IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. 7:12-CV-322-BO

HAYLEIGH LYNN PEREZ and JASON RAY THIGPEN, Plaintiffs, v. THE UNIVERSITY OF NOTH CAROLINA BOARD OF GOVERNORS, and PETER D. HANS, Chairman, H. FRANK GRAINGER, Vice Chairman, and ANN B. GOODNIGHT, Secretary, each in his or her official capacity Defendants.	)	ORDER

This matter is before the Court on the defendants' motion for dismissal of this action pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1). The defendants' motion is GRANTED and the plaintiffs' complaint is DISMISSED for lack of subject matter jurisdiction and failure to state a claim upon which relief might be granted.

BACKGROUND

The plaintiffs filed this complaint seeking monetary, injunctive, and declaratory relief. The plaintiffs alleged that their action was brought pursuant to the Fifth and Fourteenth Amendments to the U. S. Constitution; 42 U.S.C. § 1983; and the Federal Tort Claims Act ("FTCA"). The plaintiffs also use the catch-all phrase: "and other state and federal laws for relief from commission of tortious acts, Only those claims expressly identified in the plaintiffs' complaint will be acknowledged by this Court. The Court considers those claims in turn.

DISCUSSION

A Rule 12(b)(6) motion tests the legal sufficiency of the complaint. *Papasan v. Allain*, 478 U.S. 265, 283 (1986). When acting on a motion to dismiss under Rule 12(b)(6), "the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." *Mylan Labs, Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). A complaint must allege enough facts to state a claim to relief that is facially plausible. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Mere recitals of a cause of action supported by conclusory statements do not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

On the other hand, Rule 12(b)(1) authorizes the dismissal of a claim for lack of subject matter jurisdiction. When subject matter jurisdiction is challenged, the plaintiff has the burden of proving jurisdiction to survive the motion. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647-50 (4th Cir. 1999). "In determining whether jurisdiction exists, the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). To this end, "the nonmoving party must set forth specific facts beyond the pleadings to show that a genuine issue of material fact exists." *Id.*(citing *Trentacosta v. Frontier Pacific Aircraft Indus.*, 813 F.2d 1553, 1558-59 (9th Cir. 1987). The movant's motion to dismiss should be granted if the material jurisdictional facts are not in dispute and the movant is entitled to prevail as a matter of law. *Id.*

These plaintiffs are proceeding *pro se* and, as such, the Court must consider the claims presented to it in a different light than it might consider the filings of professional attorneys. Although the Court must liberally construe pleadings submitted by *pro se* claimants, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)(per curiam), "a district court is not required to recognize obscure or extravagant claims defying the most concerted efforts to unravel them." *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 391 (4th Cir. 1990).

I. PLAINTIFFS LACK STANDING TO BRING CLAIMS AGAINST THE INDIVIDUALLY NAMED DEFENDANTS.

The plaintiffs' claims against the individually named defendants must be dismissed because the plaintiffs lack standing to proceed against them. Standing doctrine requires the plaintiffs to demonstrate three "irreducible constitutional minimum" requirements:

> First, the plaintiff must have suffered an 'injury in fact'-an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' Second, there must be causal connection between the injury and the conduct complained of-the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)(internal citations omitted). The plaintiffs have failed to establish at least one element required for Article III standing: an injury that is fairly traceable to the challenged action of the defendant.

The plaintiffs have named just three members of the Board of Governors, a thirty-two member body. The defendants, representing just 10% of the Board's voting members, could not have caused the harm alleged by defendants without the actions of many other board members. Further, no action by the three named board members would

redress the harm alleged by the plaintiffs. As such, the plaintiffs lack standing against these defendants and their claims are properly dismissed.

