Cambridge University Press et al v. Patton et al Doc. 354

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CAMBRIDGE UNIVERSITY PRESS; OXFORD UNIVERSITY PRESS, INC.; SAGE PUBLICATIONS, INC.,

Plaintiffs

v.

MARK P. BECKER, in his official capacity as President of Georgia State University; RISA PALM, in her official capacity as Senior Vice President for Academic Affairs and Provost of Georgia State University; J.L. ALBERT, in his official capacity as Georgia State University Associate Provost for Information Systems and Technology; NANCY SEAMANS, in her official capacity as Dean of Libraries at Georgia State University; ROBERT F. HATCHER, in his official capacity as Vice Chair of the Board of Regents of the University System of Georgia; KENNETH R. BERNARD, JR., JAMES A BISHOP, FREDERICK E. COOPER, LARRY R. ELLIS, FELTON JENKINS, W. MANSFIELD JENNINGS, JR., JAMES R. JOLLY, DONALD M. LEEBERN, JR., WILLIAM NESMITH, JR., DOREEN STILES POITEVINT, WILLIS J. POTTS, JR., WANDA YANCEY RODWELL, KESSEL STELLING, JR., BENJAMIN J. TARBUTTON, III, RICHARD L.

CIVIL ACTION NO.
1:08-CV-1425-ODE

Dockets.Justia.com

TUCKER, ALLAN VIGIL, and LARRY WALKER, in their official capacities as members of the Board of Regents of the University System of Georgia,

Defendants

DEFENDANTS' BENCH BRIEF ON ELEVENTH AMENDMENT IMMUNITY ISSUES

The Court now has the benefit of all of Plaintiffs' evidence. The proofs are absent and as such, Defendants Mark P. Becker *et al*. (collectively, "Defendants") respectfully submit this bench brief on Eleventh Amendment immunity issues.

Because Plaintiffs' First Amended Complaint explicitly alleges that the Defendants—themselves—scanned, copied, displayed and distributed Plaintiffs' copyrighted materials, the Court, in its March 17, 2011 Order, instructed the parties:

> to present evidence and argument that will allow the Court to rule on the question whether Plaintiffs may proceed under *Ex parte Young* or whether the case must be dismissed for lack of subject matter jurisdiction. Based on the pleadings alone, the Court cannot say that it lacks subject matter jurisdiction to hear the case.

(Dkt. 267 at 13-14.) It is clear from their Proposed Findings of Fact that Plaintiffs did not and cannot prove that *Ex parte Young* applies. And at trial, Plaintiffs failed to make a prima facie case that any alleged copyright infringement was causally connected to the named Defendants.

Plaintiffs sued only members of the Board of Regents and GSU administrators, all of whom lack the requisite meaningful connection to the alleged acts of infringement for the Eleventh Amendment immunity exception under *Ex Parte Young* to apply. Accordingly, Defendants' motion for judgment on partial findings is ripe for consideration by the Court, and this case should be dismissed for lack of subject matter jurisdiction.

At trial, the Court asked whether, if the Court decides that Plaintiffs' appropriate remedy, if any, is against the individual professors, would the professors enjoy immunity. As explained below, the individual professors are entitled to Eleventh Amendment immunity so long as they are acting within the scope of their employment.

I. <u>ANALYSIS</u>

Defendants were not personally involved in any allegedly "massive" infringement. Thus, Plaintiffs' case hinges (1) on Defendants' general supervisory authority over the professors' activities, including postings of classroom readings on ERes and uLearn that allegedly violated Plaintiffs' copyrights and (2) on Defendants' general responsibility for the creation, implementation, and enforcement of all university policies, including the Copyright Policy. *See* Pls.' Proposed Findings of Fact at 98-108. Neither justify an *Ex parte Young* action.

