UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

June 1, 2000

Massala Prince Reffell, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 99B00058
Prairie View A&M University, Respondent.	)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

Massala Prince Reffell (complainant) filed a charge with the Office of Special Counsel (OSC) in which he alleged that his employer, Prairie View A&M University (respondent or Prairie View), discriminated against him on the basis of his national origin and citizenship status in violation of the nondiscrimination provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324b (INA). He subsequently filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on August 30, 1999, in which he alleged that Prairie View discriminated against him solely on the basis of his Liberian national origin. The university filed an answer denying the material allegations of the complaint and raising certain affirmative defenses.

Prairie View filed a Motion to Dismiss for Failure to State a Claim upon which Relief Can Be Granted pursuant to 28 C.F.R. § 68.10[1] in which it asserted that OCAHO lacks jurisdiction over this case; first, because Reffell had previously filed a complaint of national origin discrimination in the United States District Court for the Southern District of Texas pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., so that this action is barred by 8 U.S.C. § 1324b(a)(2)(B), and second, because Prairie View is an arm of the State of Texas entitled to sovereign immunity under the Eleventh Amendment, citing Hensel v. Office of the Chief Administrative Hearing Officer, 38 F.3d 505 (10th Cir. 1994), reh'g denied (Nov. 21, 1994). Reffell filed a response in which he alleged in response to Prairie View's first assertion that this case differs from his Title VII case because the basis for the instant complaint was his naturalized

[1] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1999).

citizenship status rather than his national origin per se,[2] and in response to the second that Hensel is not necessarily a definitive holding for the Fifth Circuit, in which this case arises. Pursuant to my request, the parties filed supplemental materials addressed to the Eleventh Amendment issue. The parties differ in their views as to whether the record is sufficiently developed to permit resolution of Prairie View's motion.

II. PRELIMINARY QUESTIONS

There is an antecedent question as to which of Prairie View's grounds for dismissal is to be addressed first. Although the Supreme Court once again expressly declined recently to decide whether Eleventh Amendment sovereign immunity is a matter of pure subject matter jurisdiction, Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381, 391-92 (1998), see also Patsy v. Board of Regents of Florida, 457 U.S. 496, 515 n. 19 (1982), the Fifth Circuit has continued to treat it as such, even after Schact. Ysleta Del Sur Pueblo v. Laney, 199 F.3d 281, 285 (5th Cir. 2000), cert. denied, __ S.Ct.__ (U.S. May 22, 2000) (No. 99-1610); Burge v. Parish of St. Tammany, 187 F.3d 452, 465 (5th Cir. 1999) (raising the issue sua sponte at oral argument on appeal), reh'g denied (November 12, 1999); United States ex rel. Foulds v. Texas Tech Univ., 171 F.3d 279, 286 n.9 (5th Cir. 1999), rehearing and suggestion for rehearing en banc denied (June 1, 1999), petition for cert. filed, 68 U.S.L.W. 3138 (U.S. Aug. 23, 1999) (No. 99-321), petition for cert. filed, 68 U.S.L.W. 3153 (U.S. August 27, 1999) (No. 99-365), petition for cert. filed, 68 U.S.L.W 3233 (U.S. Aug. 27, 1999) (No. 99-513) ("While the Supreme Court has left this question open, our court has repeatedly referred to the Eleventh Amendment's restriction in terms of subject matter jurisdiction....Until the Supreme Court, Congress, or an en banc panel of this court reverses this practice, we must continue it"); Lowery v. Univ. of Houston-Clear Lake,
82 F.Supp. 2d. 689, 692 (S.D.Tex. 2000) (raising sua sponte).[3] In deference to the views of the

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[2] Reffell's failure expressly to allege citizenship discrimination in the complaint may have been simply an oversight of the kind ordinarily cured by leave to amend the complaint. In view of the resolution of the sovereign immunity issue, it is clear that any such amendment would be futile.

