

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-cv-02517-RPM

MURRY L. SALBY

Plaintiff,

v.

UNIVERSITY OF COLORADO, and
PROVOST PHILIP DiSTEFANO,

Defendants.

DEFENDANT UNIVERSITY'S MOTION TO DISMISS

Defendant University of Colorado moves to dismiss Plaintiff Murry L. Salby's claims under F.R.C.P. 12(b)(1) and F.R.C.P. 12(b)(6).

INTRODUCTION

Salby was a tenured professor in the University of Colorado's Department of Atmospheric and Oceanic Sciences from 1997 until 2008. (Compl. ¶¶ 1, 12, 15.) Alleging that he was constructively discharged, Salby asserts three claims against the University: (1) retaliation against exercise of First Amendment rights under § 1983; (2)

violation of Fourth Amendment rights under § 1983; and (3) violation of C.R.S. § 24-50.5-103 (state whistleblower statute).

The University moves to dismiss each of these claims. This Court should dismiss Salby's First Amendment and Fourth Amendment claims under F.R.C.P. 12(b)(1) because sovereign immunity bars § 1983 claims against the University. Even if sovereign immunity did not apply to these claims, Salby's First Amendment claim should be dismissed for failure to state a claim under F.R.C.P. 12(b)(6) because his speech was made pursuant to his official duties. Because the Court should dismiss all of Salby's federal claims against the University, the dismissal of Salby's state law claim for lack of supplemental jurisdiction is also warranted.

STANDARDS OF REVIEW

F.R.C.P. 12(b)(1) applies to challenges based on subject matter jurisdiction. The plaintiff bears the burden of proving subject matter jurisdiction, and there is a presumption against federal jurisdiction. *Penteco Corp. Ltd. P'ship v. Union Gas Sys., Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991). A court may dismiss a complaint for lack of subject matter jurisdiction based on factual allegations in the complaint, without regard to conclusory or ill-developed allegations. *U.S. ex rel. Boothe v. Sun Healthcare Group, Inc.*, 496 F.3d 1169, 1175 (10th Cir. 2007)(noting that the rule precluding consideration of conclusory allegations "applies with special force to arguments seeking to establish our

subject matter jurisdiction, for we are obliged to presume the absence of jurisdiction unless and until convinced otherwise”).

In evaluating a motion to dismiss for failure to state a claim under F.R.C.P. 12(b)(6), all well-pleaded allegations in the complaint are accepted as true and viewed in the light most favorable to the nonmoving party. *Yousef v. Reno*, 254 F.3d 1214, 1219 (10th Cir. 2001). A motion to dismiss for failure to state a claim should be granted if the plaintiff fails to plead facts that would support a legally cognizable claim for relief. *Yousef*, 254 F.3d at 1219.

ARGUMENT

I. This Court should dismiss Salby’s First Amendment and Fourth Amendment claims for lack of subject matter jurisdiction.

A. Sovereign immunity bars § 1983 claims against the University.

The Eleventh Amendment generally bars suits against the state in federal court. *Tennessee v. Lane*, 541 U.S. 509, 517 (2004). As an arm of the state, the University is entitled to Eleventh Amendment immunity. *Sturdevant v. Paulsen*, 218 F.3d 1160, 1170-71 (10th Cir. 2000). Two exceptions to Eleventh Amendment immunity exist: (1) instances in which Congress has abrogated the states’ immunity; and (2) instances in which a state has unequivocally waived its immunity and consented to suit. *Lane*, 541 U.S. at 517. Neither exception applies to this case.

First, Congress did not abrogate the states' Eleventh Amendment immunity when it enacted § 1983. *See Rozek v. Topolnicki*, 865 F.2d 1154, 1158 (10th Cir. 1989).

Second, the Colorado General Assembly has not included § 1983 claims among those for which Colorado waives its sovereign immunity, C.R.S. § 24-10-101 *et seq.*, and the University has not waived, nor does it consent to waive, its immunity.

II. This Court should dismiss Salby's First Amendment claim for failure to state a claim because the alleged speech occurred pursuant to his official duties.

The U.S. Supreme Court has held that the First Amendment does not protect public employees' statements made "pursuant to their official duties" because such a restriction on speech "simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006). Accordingly, in evaluating a First Amendment claim, the Court must "first analyze whether the speech occurred pursuant to the public employee Plaintiff's official duties and ... the inquiry ends after that initial step if the court answers this legal question in the affirmative." *Hesse v. Town of Jackson*, 541 F.3d 1240, 1249 (10th Cir. 2008).

Based on the allegations in his Complaint the speech Salby alleges occurred pursuant to his official duties and therefore he has not stated a First Amendment claim. Specifically, Salby alleges that the University's "confiscation of [his] laboratory, personal effects, and professional records was undertaken in retaliation for the

grievances that Professor Salby filed to recover federal research funds that had been diverted.” (Compl. ¶ 17.) These grievances were made between 1997 and 2000.¹ (Compl. ¶ 4.)

Salby explains that “[u]nder [his] employment duties as a professor, he obtained research grants in the name of the University of Colorado and held responsibilities for performing the attendant research.” (Compl. ¶ 3.) Thus, when Salby grieved the University’s alleged diversion of these funds necessary to complete his research, he was acting pursuant to his employment duties as a professor. *See Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1202 (10th Cir. 2007)(holding that “speech relating to tasks within an employee’s uncontested employment responsibilities is not protected from regulation”). Because the speech alleged by Salby occurred pursuant to his employment duties, this Court should dismiss Salby’s First Amendment claim under F.R.C.P. 12(b)(6).

¹ Retaliation claims require plaintiffs to show that speech was a substantial or motivating factor in an adverse employment action. *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1203 (10th Cir. 2007). The fact that 8 years passed between Salby’s alleged protected speech and adverse employment action does not support a causal connection. *See O’Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001)(finding that “[u]nless there is a very close temporal proximity between the protected activity and the retaliatory conduct, the plaintiff must offer additional evidence to establish causation”).

III. Because this Court should dismiss Salby's federal claims, it should decline to exercise supplemental jurisdiction over Salby's state law whistleblower claim.

The U.S. Supreme Court has held that “[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.” *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). Accordingly, “When all federal claims have been dismissed, the court may, and usually should, decline to exercise jurisdiction over any remaining state claims.” *Smith v. City of Enid*, 149 F.3d 1151, 1156 (10th Cir. 1998); *United Mine Workers*, 383 U.S. at 726 (concluding that “[c]ertainly, if the federal claims are dismissed before trial, ... the state claims should be dismissed as well”). *See also* 28 U.S.C. § 1367(c)(3). Because this Court should dismiss Salby's federal claims for lack of subject matter jurisdiction, this Court should also decline to exercise supplemental jurisdiction over Salby's state whistleblower claim.

CONCLUSION

This Court lacks subject matter jurisdiction over Salby's First Amendment and Fourth Amendment claims because they are barred by sovereign immunity. Even if sovereign immunity did not apply to these claims, Salby's First Amendment claim should be dismissed for failure to state a claim under F.R.C.P. 12(b)(6) because his speech was made pursuant to his official duties. Assuming the dismissal of Salby's

federal claims against the University, the Court should also dismiss Salby's state law claim for lack of supplemental jurisdiction.

DATED this 15th day of January, 2009.

Respectfully submitted,

s/ David P. Temple

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January, 2009, I electronically filed the foregoing **DEFENDANT UNIVERSITY'S MOTION TO DISMISS** with the Clerk of the Court using the CM/ECF system and served the foregoing by placing a copy in the U.S. Mail postage paid and addressed to:

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