IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN MARIANA ISLANDS

VIRGILIO ABUEME, et al., Plaintiffs v. COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, et al., Defendants	Civil Action No. 96-0023 ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS [Fed.R.Civ.P. 12(c)]

THIS MATTER came before the court on Friday, March 28, 1997, for hearing of defendants' motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). Plaintiffs appeared by and through their attorney, Jay H. Sorensen; defendants appeared by and through their attorneys, Assistant Attorney General Mickeal Gehringer and Sean Frink of the Public School System.

THE COURT, having reviewed the memoranda submitted by counsel and having considered the oral arguments of the parties, rules as follows:

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Given the court's previous ruling,[1] on July 18, 1996, the only issues remaining are the following: 1) the viability of plaintiffs' Title VII claim; 2) the claim for a 28 U.S.C. § 2201 declaratory judgment that defendant Torres intentionally misinterpreted Commonwealth of the Northern Mariana Islands (CNMI) Public Law 10-34; and, 3) the

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[1] Plaintiffs have again pleaded claims for relief which were dismissed with prejudice earlier. Because the court has already ruled on those claims, it will not rule on them again.

The original complaint alleged five grounds for relief: 1) a Title VII action under 42 U.S.C. § 2000e, et seq., seeking an injunction to prevent alleged retaliation against the plaintiff teachers, 2) a declaratory relief action under 28 U.S.C. § 2201 seeking a declaration by the court that Commissioner William Torres misconstrued Commonwealth of the Northern Mariana Islands' P.L. 10-4, 3) a direct constitutional action brought under the 5th and 14th amendments to the United States Constitution alleging, respectively, a denial of due process and denial of equal protection, 4) an action under the Commonwealth's Civil Service Act, alleging that plaintiffs were entitled to the protections of that Act, and 5) a taxpayer's action brought under the Commonwealth Constitution, alleging that money used by the Commissioner of Education to recruit U.S. citizens as teachers was improvidently spent.

The court ruled that, as to the first cause of action, and except for age discrimination claims, a federal court does not have jurisdiction to hear a Title VII action until plaintiffs have first exhausted all Equal Employment Opportunity Commission (EEOC) administrative remedies. Plaintiffs maintain they have now received their "right to sue" letter from the EEOC.

The claims against defendants Board of Education and Commonwealth of the Northern Mariana Islands were dismissed with prejudice because neither of those entities was plaintiffs' "employer" as that term is used in Title VII. Only defendant Public School System is plaintiffs' employer. The Commonwealth and the Board were dismissed with prejudice.

Plaintiffs' declaratory judgment claim against Commissioner Torres, alleging diversity of citizenship as the basis for federal jurisdiction, was dismissed because complete diversity between the parties did not exist.

Plaintiffs' "direct action" claims under the 5th and 14th amendments were dismissed without prejudice, in order that they could be properly brought pursuant to 42 U.S.C. § 1983.

Plaintiffs' claim predicated on coverage by the Commonwealth's Civil Service Act, 1 Commonwealth Code (CMC) § 8101, et seq., was dismissed with prejudice because the Public School System is explicitly exempted from the Act. 1 CMC § 2268(b).

Plaintiffs' final claim, a taxpayer action brought pursuant to the authority of Art. X, section 9 of the Commonwealth Constitution, was dismissed with prejudice.

42 U.S.C. § 1983 claim against defendant Torres in his official capacity, seeking reinstatement of plaintiffs to their positions as teachers in the Public School System (PSS).

A judgment on the pleadings is properly granted when, taking all the allegations of the pleading as true, the moving party is entitled to judgment as a matter of law. Merchants Home Delivery Service, Inc. v. Hall & Co., 50 F.3d 1486, 1488 (9th Cir. 1995).

Defendants first move for judgment on the pleadings on the ground that plaintiffs failed to exhaust their administrative remedies with the Equal Employment Opportunity Commission (EEOC). On December 31, 1996, the Employment Litigation Section of the Civil Rights Division of the U.S. Department of Justice mailed to plaintiff Virgilio A. Abueme a "right to sue" letter. 42 U.S.C. § 2000e-5(f)(1). Receipt of this letter, representing as it did an "exhaustion of administrative remedies," was a necessary predicate to the pursuit of this lawsuit. The issue now before the court is whether Mr. Abueme was acting in a representative capacity for the remaining 57 plaintiffs or if only he was given the "right to sue."