[3] Sovereign immunity differs in a number of crucial ways from ordinary restraints on subject matter jurisdiction, the most obvious being that, unlike a "pure" jurisdictional question, it can be waived. Unlike diversity, moreover, where the presence of a nondiverse party destroys subject matter jurisdiction, the existence of an Eleventh Amendment immunity issue does not. A number of circuit courts after Schact have accordingly treated sovereign immunity instead as an affirmative defense or as something less than a purely jurisdictional issue. See, e.g., Richardson v. New York State Dep't of Correctional Serv., 180 F.3d 426, 448-49 (2nd Cir. 1999); Hill v. Blind Indus. and Servs. of Maryland, 179 F.3d 754, 760-63 (9th Cir. 1999), amended and superseded upon denial of rehearing, 201 F.3d 1186 (9th Cir. 2000); Sutton v. Utah State School for the Deaf and Blind, 173 F.3d 1226, 1231 (10th Cir. 1999) (a defense with "jurisdictional attributes"); Long v. SCS Bus. & Technical Inst., Inc., 173 F.3d 890, 892-93 (D.C.Cir. 1999)

circuit in which this action arises, I treat the issue of Eleventh Amendment immunity as one implicating pure subject matter jurisdiction and therefore address it prior to reaching any of the issues as to the application of provisions of 8 U.S.C. § 1324b.[4]

While there is no specific provision in OCAHO rules expressly providing for dismissal for lack of subject matter jurisdiction (the equivalent of Rule 12(b)(1) of the federal rules), the instruction of 28 C.F.R. § 68.1 is that the federal rules may be used as a general guideline in any situation not provided for or controlled by OCAHO rules and accordingly I treat Prairie View's motion to dismiss for failure to state a claim as one to dismiss for lack of subject matter jurisdiction. "[B]ecause of the importance of the 12(b)(1) defense, courts should treat an improperly identified motion that actually challenges the court's authority or competence to hear the action as if it properly raised the jurisdictional point." 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350, at 205 (2d ed. 1990)).[5]

III. APPLICABLE LAW

The Eleventh Amendment provides: "The 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." Although this provision appears on its face to preclude only federal suits by citizens of a different state or a foreign country, it has long been held to apply as well to private suits by a state's own citizens as well. Hans v. Louisiana, 134 U.S. 1, 10 (1890). Courts generally ask two predicate questions to determine whether the Eleventh Amendment applies to a particular cause of action: "first, whether Congress has unequivocally expressed its intent to abrogate that immunity, and second, if it did, whether Congress has acted pursuant to a valid exercise of constitutional

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(supplemental opinion), petition for cert. filed, 68 U.S.L.W. 3116 (U.S. August 2, 1999) (No. 99-213) ("quasi-jurisdictional or hybrid" status); Parella v. Retirement Bd. of the Rhode Island Employees Retirement Sys., 173 F.3d 46, 54-55 (1st Cir. 1999). See also In re Sealed Case No. 99-3091, 192 F.3d 995 (D.C. Cir. 1999) (deciding merits before reaching issue of federal sovereign immunity); F. Ryan Keith, Must Courts Raise the Eleventh Amendment Sua Sponte?: The Jurisdictional Difficulty of State Sovereign Immunity, 56 Wash. & Lee L. Rev. 1037 (1999).

[4] Otherwise it would generally be preferable to reach the statutory question before the constitutional question. Dep't of Commerce v. United States House of Representatives, 525 U.S. 316, 343-44 (1999) (citing Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J. concurring)).

[5] The principal difference for purposes of this motion is that in reviewing a motion for jurisdictional dismissal it is proper to look beyond the complaint and view extraneous evidence to determine jurisdiction. Such evidence is not properly considered in reviewing a dismissal for failure to state a claim. Id. at 298-99.

authority." Kimel v. Florida Bd. of Regents, _ U.S. _, 120 S.Ct. 631, 640 (2000). See also Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627, 119 S.Ct. 2199, 2205 (1999); Alden v. Maine, 527 U.S. 706, 119 S.Ct. 2240, 2254 (1999) (nonconsenting states not amenable to private suits unless immunity is validly abrogated). Abrogation of the immunity requires both an express statement by Congress and a constitutional exercise of power. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996). The party claiming immunity from suit bears the burden of establishing that the Eleventh Amendment applies to it, a question which in turn depends upon whether the state is the real party in interest. Ysleta Del Sur Pueblo, 199 F.3d at 285-86.

