UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Tayah Lackie,

Plaintiff,

vs.

Minnesota State University Student Association, Inc. d/b/a Students United; St. Cloud University; Robbyn R. Wacker, in her personal and official capacity as President of St. Cloud State University; and Larry Lee, in his personal and official capacity as Vice President for Finance and Administration at St. Cloud State University,

Defendants

Civil File No. 24-cv-01684 (JWB/LIB)

REPLY MEMORANDUM OF LAW IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS

ARGUMENT

Plaintiff concedes her claims against SCSU and the Official Capacity Defendants are barred by sovereign immunity, but suggests might be viable if the United States Supreme Court to overturn this centuries-old cornerstone of constitutional law, along several other long-standing precedents. (Doc. 27 ("Opp. Brief"), 32-33.) Plaintiff trains her remaining fire on two former SCSU administrators, seeking to hold them personally liable solely because they "collected dues from Plaintiff for Students United," as expressly required by state law. (Doc. 1, ¶¶ 14-15.) Because Defendants Wacker and Lee are entitled to qualified immunity, Plaintiff's remaining claims must also be dismissed.

I. ROBBYN WACKER AND LARRY LEE, IN THEIR INDIVIDUAL CAPACITIES, ARE PROTECTED BY QUALIFIED IMMUNITY.

Defendants Wacker and Lee are entitled to qualified immunity because Plaintiff failed to plead that their individual actions caused her harm, they acted in accordance with the mandatory terms of state law, the state law's constitutionality has never been questioned in 30 years, and no reasonable administrator could be expected to presume it's unconstitutionality.

A. Plaintiff Fails to Plead Individual Action by Defendants Wacker and Lee That Caused Her Alleged Injuries.

To defeat qualified immunity, a plaintiff must plead that the official's *individual* actions violated a statutory or constitutional right. This is because a government official is "only liable for his or her own misconduct." *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (emphasis added). And "[w]hen there are multiple defendants who played limited roles in the conduct complained of, the determination whether an individual defendant is entitled to qualified immunity is based upon that defendant's knowledge and conduct at the time or times he or she participated in that conduct." *Cannon v. Dehner*, No. 23-2167, 2024 WL 3768723, at *3 (8th Cir. Aug. 13, 2024); *Cox v. Sugg*, 484 F.3d 1062, 1068 (8th Cir. 2007) (dismissing individual capacity §1983 claims against college administrators who lacked requisite culpability to cause violation by acts of another professor.)

Here, as noted in State Defendants opening brief, Plaintiff pleads only "upon information and belief" that Defendants Wacker and Lee collected dues from Plaintiff to remit to Students United. (Doc. 19, p.14 citing (Doc. 1, ¶¶ 14-15).) But this type of pleading, without more, is too speculative to state a claim that individual defendants were

responsible for the harm. *Armstrong v. City of Minneapolis*, 525 F. Supp. 3d 954, 966-67 (D. Minn. 2021) (Nelson, J.) (allegations "upon information and belief" that officers were responsible for harm is too speculative "in the post *Twombly* and *Iqbal* era"). Moreover, these scant allegations stand in stark contrast to the alleged acts of other parties and non-parties. *See* (Doc. 1, ¶¶ 1-2, 4, 17-20, 23-26, 44, 47-50.) But none of these factual allegations support finding Defendants Wacker and Lee personally liable for anything.

Nevertheless, Plaintiff boldly states that "[t]he causal connection could not be any clearer: but for Defendants' actions, Lackie never would have paid Students United." (Opp. Br. 27.) But that's not what Plaintiff pled. Instead, Plaintiff *only* pled that "[b]ut for *the Board*'s policy forcing her to be a paying member, and *St. Cloud State University*'s enforcement of that policy, she never would have joined or paid any money to *Students United*." (Id., ¶ 50) (emphasis added). *See Clark v. Long*, 255 F.3d 555, 559 (8th Cir.2001) ("'to establish a violation of constitutional rights'" in a civil rights action, "'the plaintiff must prove that the defendant's unconstitutional action was the 'cause in fact' of the plaintiff's injury' ") (quoting *Butler v. Dowd*, 979 F.2d 661, 669 (8th Cir.1992), *cert. denied*, 508 U.S. 930 (1993)). Plaintiff never alleged that acts by Defendants Wacker and Lee were a cause-in-fact of her alleged harm, and their alleged acts, pled only upon information and belief, are not sufficient to infer that connection.[1]

Because Plaintiff's allegations "upon information and belief" are insufficiently speculative, and she fails to allege a causal nexus between the alleged acts of Wacker and

[1] Plaintiff's citations to the Board's policy manuals and SCSU website about the role of the SCSU President and Finance Administrator reflect nothing more than the "general

Lee and her alleged injury, Plaintiff fails to state a claim upon which relief can be granted. Accordingly, Plaintiff fails to state an actionable claim against Defendants Walker and Lee.

B. Acting in Accordance with a Statute Almost Always Affords an Official the Benefit of Qualified Immunity.

Beyond the pleading deficiencies, qualified immunity bars Plaintiff's claims against Defendants Wacker and Lee. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Dillard v. O'Kelley*, 961 F.3d 1048, 1052 (8th Cir. 2020) (en banc) (citing *Mullenix v. Luna*, 577 U.S. 7, 12 (2015)). To defeat a defense of qualified immunity, a plaintiff must plead facts showing violation of a "clearly established" constitutional right. *Id.* "Clearly established" rights are not to be defined at a high level of generality, and there must be a controlling case or a "robust consensus of cases of persuasive authority." *Id.* (quoting *Ashcroft v. Al-Kidd*, 563 U.S. 731, 735 (2011)). "[F]or a right to have been clearly established at the time of the alleged violation, there must have existed circuit precedent that involves sufficiently similar facts ... or, in the absence of binding precedent, a robust consensus of cases of persuasive authority constituting settled law." *Perry v. Adams*, 993 F.3d 584, 587 (8th Cir. 2021) (cleaned up).

Defendants Wacker and Lee simply did their jobs as state law specifically required, just as state law requires of every other administrator at educational institutions in the Minnesota State Colleges and Universities system. This fact alone demonstrates their entitlement to qualified immunity, because "[w]hen a legislative body establishes a law,

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supervisory authority" Defendants Wacker and Lee had in their former positions. (Opp. Br. 29-30.) An allegation of general supervisory authority is not sufficient to state a claim for personal liability under Section 1983. *Jackson v. Nixon*, 747 F.3d 537, 545 (8th Cir. 2014).

the enactment 'forecloses speculation by enforcement officers concerning its constitutionality,' unless the law is 'so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.' " *Ness v. City of Bloomington*, 11 F.4th 914, 921 (8th Cir. 2021) (quoting *Michigan v. DeFillipo*, 443 U.S. 31, 38 (1979)).

No matter, Plaintiff contends, the law's "presumption of constitutionality" does not apply because "[i]t was the Board's decision, not the Minnesota Legislature's, to name Students United—a group engaged in controversial political speech—as the statewide association." (Opp. Br. at 27.) But it's not clear why any of that matters. Plaintiff did not sue "the Board," she sued Defendants Wacker and Lee, and she does not allege that they engaged in, had knowledge of, or caused any of the actions she attributes to the Board or Students United or the harm she experienced. (Id.) If anything, Plaintiff's assertion is less an argument in her favor, than a concession she sued the wrong parties.

Further, Plaintiff's attempt to diminish *Ness* is specious. (Opp. Br., 24.) *Ness* is not an outlier but continues a long line of precedent from the United States Supreme Court and the Eighth Circuit, among others. *Ness*, 11 F.4th at 921 (collecting cases). Plaintiff endeavors to distinguish *Ness* from this case because it involved police officers who, to be sure, often make life-or-death split-second decisions in the field where they cannot reasonably consider whether a particular factual scenario they confront might pose a constitutional problem. (Opp. Br. 25–26.) College administrators, Plaintiff alleges, have the luxury to sit and deliberate the constitutionality of every aspect of their jobs, and therefore should be held to greater scrutiny. (*Id.*)

Plaintiff is correct that qualified immunity cases involving law enforcement officers often require a searching inquiry into the facts available to officers when they make split-second decisions in dangerous situations. But in those cases, courts are typically evaluating whether particular officers acted reasonably in areas where the law grants them discretion to act. *See, e.g., Mullenix v. Luna*, 577 U.S. 7, 12–15 (2015) (parsing the facts and circumstances of the scenario to consider whether particular police officer was entitled to qualified immunity). In such cases, for example, the text of the Fourth Amendment does not prescribe or guide the specific actions of officers on the street. As such, courts and parties must scour case law to determine whether a particular officer's course of conduct violated the constitution, and whether such a violation was "clearly established." *E.g., id.* at 14–19 (gathering cases and considering what legal principles those cases placed "beyond debate").

But *Ness* is different from most qualified immunity cases involving police officers. Rather than comparing a fact-intensive scenario with existing fact-intensive precedent, the officers' conduct in *Ness* involved enforcing a law "[c]onsistent with the statute." 11 F.4th at 921. Like Defendants Wacker and Lee, the officers' conduct in *Ness* was simply carrying out the law as written. On the same essential facts, the Eighth Circuit granted the officers qualified immunity in *Ness*.