First, there is no evidence that Defendants did or failed to do anything that caused professors[1] to post particular excerpts on ERes or uLearn. To the contrary, the evidence demonstrates that each professor selected his or her course readings, and that prior to posting each accused excerpt, the professor conducted a fair use analysis in accordance with the Copyright Policy and found the use to be fair, used the Copyright Policy's online request form, and represented to the GSU library staff that he or she had conducted a fair use analysis and found the use of the particular excerpt to be fair. None of the Defendants were involved in making the professor's course reading selections or fair use determinations as to the individual works used in each professor's particular course—nor could they reasonably be expected to do so.

Second, Defendants created, adopted, and implemented a comprehensive policy on copyright and fair use. The policy requires that each professor complete a fair use analysis prior to the posting of any materials onto any university network. The Copyright Policy provides a narrative description of fair use that incorporates all four of the factors provided by the Copyright Act and references

[1] At the start of the trial, Plaintiffs were alleging 99 infringements by 33 professors. Defendants believe that number has now dwindled to 75 alleged infringements by 23 professors.

other resources to consult for more information on fair use. The fair use checklist, which is to be completed for every fair use analysis, likewise includes the four factors and is grounded on the statute (17 U.S.C. § 107) and opinions analyzing fair use. The Copyright Policy thereby appropriately requires the professor—the person most familiar with the class being taught, the portion of the work to be used, and the purpose of the proposed use and thus the one in the best possible position to conduct a "fair use" analysis—to consider all of the factors and to conduct such an analysis. GSU's legal department provided education to GSU staff and professors on the Copyright Policy and its fair use checklist and is available to any professor requiring assistance in completing the analysis. The Copyright Policy provides GSU professors with necessary tools to conduct a meaningful fair use analysis before using any copyrighted materials. Plaintiffs thus cannot establish that the Copyright Policy or its implementation violates any federal law. As the Court found in its Order on Summary Judgment, GSU's "2009 Copyright Policy on its face does not demonstrate an intent by Defendants to encourage copyright infringement; in fact, it appears to be a positive step to stop copyright infringement." (Or. at 29.)

The crux of the issue before this Court is whether the named defendants are sufficiently connected to the allegedly infringing actions to obviate their Eleventh

Amendment protections by way of the *Ex parte Young* exception. "Sovereign immunity does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides *an immunity from suit*." *Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 764 (2002) (per Thomas, J.) (emphasis added).

Recognizing that the Eleventh Amendment threatened to render federal courts powerless to prevent state violations of the Constitution, the Supreme Court carved out a narrow exception in *Ex parte Young*, permitting courts to grant injunctive relief against state officers to preserve the Constitution as the "supreme law of the land." *Alden v. Maine*, 527 U.S. 706, 747 (1999). The *Young* exception provides that a state official may be sued in his or her official capacity for injunctive or other prospective relief, but only when *the state itself* is the moving force behind the deprivation. *Kentucky v. Graham,* 473 U.S. 159, 166, 169 (1985). Thus courts must judiciously invoke *Ex parte Young* and endeavor towards a "proper balance between the supremacy of federal law and the separate sovereignty of the States." *Id.; see also Papasan v. Allain*, 478 U.S. 265, 277 (1986) (explaining the Supreme Court has "described certain types of cases that formally meet the *Young* requirements but that stretch that case too far and would upset the balance of federal and state interests that it embodies."). "Were it otherwise, the

Eleventh Amendment, and not *Ex parte Young*, would become the legal fiction." *Verizon Md., Inc. v. Pub. Serv. Comn'n of Md.*, 535 U.S. 635, 649 (2002) (Kennedy, J., concurring). Here, the state is not the moving force behind any deprivation the Plaintiffs contend they have suffered. Rather, as discussed above, the State has implemented a policy that reflects a serious nonpretextual good faith effort to prevent the Plaintiffs from suffering any such deprivation.