Complainant Reffel correctly points out that Hensel, upon which Prairie View's motion is premised, is not binding in the Fifth Circuit. It is nevertheless well established in OCAHO jurisprudence since Hensel that when Congress enacted 8 U.S.C. § 1324b it did not express any intent whatever to abrogate the states' sovereign immunity. See Wong-Opasi v. State of Tennessee, 8 OCAHO no. 1042, 8 (2000) (petition for review dismissed, No. 00-3323, 6th Cir. April 25, 2000, motion for recon. filed May 8, 2000)[6]; Chehade v. Univ. of Texas, Southwestern Med. Ctr. at Dallas, 8 OCAHO no. 1022, 13 (1999) (petition for review filed No. 99-60169, 5th Cir. March 20, 1999) (Southwestern Medical Center, a component of the University of Texas System, is an arm of the State and is therefore not subject to private suit under 8 U.S.C. § 1324b); McNier v. San Francisco State Univ., College of Bus., 7 OCAHO no. 998, 1194, 1199-1200 (1998); United States v. New Mexico State Fair, 6 OCAHO no. 898, 875, 876-77 (1996); Kupferberg v. Univ. of Oklahoma Health Sciences Ctr., 4 OCAHO no. 709, 1056, 1059-61 (1994). Prior to Hensel, OCAHO precedents had found a waiver of federal sovereign immunity implied in 8 U.S.C. § 1324b, Roginski v. DOD, 3 OCAHO no. 426, 278 (1992), Mir v. Federal Bureau of Prisons, 3 OCAHO no. 510, 1073 (1993), but had not directly addressed the question of state sovereign immunity. Since Hensel held that § 1324b abrogated neither state nor federal sovereign immunity, no OCAHO case has held otherwise. Ruan v. United States Navy, 8 OCAHO no. 1046, 6-7 (2000). See also Kasathsko v. IRS, 6 OCAHO no. 840, 176, 183-84 (1996); General Dynamics Corp. v. United States, 49 F.3d 1384, 1386 (9th Cir. 1995) (no express waiver in § 1324b, United States is immune from attorney's fee request).

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[6] Citations to OCAHO precedents reprinted in bound Volumes 1 and 2, Administrative Decisions under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States, and Volumes 3 through 7, Administrative Decisions under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Law of the United States, reflect the volume number, the number of the particular decision and the page where the decision begins; pinpoint citations to those volumes are to the specific pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents which have not yet been reprinted in a bound volume are to pages within the original issuances.

IV. THE VIEWS OF THE PARTIES

In support of its motion, Prairie View argues that the case law pertaining to Texas A&M University (TAMU) is particularly relevant to this case because Prairie View itself is also a component of the Texas A&M system. Because courts have long held Texas A&M to be an alter ego of the State of Texas, Chacko v. Texas A&M Univ., 960 F. Supp. 1180, 1198 (S.D. Tex. 1997), Zentgraf v. Texas A&M Univ., 492 F. Supp. 265, 272 (S.D. Tex. 1980), Prairie View argues that these cases apply to it as well. See also Gay Student Servs. v. Texas A&M Univ., 737 F.2d 1317, 1333-34 (5th Cir. 1984), cert. denied, 471 U.S. 1001 (1985) (holding, like Chacko and Zentgraf, that Texas A&M University is an alter ego of the State of Texas).

Prairie View also filed the affidavit of Tom D. Kale, the Vice Chancellor for Business Services for The Texas A&M University System, in which Kale sets out the various sources of funding for Prairie View, noting that while the majority of such funding comes from general revenue, all funds, including those from other sources, are subject to control and appropriation by the Texas legislature. The affidavit also states that "[a]ny money that might be awarded to Mr. Massala Prince Reffell in this present case would be paid out from State funds on vouchers drawn by Prairie View A&M University, subject to the approval of the Texas Attorney General and the Governor."

In response, Reffell does not contend either that Texas has waived its sovereign immunity, or that it has consented to suit under 8 U.S.C. § 1324b. Rather, he argues that the record is not sufficiently developed at this stage to permit resolution of the immunity issue without more evidence, relying principally on Sherman v. Curators of the Univ. of Missouri, 16 F.3d 860 (8th Cir. 1994), and that Prairie View is not necessarily an arm of the state, citing Hander v. San Jacinto Junior College, 519 F.2d 273 (5th Cir. 1975). Reffell contends that there is no evidence of either the state of Texas' or Texas A&M's degree of control over Prairie View, that Prairie View may have a high degree of autonomy "because it is able to make its own hiring, firing and tenure decisions without review from the Texas A&M system," and finally, that Prairie View "may have other sources of income that are not state related." Reffell suggests that additional discovery might show that Prairie View has non-state funds or insurance from which payment could be made.

