

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM J. KEEFE and  
RANDY J. KEEFE,

Plaintiff,

v.

WISCONSIN SUPREME COURT'S  
BOARD OF ATTORNEYS  
PROFESSIONAL RESPONSIBILITY,  
a policy making arm of the WISCONSIN  
SUPREME COURT, and SHARREN B.  
ROSE, and ARTHUR C. EGBERT,  
individually and in their official capacities  
as Chairman and Vice Chairman of the  
State Board, and ADRIAN SCHOONE,  
individually and in his official capacity as  
former Chairman of the State Board, and  
GERALD O'BRIEN, JON P. AXELROD,  
and all other Board members individually  
and in their official capacities with the Board  
of Attorneys Professional Responsibility, and  
RONALD A. ARTHUR, State Bar Number  
01009-482, and KATHLEEM M. ARTHUR,  
State Bar Number 01017413,

Defendants.

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OPINION AND  
ORDER

00-C-0016-C

This is a civil action brought by plaintiffs William J. Keefe and Randy J. Keefe for alleged violations of their civil rights under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and of their rights under state law. Defendant Board of Attorneys Professional Responsibility has moved to dismiss the complaint on the ground that the Eleventh Amendment makes it immune from a suit for damages. All of the individual defendants except Ronald A. Arthur and Kathleen M. Arthur (named in the caption as Kathleem M. Arthur but referred to elsewhere as Kathleen) have moved to dismiss the complaint on the grounds that they are immune from suit in their official capacities under the Eleventh Amendment and that the complaint fails to state a claim against them in their individual capacities. (Defendants Ronald Arthur and Kathleen Arthur have not been served.) I conclude that defendants are correct: the Eleventh Amendment immunizes them from suits for damages such as this one in all but one limited respect and in that respect, the complaint fails to state a claim against them both because they had no legal or constitutional duty to plaintiffs that they could have violated by failing to take action against defendants Ronald A. Arthur and Kathleen M. Arthur and because plaintiffs have failed to show any causal connection between the harms they have suffered and the defendant board members' actions or omissions.

For the purpose of deciding this motion to dismiss, I find that the complaint fairly alleges the following facts.

## ALLEGATIONS OF FACT

Plaintiffs William J. Keefe and Randy J. Keefe are adult citizens of the state of Wisconsin. Defendant Sharren B. Rose was Chairman or Vice Chairman of the Board of Attorneys Professional Responsibility at all times material to this action; defendant Adrian Schoone was Chairman or member of the board at all material times; defendant Arthur C. Egbert is the current Vice Chairman of the board; defendants Gerald O'Brien and Jon P. Axelrod were members of the board at all material times. Defendant Ronald A. Arthur was a lawyer and business affiliate of plaintiffs at all material times; defendant Kathleen M. Arthur was the owner of Halco Financial & Realty Corporation and a business affiliate of plaintiffs.

On September 29, 1993, defendants Ronald Arthur and Kathleen Arthur documented a family racketeering scheme designed to coerce plaintiffs into devoting their sawmill business to laundering money for the Arthurs. Although plaintiffs refused to let the Arthurs use their sawmill for this purpose, the Arthurs tried to coerce and intimidate plaintiffs. On April 18, 1995, plaintiffs fired the Arthurs and severed all ongoing business ties. At this time, there were four different Timber Purchase and Sale Agreement contracts in place. Under Wisconsin law, the assets derived from performance of the contracts were to be treated as trust assets until plaintiffs' dispute with the Arthurs was resolved and their interests were severed completely.

On April 20, 1995, defendant Ronald Arthur entered plaintiffs' wordworking business

and removed lumber and other assets. The Arthurs filed a motion for a temporary injunction in the Circuit Court for Milwaukee County seeking to enjoin plaintiffs from preventing the Arthurs from removing 40,000 board feet of logs from plaintiffs' land in Endeavor, Wisconsin, and 25,000 board feet of logs from plaintiffs' "Viroqua parcel," but the court refused to grant the injunction. The Arthurs then conspired with a Marquette County Sheriff's Deputy to arrest plaintiff Randy Keefe in April 1995 and take the logs and other assets without having a court order to do so. The Arthurs filed the same request for an injunction against plaintiffs in the Circuit Court for Marquette County that they had filed unsuccessfully in Milwaukee County. On June 17, 1998, the Marquette court held that the Arthurs were required to carry out the settlement agreement they had proposed to plaintiffs and that they were not entitled to an injunction. On October 25, 1995, the Arthurs swore out false criminal complaints against plaintiffs.

Plaintiffs filed a grievance against the Arthurs with the Board of Attorneys Professional Responsibility on December 15, 1995, but the board failed to protect plaintiffs from the Arthurs. On April 17, 1996, the board suspended its investigation of the Arthurs, despite its knowledge that plaintiffs could no longer afford legal representation. Plaintiffs sent the defendant board copies of court opinions finding that defendants Arthur had acted in bad faith solely for the purpose of harassing plaintiffs, had filed frivolous affidavits and actions had

abused the legal process and that Ronald Arthur had perjured himself. Despite having this information, the board failed to prosecute the Arthurs but continued to protect them while they carried out felonious conduct.

As a result of the board's failure to take action against the Arthurs, plaintiffs were subjected to illegal arrest, illegal searches, deprivation of trust assets, emotional distress, criminal prosecution, destruction of plaintiff William Keefe's marriage and attorney fees.

#### OPINION

Although the Eleventh Amendment of the United States Constitution does not explicitly bar suits against the states by their own citizens, it has been interpreted as having that effect. See Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 640 (2000) (“for over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over nonconsenting States”). A state's Eleventh Amendment immunity extends to its agencies and instrumentalities, such as the Board of Attorneys Professional Responsibility, which, as plaintiffs acknowledge in their caption, is an arm of the Supreme Court of Wisconsin. See SCR 21, Preamble.

A state may waive the protections of the amendment and consent to suit in federal court, but the waiver must be explicit. See Clark v. Barnard, 108 U.S. 436, 447-448 (1883);

see also College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2199, 2228 (1999) (repudiating doctrine of constructive waiver). Second, Congress may use its enforcement powers under the Fourteenth Amendment to abrogate the state's Eleventh Amendment immunity through an unequivocal expression of its intent to do so and pursuant to a valid exercise of power. See Kimel, 120 S. Ct. at 640. Plaintiffs do not suggest that the state of Wisconsin has waived its immunity from private suit or that Congress has abrogated the state's immunity, so as to allow plaintiffs to bring this action. Therefore, I am required to grant defendants' motion to dismiss plaintiffs' federal claims against the Board of Attorneys Professional Responsibility on the ground that this court lacks jurisdiction to entertain the suit. See Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 98 (1984) (principle of sovereign immunity is constitutional limitation of federal judicial power established in Art. III).

The state's immunity extends to its officers and employees when they are sued in their official capacities. "A suit against an official in his official rather than individual capacity is a suit against the state." Stoner v. Dep't of Agriculture, Trade and Consumer Protection, 50 F.3d 481, 483 (7th Cir. 1995) (quoting Duckworth v. Franzen, 780 F.2d 645, 649 (7th Cir. 1985)). State officials may be sued in their official capacities for injunctive relief but may not be sued for money damages. See MSA Realty Corp. v. State of Illinois, 990 F.2d 288, 291 (7th Cir. 1993) (citing Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 n.10 (1989));

Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985)). This is because the Eleventh Amendment protects the state treasury and any recovery of money damages against defendants in their official capacities would come directly from the state treasury. Plaintiffs are seeking only money damages from the individual defendants. I have no option, therefore, but to dismiss their federal claims against the individual members of the Board of Attorneys Professional Responsibility in their official capacities.

Plaintiffs have raised state law claims against the board and its members in their official capacities. These claims, too, are barred by the Eleventh Amendment. The federal courts lack the power to entertain any claims against states or their officers acting in their official capacities, whether the claims derive from federal or state law. The principle of pendent jurisdiction does not change this result. See Pennhurst, 465 U.S. 89, 117-123.