II. WHERE NONE OF THE DEFENDANTS ARE FEDERAL ENTITIES THE FEDERAL TORT CLAIMS ACT DOES NOT APPLY.

The FTCA, 28 U.S. § 2671 *et seq.* allows a court, in limited circumstances to award damages to a plaintiff based on torts committed by the federal government. None of the defendants named by the plaintiff are federal entities and, as such, plaintiff has failed to state a claim under the FTCA and this claim must be dismissed pursuant to Rule 12(b)(6).

III. THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT DOES NOT CREATE A PRIVATE RIGHT OF ACTION.

The FERPA, 20 U.S.C. § 1232(g) is enforceable by the federal government only and does not create a private right of action. *See Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). As such, to the extent the plaintiffs have attempted to state a claim under the FERPA that claim must be dismissed pursuant to Rule 12 (b)(6).

IV. THE DECLARATORY JUDGMENT ACT IS REMEDIAL AND DOES NOT CREATE AND SUBSTANTIVE RIGHTS.

The DJA is a remedial act and did not create any new substantive rights *CGN, LLC v. BellSouth Telecommunications, Inc.*, 664 F.3d 46, 55 (4th Cir. 2011). Because the plaintiffs have stated no underlying substantive right that would entitle them to the remedial relief offered by the DJA, they have failed to state claim upon which relief might be granted. To the extent the plaintiffs have attempted to allege a separate claim for relief under the DJA, plaintiffs' claim must be dismissed pursuant to Rule 12(b)(6).

V. THE ELEVENTH AMENDMENT BARS THE PLAINTIFFS FROM RECEIVING DAMAGES AND INJUNCTIVE RELIEF.

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI. The amendment was extended to citizens of the same state by the Supreme Court in *Edelman v. Jordan*, 415 U.S. 651 (1974). Additionally, the board members enjoy Eleventh Amendment immunity in their official capacities. *Huang v. Bd. Of Governors of Univ. of N.C.*, 902 F.2d 1134, 1138-39 (4th Cir. 1990). This immunity may be waived in a limited number of cases. Immunity may be waived (1) expressly, *Huang*, 902 F.2d at 1138; (2) if the defendants removed this action from a state court with jurisdiction, *Lapides v. Bd. Of Regents of Univ. Sys. Of Ga.*, 535 U.S. 613 (2002); or (3) if Congress has exercised its authority under the Fourteenth Amendment to abrogate a states' eleventh amendment immunity, *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). There is no suggestion that any of these three types of waiver apply to the instant case. As such, the Eleventh Amendment renders the defendants immune from the plaintiffs' claims for damages. Therefore, those claims are properly dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief might be granted.

The *Ex Parte Young* doctrine applies to a limited subset of cases and provides that Eleventh Amendment immunity does not bar a suit against a state official for *prospective* injunctive relief. 209 U.S. 123 (1908). However, judgments that apply to past conduct are forbidden by the Eleventh Amendment. *See Green v. Mansour*, 474 U.S. 64, 71 (1985)(finding that where there is no continuing violation of federal law an injunction is

not available to the plaintiffs). Here, the plaintiffs only allege discrete, past harms. Because the plaintiffs fail to allege any ongoing violation, injunctive relief is barred by the Eleventh Amendment and claims for such relief must be dismissed pursuant to Rule 12(b)(6).

Finally, the North Carolina State Tort Claims Act, N.C. Gen. Stat. § 143-291 provides a "limited waiver of state sovereign immunity for negligent acts committed by state employees in their official capacities." However, the Act mandates that plaintiffs who wish to sue the state for tortious acts must bring their claims before the North Carolina Industrial Commission, not the district court." *Alston v. N.C. A & T State Univ.*, 304 F. Supp. 2d 774, 783 (M.D.N.C. 2004). As such, the plaintiffs' state law claims are not properly before this court and must be dismissed.

CONCLUSION

For the foregoing reasons, the defendants' motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) is GRANTED and the plaintiffs' complaint is DISMISSED. The clerk is directed to CLOSE the file.

SO ORDERED.

This the 18 day of June, 2013.

TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE