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| <p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</p> <p>1437 Bannock Street Denver, CO 80202</p> <hr/> <p>GARY R. JUSTUS, KATHLEEN HOPKINS, EUGENE HALAAS and LISA SILVA-DEROU, on behalf of themselves and those similarly situated,</p> <p>Plaintiffs,</p> <p>v.</p> <p>STATE OF COLORADO; PUBLIC EMPLOYEES' RETIREMENT ASSOCIATION OF COLORADO; GOVERNOR BILL RITTER, MARK J. ANDERSON AND SARA R. ALT, IN THEIR OFFICIAL CAPACITIES ONLY,</p> <p>Defendants.</p> | <p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p>Case No.: 2010-CV-1589</p> <p>Division: 6</p> |
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| <p>STATE DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED CLASS ACTION COMPLAINT</p> | |

Defendants Governor Bill Ritter and the State of Colorado (“State Defendants”) respectfully request that this Court dismiss six of the eight claims in Plaintiffs’ First Amended Class Action Complaint (“Complaint”). In support thereof, State Defendants plead as follows:

INTRODUCTION & FACTUAL BACKGROUND

Plaintiffs’ Complaint challenges the constitutionality of Senate Bill 10-001, and seeks to reinstate the most recent cost of living adjustment (“COLA”) calculation for PERA retirees that existed prior to the passage of that law. To achieve their goal, Plaintiffs assert eight claims for relief. Through this Motion, State Defendants seek to streamline the Complaint to eliminate the 2nd claim for relief, as well as to eliminate claims 4 through 8.

All of the facts and many of the legal arguments available to State Defendants in support of this Motion have been plead by the PERA Defendants in their Motion to Dismiss. To conserve the scarce judicial and legal resources of this Court and the Defendants named in this lawsuit, State Defendants respectfully adopt the “Introduction” and “Factual Background” sections of the brief filed contemporaneously in this matter by the PERA Defendants. State Defendants likewise will incorporate in this Motion many of the arguments made by PERA Defendants in response to Plaintiffs’ claims. State Defendants respectfully request the Court to consider all such facts and arguments as though set forth fully herein when the Court considers this Motion to Dismiss.

STANDARD OF REVIEW

A. Standard For Deciding Motions Under C.R.C.P. 12(b)(1)

Subject matter jurisdiction is defined as a court's power to resolve a dispute in which it renders judgment. Trans Shuttle, Inc. v. Pub. Utils. Comm'n, 58 P.3d 47, 50 (Colo. 2002); Horton v. Suthers, 43 P.3d 611, 615 (Colo. 2002). A court has subject matter jurisdiction if "the case is one of the type of cases that the court has been empowered to entertain by the sovereign from which the court derives its authority." Horton, 43 P.3d at 615. "Whether a court possesses such jurisdiction is generally only dependent on the nature of the claim and the relief sought." Trans Shuttle, Inc., 58 P.3d at 50.

When raised by a motion to dismiss based on lack of subject matter jurisdiction pursuant to C.R.C.P. 12(b)(1), courts must resolve the question of subject matter jurisdiction before trial. Trinity Broadcasting v. Westminster, 848 P.2d 916, 923-24 (Colo. 1993). Factual allegations asserted in the complaint are not taken as true on a motion to dismiss for lack of subject matter jurisdiction. Fogg v. Macaluso, 892 P.2d at 276; Trinity, 848 P.2d at 924-5. Instead, as the trier of fact, this Court must consider all competent evidence and resolve all disputed facts to determine whether the plaintiff has proven the subject matter jurisdiction. Swieckowski v. City of Ft. Collins, 934 P.2d 1380, 1384 (Colo. 1997); Trinity, 848 P.2d at 924.

A motion to dismiss for lack of subject matter jurisdiction based on Eleventh Amendment immunity is decided under Rule 12(b)(1). Smith v. Plati, 56 F.Supp.2d 1195, 1201 (D.Colo. 1999). Challenges to subject matter jurisdiction cannot be waived and may be

asserted at any time. Colorado Dept. of Public Health and Environment v. Caulk, 969 P.2d 804, 807 (Colo.App. 1998).

B. Standard Under Rule 12(b)(5)

When evaluating a motion to dismiss for failure to state a claim under C.R.C.P. 12(b)(5), a claim must be dismissed if, accepting the allegations as true, it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. Dunlap v. Colorado Springs Cablevision, Inc., 829 P.2d 1286, 1291 (Colo. 1992). The Court is not required to accept conclusory allegations. Id. Similarly, as pointed out by the PERA Defendants, the court “is not required to accept as true legal conclusions couched as factual allegations” and a claim may be dismissed if the substantive law does not support it. W. Innovations, Inc. v. Sonitrol Corp., 187 P.3d 1155, 1158 (Colo.App. 2008); see also Teigen v. Renfrow, 511 F.3d 1072, 1082-83 (10th Cir. 2007) (affirming dismissal of substantive due process claims); Atlas Corp. v. United States, 895 F.2d 745, 747, 756 (Fed. Cir. 1990) (affirming granting of motion for judgment on the pleadings because “[i]t is not necessary in every case to undertake an evidentiary hearing on the issue of whether a taking has occurred. Summary dismissal of a taking claim is appropriate where the circumstances alleged in the complaint, even if taken as true and all reasonable inferences are drawn in favor of the plaintiff, cannot establish that a taking has occurred.”); Henderson v. Gunther, 931 P.2d 1150, 1152, 1154 (Colo. 1997) (affirming dismissal of substantive due process claims).

