UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

RONALD EDWARD BARNARD,

Plaintiff,

CASE NO.:
3:01-CV-848-J-20TJC

vs.

FLORIDA COMMUNITY COLLEGE AT JACKSONVILLE, LOURDES SILVA, SHOUAN PAN, DUANE DUMBLETON and **JAMES E. MARTIN,**

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS OF DEFENDANTS FLORIDA COMMUNITY COLLEGE AT JACKSONVILLE, MARTIN, DUMBLETON AND PAN

Plaintiff, RONALD EDWARD BARNARD, by and through his undersigned attorney, respectfully submits this Memorandum of Law in Opposition to the Motion to Dismiss previously filed herein by Defendants FLORIDA COMMUNITY COLLEGE AT JACKSONVILLE, SHOUAN PAN, DUANE DUMBLETON, and JAMES E. MARTIN. For the reasons stated herein, Defendants' Motion should be denied.

The only basis Defendants have identified in support of their Motion to Dismiss is failure to state a claim upon which relief can be granted (Defendants' Motion to Dismiss, p 1). Defendants offer three alternative arguments in support of such ground. First, they assert that Plaintiff has no claims under the Family and Medical Leave Act

("FMLA") against Defendant FLORIDA COMMUNITY COLLEGE AT JACKSONVILLE ("FCCJ") because, Defendants contend, any such claims are barred by Eleventh Amendment immunity. Second, they assert that Defendant FCCJ has not been properly identified in the Complaint or served with process in this case. They next assert that Plaintiff has no claim under the FMLA against any of the Defendants other than FCCJ, arguing that only FCCJ can be considered as Plaintiff's employer under the FMLA, and that the FMLA does not give rise to any claims in favor of Plaintiff against any persons other than his employer. They characterize Plaintiff's claims against the Defendants other than FCCJ as setting forth claims against such Defendants in their official capacities, which they equate to claims against FCCJ itself.

Although Defendants' arguments appear upon first blush to have some merit, a closer examination of such arguments reveals that they are not fatal to the claims asserted by Plaintiff herein. Accordingly, the Motion to Dismiss should be denied.

With respect to Defendant FCCJ's claim of entitlement to Eleventh Amendment immunity, Plaintiff agrees that Florida community colleges have been held to be arms of the state that generally are entitled to claim such immunity. *E.g., Harris v. District Bd. of Trustees of Polk Community College*, 9 F. Supp.2d 1319 (M.D Fla. 1998). Further, although the FLMA clearly reflects an intention by Congress to subject state-level institutions and entities to the requirements of the statute, it seems that Congress' efforts to require states to comply with the FMLA were not effective, reasoning that Congress had no authority to require states to comply with the FMLA as part of its power under Section 5 of Amendment Fourteen, United States Constitution, to enforce said

amendment. *See, Garrett v. University of Alabama at Birmingham Board of Trustees*, 193 F.3d 1214 (11th Cir. 1999), *rev'd in part on other grounds*, 531 U.S. 356, 121 S. Ct. 955 (2001); *Laro v. State of New Hampshire*, No. 00-1581, __ F.3d __, 2001.CO1.0000311 (http://www.versuslaw.com) (1st Cir August 6, 2001); *Lizzi v. Alexander*, Nos 00-2103, 00-2104, 00-2126, __ F.3d __, 2001 WL 694506, 2001.CO4.0001566 (http://www.versuslaw.com) (4th Cir. June 20, 2001); *Townsell v. Missouri*, 233 F.3d 1094 (8th Cir. 2000); *Chittister v. Department of Community & Economic Dev.*, 226 F.3d 223 (3d Cir. 2000); *Kazmier v. Widmann*, 225 F.3d 519 (5th Cir. 2000); *Sims v. University of Cincinnati*, 219 F.3d 559 (6th Cir. 2000); *Hale v. Mann*, 219 F.3d 61 (2d Cir 2000).

However, Defendants' reliance upon the Eleventh Amendment in this case is misplaced, insofar as it is well established that the Eleventh Amendment does not stand as a bar to injunctive relief against a state defendant, even though the same defendant might be entitled to assert Eleventh Amendment immunity against a claim for money damages based on the same substantive right that is sought to be enforced by injunction. *See, Ex parte Young*, 209 U.S. 123 (1908). And in the very recent decision by the First Circuit in *Laro v. State of New Hampshire, supra*, the court held that while the Eleventh Amendment stood as a bar to any claim against the state for money damages under the FMLA, such immunity did not preclude injunctive relief, stating:

> While we hold that the personal medical leave provision of the FMLA does not validly abrogate the Eleventh Amendment immunity of the states as employers from private damages actions, other remedies remain.... The United States may choose to pursue its own actions against ... [the state] to enforce the FMLA and recover damages.... *Private parties may also enforce the substantive requirements of the provision against states through injunctive actions* against state officials rather than through suits for money damages.

2001 CO1.0000311 (http://www.versuslaw.com) ¶ 55 (emphasis and bracketed language added).

Count I of the Amended Complaint seeks precisely this injunctive relief, as Defendants themselves concede in their own Memorandum of Law. ("Plaintiff seeks to have the Defendants enjoined..."; Defendants' Memorandum of Law in Support of Motion to Dismiss, p. 2). Accordingly, Count I of the Amended Complaint states a valid claim upon which relief can be granted, even if this Court would lack authority to render a judgment for money damages against Defendants based on a violation of the FMLA.