Plaintiffs contend that the doctrine of *respondeat superior* rescues their cause of action. With this argument, Plaintiffs attempt to circumvent long-standing *Ex parte Young* jurisprudence that requires a meaningful connection between the named defendants and the allegedly unlawful conduct. Plaintiffs argue that "[t]he only relevant question is whether the named defendants have the *authority* to stop the violations about which Plaintiffs complain." (Pls.' Opp. to Defs.' Mot. for Summ. J., Dkt. 185 at 36.) Plaintiffs' argument, however, is unsupported by law. The Eleventh Circuit has long recognized that "a plaintiff may sue only the particular official who has threatened to take some unconstitutional act against him or her." *Int'l Soc'y for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 819 n.4 (5th Cir. 1979) (emphasis added). No such officials have been named here. Rather, the named officials here are actively promoting a policy that seeks to prevent any sort of harm to Plaintiffs, and as such, have no meaningful connection

with the conduct of which Plaintiffs now complain.

Plaintiffs' lead case, *Luckey v. Harris*, recognizes this requirement, noting that "the state officer sued must, by virtue of his office, ha[ve] some connection with the unconstitutional act or conduct complained of." 860 F.2d 1012, 1015-16 (11th Cir. 1988) (citation omitted). In *Luckey*, the Eleventh Circuit found a connection between the Governor of Georgia and certain Georgia judges and allegations of "systemic deficiencies" in the Georgia indigent criminal defense system that was sufficient to invoke the *Ex parte Young* exception to Eleventh Amendment immunity. *Id.* at 1013. The *Luckey* plaintiffs alleged widespread deficiencies including inadequate resources, delays in the appointment of counsel, adverse pressure on attorneys to expedite trials, and inadequate supervision of the Georgia indigent criminal defense system. *Id.* The language describing the shortcoming suggests a wholesale failure to provide a functional indigent defense system as required by federal law, including the United States Constitution. *Id.* The Eleventh Circuit, in finding a sufficient connection between the defendants and the inadequate indigent defense system, provided a specific list of factors supporting this connection: (1) the Governor's responsibility for law enforcement and his duty to execute the laws faithfully; (2) the Governor's residual power to commence criminal prosecutions and his final authority to direct the Attorney

General to prosecute on behalf of the state; and (3) the judges' responsibility for administering the system of representation. *Id.* at 1016

Plaintiffs' allegations against Defendants are *not* analogous; their allegations consist of inadequate "supervisory authority" over the Copyright Policy. Plaintiffs have not alleged, much less proven that the Copyright Policy is not adequately funded, or that the named defendants have applied pressure to the professors to streamline or ignore appropriate fair use analysis, or that the Copyright Policy itself contravenes federal law. Without such evidence, Plaintiffs cannot show a connection between the named defendants and the alleged copyright infringement sufficient to support the *Ex parte Young* exception.

The only directly relevant case addressing whether the supervisory authority over a University's copyright policy would be sufficient to meet the connection requirement of *Ex parte Young* is *Pennington Seed*, which directly deals with and disposes of Plaintiffs' supervisory theory argument. *See Pennington Seed, Inc. v. Produce Exchange No. 299, L.L.C.*, 457 F.3d 1334, 1342-43 (Fed. Cir. 2006). The Federal Circuit in *Pennington Seed* found that "a nexus between the violation of federal law and the individual accused of violating that law requires more than simply a broad general obligation *to prevent a violation*; it requires an actual violation of federal law ***by that individual***." *Id.* (emphasis added) Plaintiffs'

supervisory authority allegations—the same type of allegations found wanting by the Federal Circuit in *Pennington Seed*—are deficient and the case should therefore be dismissed.