V. DISCUSSION AND ANALYSIS

Whether an entity is an arm of the state principally turns upon its functions and characteristics as determined by state law. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977). In analyzing the scope of Eleventh Amendment protection for a university, courts in the Fifth Circuit have considered the university's status under state law as the major factor, and in addition, have looked to the degree of state control over the university and whether a money judgment against the university would, because of the status of the university's funds, interfere with the fiscal autonomy of the state. Lewis v. Midwestern State Univ., 837 F.2d 197, 198 (5th

Cir.), cert. denied, 488 U.S. 849 (1988); United Carolina Bank v. Bd. of Regents, 665 F.2d 553, 556-61 (5th Cir. 1982) (Stephen F. Austin State University).[7]

A. Prairie View's Status under Texas Law

According to the Fifth Circuit, a university is immune from suit under the Eleventh Amendment only if it is a "state agency" rather than a "political subdivision"[8] under applicable state law. United Carolina Bank, 665 F.2d at 557. Texas law defines a "state agency," as, among other things, "a university system or an institution of higher education as defined in section 61.003, Education Code,[9] other than a public junior college." Tex. Gov't Code § 572.002 (West 1999). Courts in Texas, both federal and state, have consistently held that the general academic teaching institutions and public senior colleges and universities in Texas are part of the State. See, e.g., Lewis, 837 F.2d at 198 (Midwestern University "is classified as a 'general academic teaching institution' under Texas law, and is therefore an agency of the state"); Chacko, 960 F. Supp. at 1198 ("[T]he Texas Education Code classifies TAMU (Texas A&M University) as a 'general academic teaching institution' and a 'public senior college or university.' As such, TAMU is considered an agency of the state"); University of Texas Med. Branch at Galveston v. Hohman, 6 S.W.3d 767, 777 (Tex. Ct. App. 1999) (UTMB is a "state agency"); Whitehead v. University of Texas Health Science Ctr. at San Antonio, 854 S.W.2d 175, 180 (Tex. Ct. App. 1993) (as a

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[7] For entities other than universities, the Fifth Circuit has generally referred to the six so-called "Jacintoport factors" (after Jacintoport Corp. v. Greater Baton Rouge Port Comm'n., 762 F.2d 435 (5th Cir. 1985), cert. denied, 474 U.S. 1057 (1986)), which include, in descending order of importance, 1) the entity's status under state law, 2) the source of its funding, 3) the degree of local autonomy, 4) whether the entity is primarily concerned with state or with local problems, 5) whether the entity can sue and be sued in its own name, and 6) whether the entity can hold or use property. See, e.g., Flores v. Cameron County, Texas, 92 F. 3d 258, 265 (5th Cir. 1996).

[8] The term "political subdivision" means "a county, home-rule city, a city, town or village organized under the general laws of this state, a special district, a junior college district, or any other legally constituted political subdivision of the state." United Carolina Bank, 665 F.2d at 556 (quoting Tex.Rev.Civ.Stat.Ann. art. 8309h, repealed and codified at Tex. Labor Code § 504.001 (West 1999)).

[9] The Texas Education Code defines "university system" as "the association of one or more public senior colleges or universities, medical or dental units, or other agencies of higher education under the policy direction of a single governing board." The code defines "institution of higher education" as "any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in this section." Tex. Educ. Code § 61.003.

branch of the UT system, Health Science Center is entitled to immunity). Similarly, as a component of the TAMU system, Prairie View is an agency of the state.[10]

Reffel pointed to no case holding that any public general academic teaching institution in Texas or any component of Texas' university system is excluded from the protection of the Eleventh Amendment. Rather, he cited to Hander v. San Jacinto Junior College, 519 F.2d 273 (5th Cir. 1975), in support of his contention that Prairie View is not necessarily an arm of the state. Unlike Prairie View, however, San Jacinto Junior College, is not a "general academic teaching institution," but a public junior college, and "junior colleges, rather than being established by the legislature, are created by local initiative." United Carolina Bank, 665 F.2d at 558 ("[w]hile SFA and San Jacinto Junior College are both institutions of higher learning created by the State of Texas, they are treated by state law so differently that this surface similarity is meaningless"). Junior college districts in Texas, unlike agencies of the state, have the legal status of "independent school districts" and are, like municipalities, "independent political corporations, distinct from the state itself." 519 F.2d at 279. On petition for rehearing in Hander, the Fifth Circuit affirmed its determination that Texas junior college districts are independent political subdivisions not immune from suit under the Eleventh Amendment. Hander v. San Jacinto Junior College, 522 F.2d 204 (5th Cir. 1975).[11] In contrast, Prairie View was designated as a "land-grant institution," and a "statewide general purpose institution of higher education." Tex. Educ. Code § 87.104 (West 1999). It is thus evident that Prairie View's status under state law is that of a state agency, not a political subdivision or independent school district.[12]