The December 31st letter is addressed only to plaintiff Abueme and was mailed to what appears to be his personal post office box (it is not the address of his attorney). The letter uses only the singular pronoun throughout, although it is almost certainly a form letter. The court also has before it an August 15, 1996, letter from plaintiff's attorney to the San Francisco Office of the EEOC, with forms attached which were completed by plaintiff Abueme. The forms also make use of only the singular pronoun.

However, on one form plaintiff Abueme handwrote next to his name "on behalf of plaintiffs to Civil Action #96-0023 Federal Court." In an attachment to EEOC Form 5, plaintiff Abueme typed, in part:

> 3) On May 08, 1996, fifty-six (56) non-resident Filipino teachers who are third-party beneficiaries of Case 92-0016 and two (2) non-resident teachers of Indian citizenship (who are not third-party beneficiaries in Case 92-0016) joined as plaintiffs and filed a case in the District Court (Case No. 96-0023) alleging retaliation, among other claims.
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> 4) On July 18, 1996, Judge Munson issued a ruling on Case No. 96-0023 ordering herein plaintiffs in so far as the claim on retaliation is concerned to "exhaust all Equal Employment Opportunity Commission (EEOC) administrative remedies."

May plaintiff Abueme properly act on behalf of all named plaintiffs in the absence of class certification? Although the Ninth Circuit appears not to have addressed this question, other circuits have responded in the affirmative. Courts have recognized a "single-filing rule," wherein "in a multiple-plaintiff, non-class action suit, if one plaintiff has filed a timely EEOC complaint as to that plaintiff's individual claim, then co-plaintiffs with individual claims arising out of similar discriminatory treatment in the same time frame need not have satisfied the filing requirement." Forehand v. Florida State Hospital at Chattahoochee, 89 F.3d 1562, 1565 n.8 (11th Cir. 1996) (quoting Jackson v. Seaboard Coast Line R.R., 678 F.2d 992, 1011 (11th Cir. 1982)). Pursuant to this "single-filing rule," "[a]s long as at least one named plaintiff timely filed an EEOC charge, the precondition to a Title VII action is met for all other named plaintiffs[.]" Jones v. Firestone Tire and Rubber Co., Inc., 977 F.2d 527, 532 (11th Cir. 1992) (quoting Griffin v. Dugger, 823 F.2d 1476, 1482 (11th Cir. 1987), cert. denied, 486 U.S. 1005, 108 S.Ct. 1729 (1988)). See also EEOC v. Wilson Metal Casket Co., 24 F.3d 836, 839-40 (6th Cir.

1994); Allen v. United States Steel Corp., 665 F.2d 689 (5th Cir. 1982); Eichman v. Indiana State University Bd. of Trustees, 597 F.2d 1104 (7th Cir. 1979). The rationale for the "single-filing" rule is that it would be wasteful for numerous employees with the same grievance to file identical complaints with the EEOC. See Wheeler v. American Home Products Co., 582 F.2d 891, 897 (5th Cir. 1977).

Two requirements must be satisfied to entitle a plaintiff who has not exhausted the EEOC review process to append his or her claim to that of the "filing plaintiff": 1) at least one plaintiff must have timely filed an EEOC complaint that is not otherwise defective, and 2) the individual claims of the filing and non-filing plaintiffs must have arisen out of similar allegedly discriminatory treatment in the same time frame. Forehand, 89 F.3d at 1565 n.8.

Here, there is no claim that plaintiff Abueme's EEOC complaint was not timely filed or was otherwise defective. Also, the claims of discriminatory treatment made by plaintiff Abueme appear to be identical to the claims made by the other plaintiffs and to have occurred "in the same time frame." For these reasons, the court concludes that plaintiff Abueme's timely filing of a non-defective EEOC complaint (and the subsequent receipt of the "right to sue" letter), together with the nearly-identical claims of all the other plaintiffs, are sufficient to allow the remaining plaintiffs to bypass the condition precedent of exhaustion of administrative remedies, and allows his charge to be used as the foundation for claims by the other plaintiffs. Defendants' motion for judgment on the pleadings for failure of each plaintiff to satisfy the Title VII jurisdictional prerequisite of exhaustion of administrative remedies is DENIED.

