 (6th Cir. 1985).

These cases are further distinguishable on the mere fact that they are §1983 cases, a law enacted to provide a remedy for violations of individuals' civil rights following a time of social change in our country. This case is not and has not been brought under 42 U.S.C. §1983. While the Supreme Court confirmed that damage claims against individual defendants are a permissible remedy in some circumstances, such as §1983, it infers that damage claims against state employees individually are not available in other circumstances. *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974). To allow a damage claim against an individual state employee to stand in a copyright action, is to essentially circumvent the Eleventh Amendment and should not be allowed.

II. Professor Warren is entitled to qualified immunity on the plaintiff's copyright claim

As discussed above, state employees must be able to act freely and use their discretion without fear of litigation. Qualified immunity balances that recognized need with a need for a damages remedy to protect the rights of citizens. *GJR Investments, Inc. v. County of Escambia*, 132 F.3d 1359, 1366 (11th Cir. 1998). A defendant state employee is given

the **benefit of the doubt**, unless [his] actions were so obviously illegal in the light of then-existing law that only an official who was incompetent or who knowingly was violating the law would have committed them. Qualified immunity thus represents the **rule, rather than the exception**: "Because qualified immunity shields government actors in all but exceptional cases, courts should think long and hard before stripping defendants of immunity."

(emphasis added) *Id. quoting Lassiter v. Alabama A & M University, Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994).

Some detail is required in the allegations of a complaint to overcome a defense of qualified immunity. *GJR Investments*, 132 F.3d at 1367. The qualified immunity analysis requires a two-part analysis. "First, the official must prove that the allegedly unconstitutional

conduct occurred while he was acting within the scope of his discretionary authority. (citation omitted) Second, if the official meets the burden, the plaintiff must prove that the official's conduct violated clearly established law." *Harbert International, Inc. v. James*, 157 F.3d 1271, 1281 (11th Cir. 1998), *citing Evans v. Hightower*, 117 F.3d 1318, 1320 (11th Cir. 1997). Plaintiff has alleged that Professor Warren was acting within the scope of his employment with the State of Georgia. (Amended Complaint, pg. 13, ¶28). Though Professor Warren contends that the allegation of copyright infringement was not adequately pled as to Professor Warren in his individual capacity, it is nonetheless within the discretionary duties of a professor to prepare or take part in the preparation of course materials. Additionally, such actions would be within the scope of his authority.

The burden, then, is on the plaintiff to establish that Professor Warren violated a clearly established law. *Harbert International, Inc. v. James*, 157 F.3d 1271, 1281 (1998). Plaintiff has failed to meet its burden. Where a violation of a constitutional right is not sufficiently alleged, then the allegation of a clearly established right is likewise insufficient. *Id.* A court may not infer claims other than those raised in the pleading and where a court is not able to determine from the pleading that a defendant's actions violated a clearly established right, the rule of qualified immunity prevails. *Id.* "For the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing' violates federal law." *Harbert International, Inc. v. James*, 157 F3d. 1271, 1284 (1998).

First, with the law surrounding CRCA in flux, it cannot be said that there was a clearly established right. While the copyright law, in general, may be considered clearly established, the

questioned constitutionality of CRCA is certainly enough to also raise doubt as to whether plaintiff had an established right to copyright as against the states. Second, Professor Warren's knowledge of the 1995 agreement, and indeed his participation in it, does not affect Professor Warren's qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). In order to limit the burden of factual inquiry for government officials, the Supreme Court adopted the objective standard for determining the validity of a qualified immunity defense. *Id.* Third, the applicability of the fair use provision in the copyright statute casts a doubt about whether the right alleged was clearly established at the time, and Plaintiff fails to overcome that doubt.

17 U.S.C. §107.

“Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has every emerged.” Staff of H. Comm. on the Judiciary, H.R. Rep. No. 94-1476. The line between infringement and fair use of copyrighted material depends on the facts of each case. The fair use limitation on copyright law and the applicability of the limitation on exclusive rights for teaching at a state university casts doubt on plaintiff's burden to show Professor Warren violated a clearly established law. 17 U.S.C. §107.