Finally, plaintiffs have raised federal and state law claims against the members of the board in their individual capacities. Although the general rule is that Eleventh Amendment immunity bars suits against the state and its officers, one exception to this rule is a suit brought against a state official in his or her individual capacity challenging the official's acts as contrary to the Constitution or laws of the United States. Such a suit is not considered one against the state, see Pennhurst, 465 U.S. at 102 (citing Ex parte Young, 209 U.S. 123 (1908)), unless the action implicates special sovereignty interests. See Idaho v. Coeur d'Alene Tribe of Idaho, 521

U.S. 261, 281, 287-88 (1997). The exception does not apply to suits based on alleged violations of state law, see Pennhurst, 465 U.S. at 106 (entire basis for doctrine of Ex parte Young vanishes when plaintiff alleges that state official has violated *state* law).

Defendants do not argue that the Eleventh Amendment bars a suit against them in their individual capacities for their alleged violation of plaintiffs' federal constitutional rights. They do argue, however, that plaintiffs have failed to state a claim against them on which relief could be granted. They contend that the individual members of the board have no constitutional or legal duty to protect plaintiffs from the "overt and criminal misconduct" of the Arthurs. Defendants are correct; nothing in the United States Constitution or the laws of the United States imposes a duty upon the members of a state board of professional responsibility to investigate alleged misconduct by a member of the bar or to prevent misconduct from occurring. Showing the existence of a duty is the first step in proving liability. Since plaintiffs have failed to take this first step, their claim against the board members in their individual capacities must be dismissed.

Moreover, in their complaint, plaintiffs allege misconduct by the Arthurs occurring before December 15, 1995, the day on which they filed their grievance with the board. Even if plaintiffs could have shown that the board members had an enforceable duty to take action on any grievance filed with the board, they cannot be held responsible for illegal acts committed



before the grievance was filed. It is not entirely clear from the complaint or from plaintiffs' brief, but plaintiffs may be complaining in part about law suits and appeals filed or defended by the Arthurs after December 15, 1995. If this is part of their complaint, they have not shown how any action taken by the board would have stopped the lawsuits. Even if the board had suspended the Arthurs from membership in the state bar, such an action would not have prevent them from prosecuting or defending these actions in their own names. Plaintiffs' complaint demonstrates a total absence of any causal connection between defendants' acts or omissions and plaintiffs' alleged injuries that would be a separate and independent reason for dismissing the complaint against the individual board members, even if plaintiffs could establish that these defendants had any duty to plaintiffs to protect them from the Arthurs' alleged illegal acts.

In summary, I conclude that plaintiffs' complaint must be dismissed in all respects because this court lacks jurisdiction to hear any of the claims against the defendant board and its members with the exception of the claims against the board members in their individual capacities for alleged violation of plaintiffs' constitutional rights and as to those claims, plaintiffs have failed to state claims on which relief could be granted.

Plaintiffs have 120 days in which to serve defendants Ronald Arthur and Kathleen Arthur. See Fed. R. Civ. P. 4(m). If plaintiffs do not accomplish service within that time, the

court may dismiss the action without prejudice as to those defendants. See id. The one-hundred-and-twenty-day period will expire on May 3, 2000.

ORDER

IT IS ORDERED that the motion to dismiss of defendants Wisconsin Supreme Court's Board of Professional Responsibility, Sharren B. Rose, Arthur C. Egbert, Adrian Schoone, Gerald O'Brien and Jon P. Axelrod and all other board members individually and in their official capacities with the Board of Attorneys Professional Responsibility is GRANTED and plaintiffs William J. Keefe and Randy J. Keefe's complaint is DISMISSED as to these defendants.

FURTHER, IT IS ORDERED that if, by May 3, 2000, plaintiffs fail to submit proof of service or completed waiver forms for defendant Ronald A. Arthur and defendant Kathleen M. Arthur, or to show cause why he is unable to do so, then the Clerk of Court shall enter judgment, dismissing the case against those defendants for plaintiffs' failure to prosecute and close this case.

Entered this \_\_\_\_\_ day of March, 2000.

BY THE COURT:

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BARBARA B. CRABB  
District Judge