ARGUMENT

I. Claim II Fails to State a Claim Upon Which Relief Can Be Granted Against State Defendants Under Article V, Section 38 of the Colorado Constitution

State Defendants join in the arguments of the PERA Defendants set forth in Section I of their Motion to Dismiss in all respects with regard to Plaintiffs’ second claim for relief.

II. Claim IV And V Must Be Dismissed For Lack Of Subject Matter Jurisdiction Over State Defendants And Because The Claims Fail To State A Claim Upon Which Relief Can Be Granted Against State Defendants

A. Claims IV and V fail to state a claim upon which relief can be granted

With regard to Plaintiffs’ fourth and fifth claim for relief, State Defendants join in the arguments set forth in Sections II and III of the PERA Defendants’ brief in all respects. These claims should be dismissed for failure to state claims upon which relief can be granted.

B. Claims IV and V were properly brought under 42 U.S.C. § 1983, and must either be dismissed or merged with Claims VII and VIII

In the event the Court declines to dismiss Plaintiffs' claim IV for failure to state a claim, Defendants Plaintiffs' Fourth and Fifth claims for relief allege, respectively, that Defendants violated the Takings and Substantive Due Process Clauses of the U.S. Constitution. See generally, Complaint, Claims IV and V. The U.S. Supreme Court has held that direct causes of action for alleged violations of the United States Constitution may be brought against federal officials. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 392-93 (1971). However, direct actions alleging violations of the U.S. Constitution against state officials are not appropriate, as Congress, when it enacted 42 U.S.C. § 1983, "provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution... ." Carlson v. Green, 446 U.S. 14, 18-19 (1980); Robinson v. Bd. of Regents, 390 F Supp.2d 1011, 1017 (D.Colo. 2005) (claims alleging violation of the Fourteenth Amendment must be brought pursuant to 42 U.S.C. § 1983, as the Amendment itself does not provide a direct cause of action); Bieneman v. City of Chicago, 662 F.Supp. 1297, 1298-1300 (N.D.Ill. 1987) (there is no direct cause of action against non-federal governmental employees for alleged violations of the Fifth and Fourteenth Amendments to the U.S. Constitution); Strauss v. City of Chicago, 614 F.Supp. 9, 10 (N.D.Ill. 1984), aff'd 760 F.2d 765 (7th Cir. 1985) ("Congress intended § 1983 to be the exclusive federal remedy for the unconstitutional actions of city officials.").

Consequently, Plaintiffs' Claim IV and Claim V, which are direct claims alleging violations of the federal constitution, must be dismissed. Robinson, 390 F Supp.2d at 1017. Alternatively, some courts have declined to dismiss such claims and have instead construed them as being brought pursuant to 42 U.S.C. § 1983. See, e.g., Beard v. Louisville Metro Police Dept., 2010 WL 688231, *2 (W.D.Ky. 2010). To the extent the Court construes Claims IV and V as § 1983 claims, Defendants note that they are identical to Claims VII and VIII, respectively. The same arguments made by Defendants in response to Claims VI-VIII would therefore apply to Claims IV and V, and the claims should be dismissed.

IV. Claims IV, V, VI, VII And VIII Fail To State Claims Under 42 U.S.C. § 1983 For Violations Of The Contracts Clause, Takings Clause, And Substantive Due Process Or Are Barred For Lack Of Subject Matter Jurisdiction

As noted in Section II of this Motion, Claims IV and V are properly dismissed for failure to state a claim on which relief can be granted, as they are improperly plead direct constitutional tort claims. To the extent the Court treats the claims as § 1983 claims, they are identical to Claims VII and VIII, and must be dismissed as set forth below.

C. Plaintiffs' claims under 42 U.S.C. § 1983 fail to state claims for relief and must be dismissed.

With regard to Plaintiffs' Claims IV-VIII, State Defendants join in the arguments set forth in Section IV of the PERA Defendants' brief in all respects. These claims should be dismissed for failure to state claims upon which relief can be granted.

D. The State of Colorado is not susceptible to suit under 42 U.S.C. § 1983

Section 1983 applies to “[e]very person” who, under color of state law, deprives a citizen of rights, privileges, and immunities secured by the federal Constitution and laws. 42 U.S.C. § 1983. The Supreme Court interpreted the words “every person” to exclude the states themselves. Hafer v. Melo, 502 U.S. 21, 26 (1991). Plaintiffs' § 1983 claims therefore fail to state claims against the State of Colorado, and must be dismissed pursuant to C.R.C.P. Rule 12(b)(5). Dunlap, 829 P.2d at 1291.