Government officials performing discretionary functions are generally granted qualified immunity “as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.” *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). None of the cases plaintiff cites involve a state employed professor being sued for work done in the scope of employment. Instead, the individuals in the cases cited have compiled review materials and provided teaching review courses either through an entity owned by them or through a private school. Here, we have a professor of a state university preparing materials for a review course to be taught as a part of his employment. Plaintiff can point to no factually analogous case to

support its assertion that there was clearly established law. *Harbert International, Inc.*, 157 F.3d at 1284-85. Plaintiff has failed to discharge its burden and Professor Warren is entitled to qualified immunity.

Qualified immunity should be applied at the earliest stage in the litigation as possible because the defense is immunity not only from damages, but also from suit. *Marsh v. Butler Co.*, 268 F.3d 1014, 1022 (11th Cir. 2001). Therefore, even at this early stage, without the more substantial evidentiary showing that could be made, and under the allegations of the Amended Complaint, which must be taken as true in considering this motion to dismiss, Professor Warren is entitled to an order dismissing this action on the basis of qualified immunity. For this reason, Professor Warren urges this court grant his motion to dismiss.

III. Professor Warren adopts and incorporates The Board of Regents' argument that the CRCA is an unconstitutional Congressional attempt to abrogate state sovereign immunity.

In order not to unnecessarily expand the already large number of pages of briefs submitted to the court in connection with the pending motions to dismiss, Professor Warren joins in and adopts the arguments made by the Board of Regents that the CRCA is unconstitutional and not a valid exercise of Congress' powers under either Article I or under §5 of the Fourteenth Amendment, as set forth in section II of its reply brief.

IV. Professor Warren adopts and incorporates the Board of Regents' argument that there have been no waiver of state sovereign immunity or consent to suit in this case.

Professor Warren joins in and adopts the arguments made by the Board of Regents that there has been no waiver or consent to suit by the Board or Professor Warren, as set forth in section III of its reply brief.

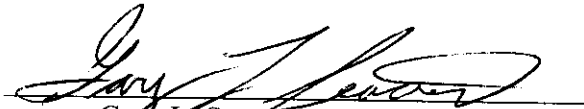
V. This Court does not have jurisdiction over the breach of contract and misappropriation of trade secrets claims because Professor Warren is immune from the copyright infringement claim

Plaintiff alleges supplemental jurisdiction over the breach of contract claim and the misappropriation of trade secrets claim based on its assumption that it has jurisdiction over Professor Warren on the copyright infringement claim. Because Professor Warren has shown that he is entitled to sovereign immunity and that he is entitled to qualified immunity, this court does not have jurisdiction over the breach of contract claim and the misappropriation of trade secrets claim.

CONCLUSION

For the reasons set forth herein, Defendant Flynn Warren Jr. respectfully requests that his motion to dismiss be granted.

Respectfully submitted this 18th day of January, 2008

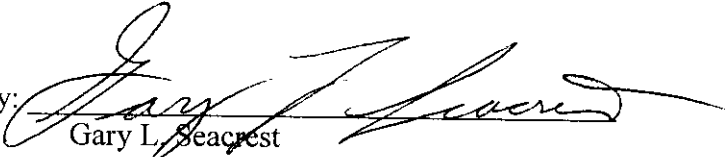


Gary L. Seacrest
Georgia Bar No. 632900
John G. Haubenreich
Georgia Bar No. 337950
Annarita M. Busbee
Georgia Bar No. 098141
Attorneys for Defendant, Flynn Warren, Jr.

Seacrest, Karesh, Tate & Bicknese, LLP
56 Perimeter Center East, Suite 450
Atlanta, GA 30346
PH: (770) 804-1800
FX: (770) 804-1400
EM: sktbgary@bellsouth.net
EM: sktbjohn@bellsouth.net
EM: sktbanna@bellsouth.net

This 18th day of January, 2008.

SEACREST, KARESH, TATE & BICKNESE, LLP

By: 
Gary L. Seacrest
Georgia Bar No. 632900

56 Perimeter Center East, Suite 450
Atlanta, GA 30346
PH: (770) 804-1800
FX: (770) 804-1400
EM: sktbgary@bellsouth.net