UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5694
Summary Calendar

PHILIP D. OLIVIER,

Plaintiff-Appellant,

versus

UNIVERSITY OF TEXAS SYSTEM AND
ITS BOARD OF REGENTS IN THEIR
OFFICIAL CAPACITY and UNIVERSITY
OF TEXAS AT SAN ANTONIO,

Defendants-Appellees.

Appeal from the United States District Court
For the Western District of Texas
(SA-92-cv-758)

(March 9, 1993)

Before POLITZ, Chief Judge, KING and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Philip Olivier appeals the Rule 12(b)(2) dismissal of his section 1983 claims against the University of Texas System Board of Regents. Finding Olivier's appeal without merit, we affirm.

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Olivier's claim is based upon the denial of his tenure as a faculty member in the graduate electrical engineering program at the University of Texas at San Antonio. Olivier filed suit against the University of Texas System, the University of Texas at San Antonio, and the University System Board of Regents in their official capacities. The district court dismissed the suit based upon the defendants' immunity under the eleventh amendment. Olivier timely appeals only the dismissal of the Board.

Analysis

Olivier asserts that the Board of Regents and its members in their official capacities are not entitled to eleventh amendment immunity. Without doubt, the eleventh amendment forbids suits in federal court by private parties against a state, state agency, or department unless the state expressly consents to such suit.[1] "This jurisdictional bar applies regardless of the nature of the relief sought."[2]

An action against the Board as an entity would be barred by the eleventh amendment because the Board is an agency of the State of Texas.[3] Olivier's complaint states that the members of the

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[1] **Pennhurst State School & Hosp. v. Halderman**, 465 U.S. 89 (1984).

[2] **Id.** at 100.

[3] See **United Carolina Bank v. Bd. of Regents of Stephen F. Austin University**, 665 F.2d 553 (5th Cir. 1982); **Clay v. Texas**

Board of Regents are sued in their official capacity. Service of process was made only on the chairman of the Board, no other Board member was served. From this, and the pleadings, we can only conclude that the plaintiff has not sued any of the regents individually.[4]

Eleventh amendment sovereign immunity applies to actions against a state official if "the state is the real, substantial party in interest,"[5] and any recovery will come from the state.[6] Official capacity suits are considered "in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity."[7] Thus, the suit against the members of the Board in their official capacities is to be treated as a suit against the Board, subject to the sovereign immunity possessed by the Board,

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Women's University, 728 F.2d 714 (5th Cir. 1984). Olivier does not appear to dispute that the Board of Regents, as an entity, is a state department or agency.

[4] See Fed.R.Civ.P. 4(d)(1), (6).

[5] **Ford Motor Co. v. Department of Treasury of Indiana**, 323 U.S. 459, 464 (1945).

[6] **United Carolina Bank**; **Edelman v. Jordan**, 415 U.S. 651 (1974).

[7] **Kentucky v. Graham**, 473 U.S. 159, 166 (1985) (emphasis in original).

qua Board.[8] Suits against the regents in their official capacity are barred by the eleventh amendment.

Olivier contends that the State of Texas waives sovereign immunity in section 104.001 of the Texas Civil Practice and Remedies Code. Section 104.001 provides that state officials sued in their official capacity are entitled to indemnity from the state. His reliance on this statute is misplaced. He fails to note that section 104.008 expressly provides that "[t]his chapter does not waive a defense, immunity, or jurisdictional bar available to the state or its officers, employees, or contractors."

Olivier contends that **Hafer v. Melo**[9] altered the Supreme Court's eleventh amendment analysis and removed "the eleventh amendment immunity from state officials acting in their official capacity thus allowing them to be sued individually." His reliance on **Hafer** is misplaced. In **Hafer** the Court specifically distinguished between suits against state officials in their official capacities and in their personal capacities.[10] Whereas the

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[8] **Id.** Official capacity suits for prospective relief, however, are not treated as actions against the state. See **Ex Parte Young**, 209 U.S. 123 (1908). "The essential ingredients of the **Ex Parte Young** doctrine are that a suit must be brought against individual persons in their official capacities as agents of the state and the relief sought must be declaratory or injunctive in nature and prospective in effect." **Saltz v. Tennessee Dept. of Employment Security**, 976 F.2d 966, 968 (5th Cir. 1992). Olivier does not assert on appeal that he seeks prospective relief from the Board members.

[9] 116 L.Ed.2d 301 (1991).

[10] **Id.** at 309-311.

eleventh amendment is a bar to the former,[11] "the Eleventh Amendment does not erect a barrier against suits to impose 'individual and personal liability' on state officials under section 1983."[12] Olivier, however, has sued the Board members only in their official capacities.

Finally, Olivier suggests that in **Doe v. Taylor Independent School District**[13] we recently recognized a public policy exception to eleventh amendment immunity. This is a gross misunderstanding of **Doe v. Taylor**. At issue in that case was whether a school principal and superintendent were entitled to qualified immunity -- not immunity under the eleventh amendment. Olivier also points to

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> [T]he distinction between official-capacity suits and individual-capacity suits is more than "a mere pleading device." State officers sued for damages in their official capacity are not "persons" for purposes of the suit because they assume the identity of the government that employs them. By contrast, officers sued in their personal capacity come to court as individuals. A government official in the role of personal-capacity defendant thus fits comfortably within the statutory term "person."

Id. at 310 (citing **Will v. Michigan Dept. of State Police**, 491 U.S. 58, 105 L.Ed.2d 45 (1989)).

[11] See **Will**.

[12] **Hafer**, 116 L.Ed.2d at 313.

[13] 975 F.2d 137 (5th Cir. 1992), cert. denied, 122 L.Ed.2d 371 (1993).

Board of Regents v. Roth[14] and **Perry v. Sindermann**[15] for the proposition that a federal court may exercise jurisdiction over a state board of regents on a section 1983 claim. Again he cites cases which are inapposite; neither case addresses eleventh amendment immunity and, thus, offer no support for his position.

The district court committed no error in dismissing Olivier's claims against the Board of Regents in its official capacity. For the foregoing reasons, the judgment of the district court is AFFIRMED.

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[14] 408 U.S. 564 (1972).

[15] 408 U.S. 593 (1972).