E. Governor Ritter is not a “person” under § 1983 for Plaintiffs' damages claims.

A State's agencies and its employees acting within their official capacities are considered “the State,” and are therefore not “persons” subject to liability for damages under § 1983. Will v. Michigan Dept. of State Police, 109 S. Ct. 2304, 2312 (1989). There is an exception to that rule when an action seeks only prospective injunctive relief, and, for example, a claim may be brought under §1983 against a state official whose duties include “implementation and enforcement” of a constitutionally challenged statute to preclude future enforcement of that statute. See, e.g., Graham v. State, 956 P.2d 556, 561-62 (Colo. 1998) (quoting Will, 491 U.S. at 58).

In Claims IV to VIII, Plaintiffs appear to make claims for both injunctive relief and damages against Governor Ritter. The damages portion of each of these claims must be dismissed. Graham, 956 P.2d at 561-62.

V. The Eleventh Amendment To The United States Constitution Bars Certain Of Plaintiffs' Claims Against State Defendants

Plaintiffs allege that State Defendants violated rights secured to them by the United State Constitution. All such claims against the State of Colorado are barred by application of the Eleventh Amendment to the United States Constitution, which provides that the judicial power of federal courts does not extend to actions against States in federal court for violations of federal law by private parties. Edelman v. Jordan, 415 U.S. 651, 662-63 (1974). Eleventh Amendment immunity is not limited to protecting States from lawsuits in federal court, but also protects states from suits in their own courts for violations of federal law. Middleton v. Hartman, 45 P.3d 721, 727 (Colo.2002) (quoting Alden v. Maine, 527 U.S.

706, 742-43 (1999)). Congress did not abrogate the States' entitlement to Eleventh Amendment immunity when it enacted §1983. Quern v. Jordan, 440 U.S. 332, 345 (1979); Ellis v. University of Kansas Med. Ctr., 163 F.3d 1186, 1196 (10th Cir. 1998).

Accordingly, Claims III-VIII, which allege violations by the State of Colorado of Plaintiffs' federal constitutional rights, must be dismissed. Middleton, 45 P.3d at 727.

As a government official, Governor Ritter, sued in his official capacity, is similarly protected by the Eleventh Amendment from claims alleging violations of federal law, as it is well settled that a judgment against a public servant in his official capacity imposes liability not on the particular servant in office, but on the governmental entity the official represents. See, e.g. Middleton, 45 P.3d at 725 (quoting Kentucky v. Graham, 473 U.S. 159, 165-66 (1985)). Consequently, "an official-capacity suit is, in all respects other than in name, to be treated as a suit against the entity" and state officials may therefore avail themselves of the immunity provided by the Eleventh Amendment. Middleton, 45 P.3d at 727 (citations omitted).

The Court might note that the Eleventh Amendment generally does not apply when an individual state defendant is named in his official capacity in a lawsuit where the plaintiff requests only prospective injunctive relief. Ex Parte Young, 209 U.S. 123, 156-57 (1908). Plaintiffs appear to seek prospective injunctive relief from Governor Ritter to enjoin him from enforcing S.B. 10-0001. However, Plaintiffs' clearly request unspecified "damages" under 42 U.S.C. § 1983 as a form of relief if they are successful on their claims. See Amended Complaint, Section VI, "Relief Requested."

Because Plaintiffs seek damages against Governor Ritter, Plaintiffs' § 1983 claims do not fall under the exception in Ex Parte Young, and the Eleventh Amendment bars claims IV to VIII as to Governor Ritter.

Accordingly, the Eleventh Amendment to the U.S. Constitution bars Plaintiffs' §1983 claims against Governor Ritter. Edelman, 415 U.S. at 662-63; Wilkerson v. State, 830 P.2d 1121, 1126 (Colo.App. 1992). Judgment in favor of Governor Ritter pursuant to C.R.C.P. Rule 12(b)(1) is therefore appropriate on Claims IV-VIII.¹ Smith v. Plati, 56 F.Supp.2d 1195, 1201 (D.Colo. 1999) (a motion to dismiss for lack of subject matter jurisdiction based on Eleventh Amendment immunity is decided under Rule 12(b)(1) for lack of subject matter jurisdiction).

¹ The Ex Parte Young exception does not extend to abrogate Eleventh Amendment immunity for the State of Colorado, as the Eleventh Amendment shields the State regardless of the type of relief sought. ANR Pipeline Co., v. LaFaver, 150 F.3d 1178, 1187 (10th Cir. 1998) (any form of relief against a state or an arm of the State, even solely for prospective injunctive relief, is barred), *partial overruling on other grounds recognized by* Hill v. Kemp, 478 F.3d 1236, 1259 (10th Cir. 2007).

CONCLUSION

For the foregoing reasons, State Defendants respectfully request that the Court dismiss with prejudice Plaintiffs' second, fourth, fifth, sixth, seventh, and eighth claims in their First Amended Complaint.

Respectfully submitted this 10th day of May, 2010.

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In accordance with Colo.R.Civ.P. 121 § 1-26(7), a printed or printable copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within Motion to Dismiss upon all parties herein by e-filing or emailing copies of same, this 10th day of May, 2010 addressed as follows:

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