B. Degree of State Control over Prairie View

In determining the extent to which a state exercises control over a university, courts in the Fifth Circuit, as elsewhere, focus primarily on the characteristics of the university's governing structure, typically a board of regents, and the powers vested in that board. See, e.g., Lewis, 837 F.2d at 198. The universities in Texas which have been found to be arms of the state share several characteristics, including: 1) Texas statutes authorize the operation of the university and provide for its governance, 2) the board of regents is appointed by the Governor and confirmed by the Texas Senate, 3) the board of regents is vested with the power of eminent domain, 4) the funds used for permanent improvements come from the Permanent University Fund, and 5) the

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[10] As pointed out in Zentgraf, 492 F. Supp. at 271, Texas A&M was originally constituted as a branch of the University of Texas under the Texas Constitution of 1876. Tex. Const. art. 7, § 13.

[11] The same holding was reiterated in Goss v. San Jacinto Junior College, 588 F.2d 96, 98 (5th Cir. 1979), vacated and modified per curiam on other grounds, 595 F.2d 1119 (5th Cir. 1979).

[12] Because analysis of this factor is wholly dependent upon the law of Texas, other cases which Reffell cites from different jurisdictions are inapposite to a determination of Prairie View's status under Texas law, and are therefore not considered further here.

university's operating expenses are paid to a large extent by legislative appropriations. See Zentgraf, 492 F. Supp. at 271 (Texas A&M University); Lewis, 837 F.2d at 198 (Midwestern State University); United Carolina Bank, 665 F.2d at 557 (Stephen F. Austin State University).

Prairie View shares the characteristics of these universities. Tex. Const. art. 7 § 14 provides that Prairie View is an institution of the first class, under the direction of the same governing board as Texas A&M, which has "the same powers and duties with respect to (Prairie View) as are conferred on it by statute with respect to Texas A&M University." Tex. Educ. Code § 87.102. This board consists of nine regents appointed by the Governor with the advice and consent of the Texas Senate. Tex. Educ. Code § 85.11. The board may issue bonds and notes payable out of the "available university fund" for the purpose of acquiring land, constructing and equipping buildings, for major repairs and rehabilitation of buildings and for other permanent improvements. Tex. Const. art. 7, § 18(a). The available university fund consists of the dividends, interest and other income from the Permanent University Fund, Tex. Const. art. 7, § 18, and "sums belonging to the Fund" are "received into the Treasury of the State." Tex. Const. art. 7, § 11. The board's broad general powers and duties are set out at Tex. Educ. Code § 85.21, which provides, inter alia,

> The board shall make bylaws, rules, and regulations it deems necessary and proper for the government of the university system and its institutions, agencies, and services. The board shall regulate the course of study and prescribe the course of discipline necessary to enforce the faithful discharge of the duties of the officers, faculty, and students.

The regents are directed by law to appoint a chief executive officer for the whole university system, as well as a central administrative office to provide oversight and coordination for the activities of each component institution within the system, including Prairie View. The chief executive officer is responsible for the general management and success of the university system. Tex. Educ. Code § 85.17.

The board of regents is in turn subject to the authority of the Texas Higher Education Coordinating Board which exercises broad managerial powers over all the public institutions of higher learning in Texas as set out at Tex. Educ. Code § 61.021. This body consists of 18 members, also appointed by the governor with the advice and consent of the senate, Tex. Educ. Code § 61.022, and constitutes the highest authority in the state on matters of public higher education. Its oversight functions with respect to Texas' institutions of higher learning are set out at Tex. Educ. Code § 61.051.