Next, plaintiffs seek a declaration pursuant to 28 U.S.C. § 2201 that Commonwealth Public Law 10-4, the "Non-Resident Worker Extension Act of 1996" (Mar. 6, 1996), has been intentionally misinterpreted by Commissioner of Education Torres. Plaintiffs contend that an actual controversy exists between the parties and asserts jurisdiction in this court based on diversity.[2] Defendants respond that the lack of complete diversity noted in the court's order of July 18, 1996, still remains in that defendant Torres is an agent of PSS, that PSS (as an agency of the Commonwealth government) is merely the "alter ego" of the Commonwealth government, and that, consequently, the Commonwealth government is not a "citizen" for purposes of determining diversity jurisdiction, and such jurisdiction fails.

Because the court ruled in its July 18, 1996, order that the Commonwealth is not a "citizen" for purposes of diversity jurisdiction, the issue remaining is whether or not the CNMI Public School System is merely the "alter ego" of the Commonwealth government. If so, complete diversity does not exist and jurisdiction fails. In Belanger v. Madera Unified School Dist., 963 F.2d 248 (9th Cir. 1992), the Ninth Circuit considered whether a school district was a state agency for purposes of Eleventh Amendment sovereign immunity. The court used the multi-factor balancing test it had first enunciated in Mitchell v. Los Angeles Community College Dist., 861 F.2d 198 (9th Cir. 1988), cert. denied, 490 U.S. 1081, 109 S.Ct. 2102 (1989):

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[2] The Declaratory Judgment Act, 28 U.S.C. § 2201 et seq. is remedial, not jurisdictional, so an independent ground for federal jurisdiction must exist. See e.g. Wan Shih Hsieh v. Kiley, 569 F.2d 1179 (2nd Cir.), cert. denied 439 U.S. 828, 99 S.Ct. 102 (1978).

> To determine whether a governmental agency is an arm of the state, the following factors must be examined: (1) whether a money judgment would be satisfied out of state funds, (2) whether the entity performs central governmental functions, (3) whether the entity may sue or be sued, (4) whether the entity has the power to take property in its own name or only in the name of the state, and (5) the corporate status of the entity.

The first factor is the most important: would a judgment against PSS affect the Commonwealth treasury. Belanger, 963 F.2d at 251 (citations omitted); Doe v. Lawrence Livermore Nat. Laboratory, 65 F.3d 771, 774 (9th Cir. 1995) (state liability for money judgment "is the single most important factor in determining whether an entity is an arm of the state.") Because the PSS school budget is controlled and funded by the Commonwealth Legislature, rather than by local school districts, a judgment would be satisfied out of Commonwealth funds. See Commonwealth Constitution Art. XV, § 1(e) (PSS "guaranteed an annual budget of not less than fifteen percent of the general revenues of the Commonwealth."); 3 CMC § 1191 ("The Director of Finance shall, on a monthly basis, disburse funds to the public school system subject to their having been appropriated by the legislature." (emphasis added)). Even though no evidence was presented on the other Mitchell factors, the court is persuaded that, as to the most important factor, PSS is indeed an agency of the Commonwealth government for diversity purposes and, therefore, the court lacks jurisdiction over the claim for declaratory relief.[3] Defendants' motion for judgment on the pleadings on plaintiffs' claim for declaratory relief pursuant to 28 U.S.C. § 2201 is GRANTED.

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[3] Also, although it was not raised or argued by the parties, 28 U.S.C. § 2201, requiring as it does an independent basis for federal jurisdiction, does not appear to be a suitable candidate for the exercise of supplemental jurisdiction under 28 U.S.C. § 1367.