II. ELEVENTH AMENDMENT IMMUNITY AND PROFESSORS

During opening statements, the Court asked whether GSU professors who make fair use determinations are entitled to Eleventh Amendment immunity. They are. Acting solely as agents for GSU (an arm of the State), the professors share Eleventh Amendment immunity to the extent that they are sued in their official capacities and they may further invoke qualified immunity to the extent that they are sued in their individual capacities. *See Jackson v. Ga. Dep't of Transp.*, 16 F.3d 1573, 1575, 1577 (11th Cir. 1994) (state employees sued in their official capacities are entitled to sovereign immunity); *Chavez v. Arte Publico Press*, 59 F.3d 539, 547-48 (5th Cir. 1995), *vacated on other grounds*, *Univ. of Houston v. Chavez*, 517 U.S. 1184 (1996) (university employee entitled to qualified immunity on alleged copyright violation because the employee's conduct did not violate clearly established law).

In *Chavez,* the plaintiff sued the University and the University employee who had signed the publishing contract at issue. In addressing whether the University employee was entitled to qualified immunity, the Court stated:

> Qualified immunity shields from liability government officials performing discretionary functions "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." . . . The dispositive question is "whether an objectively reasonable official would understand that the alleged improper actions were unlawful."

Chavez, 59 F.3d at 547 (internal citations omitted). Because the contractual provision relating to the duration of the publishing license was ambiguous, the University employee who executed the contract was entitled to qualified immunity. *Id.*

Here, as in *Chavez*, the individual professors would be entitled to qualified immunity. Because the task of ascertaining a fair use "is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for a case-by-case analysis." *Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569, 577 (1994), citing *Harper & Row Publishers, Inc. v. Nation Enters.,* 471 U.S. 539, 560 (1985); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448, and 450 n.31 (1984); House Report, pp. 65-66; Senate Report, p. 62. The evidence shows that the professors' selections were, at a minimum, "reasonably . . . thought consistent with the rights they are alleged to have violated." *See Chavez,* 59 F.3d at 547.

Plaintiffs could have sued the professors and attempted to establish the meaningful connection required for an *Ex parte Young* action. If Plaintiffs had proved that the professors continuously failed to abide the Copyright Policy and

were misusing the fair use defense in an ongoing and continuous manner, the Court could have issued prospective injunctive relief against each professor in his or her capacity as an employee of GSU. *See Pennington Seed,* 457 F.3d at 1342-43.

III. CONCLUSION

The evidence at trial confirms that Defendants created, adopted, and implemented a comprehensive copyright policy and required professors to certify that they conducted a fair use analysis before excerpts are posted, and that the professors certified that each excerpt at issue was fair. There is no evidence whatsoever that the named defendants had any involvement with the fair use determinations at issue in this case or that they were willfully blind to the same. Instead, Defendants' connection is merely have a generalized responsibility for all policies at the University (and in this case, the policy was followed). This general power, however, is not sufficient to establish the necessary connection between the Defendants and the professors' allegedly incorrect fair use findings to meet the *Ex parte Young* exception to Eleventh Amendment immunity. *See Women's Emergency Network v. Bush*, 323 F.3d 937, 949-50 (11th Cir.2003) (where enforcement of state statute is the responsibility of parties other than governor, the governor's general executive power to enforce the statute is insufficient to confer jurisdiction over him in an action challenging statute as unconstitutional); *Waste*

Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 331 (4th Cir. 2001) (mere fact governor is under general duty to enforce laws does not make him a proper defendant in every action attacking constitutionality of a state statute), *cert. denied*, 535 U.S. 904 (2002); *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979) (same). Accordingly, Defendants respectfully request that the Court find in favor of Defendants and dismiss this action.

Respectfully submitted, this 25th day of May, 2011.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1D of the Local Rules of the Northern District of Georgia, counsel for Defendants certifies that the foregoing Defendants' Bench Brief on Eleventh Amendment Immunity Issues was prepared in a font and point selection approved by this Court and authorized in Local Rule 5.1C.

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UNITED STATES DISTRICT COURT
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of May, 2011, I have electronically filed the foregoing Defendants' Bench Brief on Eleventh Amendment Immunity Issues with the Clerk of the Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

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