Although it can be seen that the state's regulation of the TAMU system, like that of the UT system, appears to be pervasive, Reffell nevertheless argues, relying principally upon Sherman, that there is insufficient evidence to make a determination as to this factor because it is unclear whether Prairie View "enjoys independence, financially and otherwise unlike that enjoyed by other educational institutes within the Texas A & M System," pointing chiefly to the fact that

Prairie View makes its own hiring, firing and tenure decisions. He identifies no case, however, in any jurisdiction, in which a state university did not make its own hiring and firing decisions, or in which the governing body of the entire university system did. The statutory role of a board of regents or other oversight body is not to engage in day-to-day personnel decisions, but rather to make policy, to oversee the general operations of the university and to guide its development. The question addressed by most courts is thus not whether the governing body of the university has a role in individual personnel decisions, but how pervasive is the state's governance of the university generally.

Sherman itself observed that the vast majority of courts considering the status of state universities, whether in Texas or elsewhere, have found them immune from suit under the Eleventh Amendment. 16 F.3d at 863 n.3 (noting that the court's own research revealed only one fact-specific case holding otherwise, Kovats v. Rutgers, the State Univ., 822 F.2d 1303 (3rd Cir. 1987)). As the Seventh Circuit has also observed, "it would be an unusual state university that would not receive immunity." Kashani v. Purdue Univ., 813 F.2d 843 (7th Cir.), cert. denied, 484 U.S. 846 (1987).[13] Sherman itself is not to the contrary; indeed on remand the district court in that case did not even address the question of hiring, firing and tenure decisions, but looked instead to the oversight role of the state over the general operations of the university, observing that,

> Possibly the most important consideration in evaluating the University's level of autonomy is the Governor's power to appoint the Curators. Obviously, the ability to select the University's governing body provides the executive branch of the State with a great deal of power and control over the University.

871 F. Supp. 344, 346 (W.D. Mo. 1994). Here the authority of the state of Texas, through its power of appointment both of the board of regents, to which the chief executive officer of the TAMU system is accountable, and the Higher Education Coordinating Board, to which the regents report, similarly exercises a comprehensive degree of control and oversight of all the components of both the UT and the TAMU systems.

C. Interference with the Fiscal Autonomy of the State

Although Reffell also contends that discovery is needed to determine whether Prairie View has other sources of income which could pay a judgment from unappropriated funds, such speculation is insufficient to overcome affidavit testimony by the Texas A & M Vice Chancellor

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[13] An exhaustive list of recent cases holding state universities entitled to Eleventh Amendment immunity is found in the 2000 Supplement to the notes in the main volume, 13 Charles Alan Wright, Arthur R. Miller and Edward R. Cooper, Federal Practice and Procedure, Jurisdiction and Related Matters 2d § 3524, at 405-10 n. 38 (2000). See also Frank H. Julian, The Promise and Perils of Eleventh Amendment Immunity in Suits Against Public Colleges and Universities, 36 S.Tex.L.Rev. 85 (1995).

for Business Services that all of Prairie View's funds are subject to the appropriations process. The Kale affidavit states that there are essentially five sources of funding: the Texas Constitution, art. 7 § 17; the general revenue of the State of Texas; local funds (including tuition, athletic activities, book stores, cafeterias, student services, non-instructional services, etc.); grants and gifts; and federal funds. Most of the funding comes from Texas' general revenue, but all the funds are subject to the control of, and appropriation by, the Texas Legislature. That affidavit specifically states as well that any judgment in Reffell's favor would have to be paid on vouchers drawn by Prairie View subject to the approval of the Attorney General and the Governor.

It is clear, moreover, that satisfaction of a judgment need not come directly out of the state treasury for Eleventh Amendment immunity to apply. United Carolina Bank, 665 F.2d at 560. Courts in the Fifth Circuit have repeatedly rejected the argument that a university is not entitled to sovereign immunity because a judgment could possibly be satisfied out of "nonstate" funds. See, e.g., Gay Student Servs., 737 F.2d at 1333 (declining the invitation to craft a judgment wherein monetary damages could come from bookstore profits or student service fees as a means to avoid the proscription of the Eleventh Amendment); Lewis, 837 F.2d at 198 (rejecting the plaintiff's argument that Midwestern University was not entitled to immunity because a judgment could be satisfied out of private donations and revenues from the university's commercial operations); United Carolina Bank, 665 F.2d at 561.