Finally, defendants seek judgment on the pleadings on plaintiffs' 42 U.S.C. § 1983 claim for declaratory or injunctive relief against defendant Torres in his official capacity, arguing that plaintiffs still have not satisfied the "heightened pleading" requirement of Branch v. Tunnell, 937 F.2d 1382 (9th Cir. 1991) ("Branch I").[4] Branch mandates that in cases in which the parties' subjective intent is an element of the constitutional tort (here, the alleged denial of due process and equal protection), plaintiffs must plead "nonconclusory allegations of subjective motivation, supported either by direct or circumstantial evidence." Id. at 1387. That is, the allegations of fact "must be specific enough to enable the defendants to prepare a response[.]" Id. at 1386. The rationale for the "heightened pleading" standard is to weed out unmeritorious cases seeking damages against individual or official capacity defendants who could assert the defense of qualified immunity, so as to spare them the burdens, costs, risks, and distractions of litigation. Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct. 2806 (1985).

Neither the CNMI nor its officers acting in their official capacity can be sued under 42 U.S.C. § 1983 because they are not "persons" within the meaning of § 1983.[5] DeNieva v. Reyes, 966 F.2d 480, 483 (9th Cir. 1992). However, a state official in his or her official capacity, when sued for injunctive relief, is a "person" under § 1983; the

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[4] The Supreme Court's decision in Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, ___ U.S. ___, 113 S.Ct. 1160 (1993), did not address the application of the heightened pleading standard to cases involving government officials sued as individuals, because individuals sued under 42 U.S.C. § 1983, unlike municipalities, can assert the defense of immunity, either absolute or qualified.

[5] In contrast, state officials sued in their individual capacities are "persons" within the meaning of 42 U.S.C. § 1983. Hafer v. Melo, 502 U.S. 21, 32, 112 S.Ct. 358, 365 (1991).

limitation on suits against officers in their official capacity applies only to suits for damages, because "official-capacity actions for prospective relief are not treated as actions against the state." Will v. Michigan Department of State Police, 491 U.S. 58, 71 n.10, 109 S.Ct. 2304, 2311 n.10 (1989).

Here, plaintiffs ask the court to direct defendant Torres, in his official capacity, to renew plaintiffs' employment contracts as teachers with PSS. To the extent that that relief would include money damages against Torres in his official capacity,[6] it is unavailable to them. DeNieva, supra. However, "[q]ualified immunity is an affirmative defense to damage liability; it does not bar actions for declaratory or injunctive relief." Los Angeles Police Protective League v. Gates, 995 F.2d 1469, 1472 (9th Cir. 1993) (quoting American Fire, Theft & Collision Managers, Inc. v. Gillespie, 932 F.2d 816, 818 (9th Cir. 1991). This is "because an action seeking only injunctive relief effectively puts the government on trial, not the individual defendant." DiMartini v. Ferrin, 889 F.2d 922, 925 (9th Cir. 1989), amended, 906 F.2d 465 (9th Cir. 1990). See also Ho'ohuli v. Ariyoshi, 741 F.2d 1169 (9th Cir. 1984) (the defense of qualified immunity is inapplicable in a § 1983 action brought to enjoin state officials). Therefore, because only declaratory or injunctive relief is sought against defendant Torres in his official capacity, and because the defense of qualified immunity would therefore not be available to Torres, the rationale supporting Branch, see Mitchell, Will, supra, does not come into play and

[6] "4. Order payment of any benefits to which plaintiffs are entitled to complete equitable relief." "Prayer for Relief," First Amended Complaint for Injunction and Declaratory Relief, p. 10 (Aug. 2, 1996).

plaintiffs need not meet the "heightened pleading" standard of that case.[7] Defendants' motion for judgment on the pleadings is DENIED.

FOR THE FOREGOING REASONS, defendants' motion for judgment on the pleadings 1) as to the Title VII claim is DENIED, 2) as to the 28 U.S.C. § 2201 claim for declaratory relief is GRANTED, and 3) as to the 42 U.S.C. § 1983 claim for relief is DENIED.

IT IS SO ORDERED.

DATED this 10th day of April, 1997.

ALEX R. MUNSON
Judge

[7] Recognizing there still remains a significant potential burden to defendants, the Supreme Court has said that courts and litigants "must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." Leatherman, 113 S.Ct. at 1163. See also Gilligan v. Jamco Development Corp., ___ F.3d ___, 1997 WL 92621 (9th Cir. Mar. 5, 1997); Fobbs v. Holy Cross Health System Corp., 29 F.3d 1439, 1449 (9th Cir. 1994).