Defendants also contend that the claims against FCCJ must be dismissed because that Defendant has not been properly named or served in this case. They argue that as a result of Section 240.315, Florida Statutes, the caption in this case should have identified the defendant as "The District Board of Trustees" of FCCJ, rather than FCCJ itself, and that service of process should be made on the chair (or in his absence, some other member) of such board. Plaintiff submits that Defendants have waived any such objection by failing to specifically assert insufficiency of process or insufficiency of service of process as a basis for dismissal of the Amended Complaint. Although

Defendants have alleged noncompliance with Section 240.315, Florida Statutes, as an *argument* in support of their motion to dismiss, the only specific *ground* asserted in the Motion itself was failure to state a claim upon which relief can be granted. ("The basis for the Motion to Dismiss is that the Complaint fails to state a claim upon which relief can be granted." Defendants' Motion to Dismiss, p. 1). By failing to raise their objections to the identification of, and service upon, FCCJ as a specific ground for dismissal, Defendants have waived any such objections or defenses.

Rule 12 of the Federal Rules of Civil Procedure requires that a defendant set forth all defenses it has against a plaintiff's claims (including without limitation the defenses of insufficiency of process and insufficiency of service of process) in a responsive pleading or by motion prior to such responsive pleading. By filing a motion to dismiss which did not specifically assert such defenses, Defendants must be deemed to have waived such defenses. FED. R. CIV. P. 12(g) and (h)(1).

In any event, even if the Court is of the opinion that Defendants have not waived these objections and that such objections would otherwise require dismissal of this action, then certainly the Court should afford Plaintiff an opportunity to amend his complaint in order to cure the alleged deficiencies. Clearly, Defendants have been given fair notice of the entity that Plaintiff was attempting to sue, and even if Defendants' failure to specifically raise Plaintiff's alleged noncompliance with the Florida Statutes as a basis for dismissal has not resulted in a waiver of such objections, it is obvious that Defendants would not be overly prejudiced by allowing Plaintiff an opportunity to amend his Complaint and, if necessary, re-serve defendant FCCJ.

The last argument raised by Defendants in their Motion to Dismiss is that Plaintiff's Amended Complaint fails to state any claims against the individual Defendants in their individual capacities, insofar as any claims against the Defendants other than FCCJ are based upon actions by such individual Defendants while acting as representatives of FCCJ, so that such claims must necessarily be considered "official capacity" claims that are tantamount to claims against FCCJ itself. Although recent case law does appear supportive of the Defendants' argument that the FMLA does not impose any obligations on persons other than the plaintiff's employer (and thus does not authorize any "individual capacity" claims against supervisory or superior co-employees), *see, Wascura v. Carver*, 169 F.3d 683 (11th Cir. 1999); *Lizzi v. Alexander, supra*, there are two flaws with Defendants' argument in this case The first flaw is that, as previously noted, the Amended Complaint *does* state a valid claim against FCCJ for injunctive relief, and by the same token, states similar valid claims against the individual Defendants as well, even if the claims against such Defendants are deemed to be "official capacity" claims. Furthermore, the *factual allegations* of the Amended Complaint indicate a basis for valid claims for money damages against the individual Defendants in their individual capacities, even if the allegations of the Amended Complaint as it presently stands do not plead such claims in a technically proper manner

While the formal allegations of the Amended Complaint presently allege only a violation of Plaintiff's rights under the FMLA, and attempt to predicate Plaintiff's causes of action upon the same statute, the factual allegations of the Amended Complaint indicate that Plaintiff may have claims against the individual Defendants under 42 U.S.C

§ 1983, for violation of Plaintiff's rights under the FMLA as well as the due process clause of the constitution, insofar as the Amended Complaint alleges that the individual Defendants failed to recognize Plaintiff's right to a meaningful hearing as specified in applicable statutes as well as FCCJ's own policies and practices. Although the Eleventh Amendment bars damage claims against states or state agencies, it has been held that 42 U.S.C § 1983 allows "individual capacity" suits for damages against individual state agents based on their acts in their official capacities. *See, Hafer v. Melo,* 502 U.S. 21 (1991); *see also, Harris v. District Bd. of Trustees of Polk Community College,* 9 F. Supp.2d 1319 (M.D. Fla. 1998) (allowing § 1983 claims against individual officers of community college, even though claim against college itself was barred by Eleventh Amendment). And in a very recent decision, the Fourth Circuit has suggested that individual-capacity claims under Section 1983 against individual state officials may properly be based on deprivation of rights under the FMLA, even though the FMLA itself does not authorize such individual capacity claims. *Lizzi v. Alexander, supra* 2001.CO4.0001566 (http://www.versuslaw.com) at ¶ 50.

The law is clearly settled that courts should be reluctant to grant motions to dismiss based on the ground of failure to state a claim, and that such dismissal should be ordered only when the defendant demonstrates "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S 41, 45-46 (1957). The factual allegations of the Amended Complaint indicate that Plaintiff may have valid "individual capacity" claims for damages under 42 U.S.C. § 1983, and other pendent state causes of action under Florida Statute, Chapter

120, Chapter 240 and other State Statutes, which claims have not been pleaded at present, but will be set out in particularity in a motion to further amend the complaint.

Plaintiff therefore submits that the Motion to Dismiss should be denied, and alternatively, that Plaintiff be entitled to file a second amended complaint

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing Plaintiff's Memorandum of Law has been furnished to Allan P. Clark. Esq. and Dabney D. Ware, Esq., FOLEY & LARDNER, 200 Laura Street, Jacksonville, Florida 32202-3510 by prepaid mail this 20 day of August, 2001.

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