Rather, the ultimate test is whether a money judgment against Prairie View would, because of the status of the university's funds, interfere with the fiscal autonomy and political sovereignty of the State. Id. As the court in United Carolina Bank explained, "nonstate" funds, collected under authority of state law, are either held in the State Treasury or restricted as to their use. "In either event they are subject to audit and budget planning. Thus any award from those funds would directly interfere with the state's fiscal autonomy." Id. Money is fungible; common sense tells us that any funds Prairie View used to pay a judgment would necessarily have an impact because they would have to be replaced from other sources. Other circuits have recognized this fact as well.

> [E]ven though the school might have the power to satisfy any judgment won[,] such judgment would inevitably have to be paid from state funds...Creating any distinction between [the school's] appropriated and self-generated revenues in the context of Eleventh Amendment immunity would be a pure exercise in elevating form over substance.

Hall v. Medical College of Ohio at Toledo, 742 F. 2d 299, 305 (6th Cir. 1984), cert. denied, 469 U.S. 1113 (1985). Cf. Hadley v. North Ark. Community Tech. College, 76 F.3d 1437, 1441 (8th Cir. 1996), cert. denied, 519 U.S. 1148 (1997) ("[E]ven if [the entity] could initially satisfy a judgment from other operating revenues, such as tuition payments or federal grants, the judgment would produce a higher operating budget shortfall that must, by state law, be satisfied by an appropriation from the state treasury"); Kashani, 813 F. 2d at 846 (where university lacks power

to levy taxes itself, it is necessarily dependent upon state appropriations; payment of a judgment would therefore directly affect state treasury).

Neither am I persuaded that discovery is needed by Reffell's speculation that payment of a judgment might be covered by insurance. First, the suggestion is totally contrary to the principle set forth on the highest authority that a state agency's Eleventh Amendment immunity is not divested by the agency's entering a contractual agreement by which it is reimbursed for liability by a third party. Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 430-31 (1997). Speaking for a unanimous court in that case, Mr. Justice Stevens observed,

> ...it is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant. Surely, if the sovereign state of California should buy insurance to protect itself against potential tort liability to pedestrians stumbling on the steps of the State Capitol, it would not cease to be "one of the United States."

For that reason, Doe held that "[t]he Eleventh Amendment protects the State from the risk of adverse judgments even though the State may be indemnified by a third party." Id. at 431. Lower courts have reached the same result. Cowan v. Univ. of Louisville Sch. of Med., 900 F.2d 936, 941 (6th Cir. 1990), abrogated on other grounds by Hafer v. Melo, 502 U.S. 21 (1991) (no waiver of immunity where university purchased liability insurance); In re San Juan Dupont Plaza Hotel v. Tourism Co. of Puerto Rico, 888 F.2d 940, 945 (1st Cir. 1989) (that damage award might be paid by insurance carrier does not alter fact of immunity); Markowitz v. United States, 650 F.2d 205, 206 (9th Cir. 1981) (immunity should not be made to turn on whether the state is self-insurer). Discovery as to insurance coverage is therefore unwarranted, because the question is ultimately irrelevant to the outcome of this case.

VI. FINDINGS AND CONCLUSIONS

I have considered the pleadings, motions, evidence, briefs and arguments submitted by the parties on the basis of which I make the following findings and conclusions.

1. Congress expressed no intent to abrogate the states' sovereign immunity under the Eleventh Amendment when it enacted 8 U.S.C. § 1324b.

2. The state of Texas has not waived its Eleventh Amendment immunity to private suit under 8 U.S.C. § 1324b.

3. Prairie View A&M University is a component of the Texas A&M University (TAMU) system.

4. Under Texas law, Prairie View A&M University, like Texas A&M University of which it is a part, is an arm of the state of Texas.

5. The degree of control exercised by the state of Texas over general academic teaching institutions, including public colleges and universities such as Prairie View A&M University, is extensive.

6. A money judgment against Prairie View A&M would, because of the status of the university's funds, interfere with the fiscal autonomy of the State of Texas.

7. Eleventh Amendment sovereign immunity shields Prairie View A&M University from the complaint filed in this matter by Massala Prince Reffell, an individual.

8. OCAHO therefore lacks subject matter jurisdiction over this case.

ORDER

Prairie View's Motion to Dismiss is granted. Reffell's complaint should be, and it hereby is, dismissed for lack of subject matter jurisdiction.

SO ORDERED.

Dated and entered this 1st day of June, 2000.

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Ellen K. Thomas
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i)(1), any person aggrieved by such Order seeks timely review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order.