Moreover, the law Plaintiff challenges here has never been challenged in its thirty-year existence. "No court has ever considered—let alone decided—whether the" mandates set forth in Minn. Stat. § 136F.22 are "constitutional in any context, let alone [that] the context addressed in this case . . . comes close to establishing that" Defendants acted

unreasonably in relying on its validity. *Armendariz v. Rovney*, 575 F. Supp. 3d 1131, 1136 (D. Minn. 2021).

In *Armendariz*, the plaintiff at least pointed to factually similar, out-of-circuit precedent to buttress his claim that Minnesota's law was clearly unconstitutional, but that still wasn't enough to defeat qualified immunity. 575 F. Supp. 3d at 1135. Here, where Plaintiff refers to a handful of inapposite, out-of-circuit cases, there is even less reason to believe a college administrator might reasonably be expected to independently cobble together Plaintiff's theory of the case and refuse to carry out an explicit state law mandate. (*Cf*. Opp. Br., 18–20.)

C. No Reasonable Official Would Have Believed That Following A State Law That Has Never Been Challenged Violates The First Amendment.

Plaintiff contends the Defendants' alleged conduct—collecting student fees and remitting them to a statewide student association—is so obviously unconstitutional that it deprives them of qualified immunity. (Opp. Br,. 24.) This would certainly come as a shock to countless college administrators charged with collecting fees and distributing them to any number of student associations. Moreover, while Plaintiff obviously takes issue with what it alleges Students United did *after* it received this funding, she never pleads that Defendants Wacker and Lee were aware of, responsible for, or facilitated Students United's alleged political advocacy. *Ness*, 11 F.4th at 922 ("It is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the 'policy' of enforcing state law.")

Plaintiff claims Defendants Wacker and Lee had "fair warning" of the statute's unconstitutionality because it is "'beyond debate' that universities cannot extract student fees and give them to their preferred organizations based on that organizations viewpoint." (Opp. Br. 22.) But whether that assertion is true is irrelevant here. Plaintiff's complaint does not allege that Defendants Walker and Lee collected fees from Plaintiff to Students United "based on that organization's viewpoint" and does not allege they "failed to even attempt neutrality." *Compare* (Opp. Br. 22) *with* (Doc. 1.)

Moreover, the Eighth Circuit cases Plaintiff cites as giving the Defendants notice are all inapposite because they involve universities engaging in viewpoint discrimination against student organizations. *Gay & Lesbian Students Assoc. v. Gohn*, 850 F.2d 361, 368 (8th Cir. 1988) (holding that a student club could not be denied funding because of a disagreement with the group's speech); *Bus. Leaders in Christ v. Univ. of Iowa*, 991 F.3d 969, 980 (8th Cir. 2021) (finding the First Amendment's prohibition on the uneven enforcement of a nondiscrimination policy against student organizations clearly established); *Intervarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855, 859, 867 (8th Cir. 2021) (same).

Here, Plaintiff does not allege viewpoint-based differential treatment at all. Plaintiff's claims are entirely different. Plaintiff alleges she was treated identically to all other students insofar as all students are required to join and remit fees (via SCSU) to a statewide student association that allegedly engaged in speech to she disagreed with. None of the preceding cases are even remotely related to the First Amendment claims and factual circumstances alleged in this case.

Plaintiff's citation to the *Galda v. Rutgers*, while facially appealing, is simply inapposite. *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985). According to Plaintiff, *Galda* placed the individual Defendants on notice that their alleged collection of student fees and remittance to a statewide student association under Section 136F.22 was unreasonable. But *Galda* was not the watershed moment in First Amendment history that Plaintiff claims. (Opp. Mem., 19) ("Since *Galda*, most universities have been more careful.") Plaintiff makes no effort to support the assert this assertion, likely because *Galda* has been cited only 17 times by federal courts since it was decided in 1985, only 9 times in the federal courts of appeal, and never by the Eighth Circuit or District of Minnesota. *Id*. (citing references).

Moreover, the Minnesota Legislature did not even pass section 136F.22 until nine years after *Galda* was decided. *See* Act of May 5, 1994, Reg. Sess., ch. 532, Art. 7, § 7, 1994 Minn. Laws 756-57. Since then, thousands upon thousands of students have been members of and paid fees to their campus and state student associations, yet none of them challenged the statute. If *Galda* had been such a bellwether case, it's hard to imagine why the Minnesota Legislature would bother to pass section 136F.22 nine years after *Galda* was decided, and even more astonishing that its constitutionality was not challenged for another thirty years.

In any event, *Galda* is simply inapposite. *Galda*'s majority relied on a legal framework from Supreme Court cases that analyzed whether compelled union dues by nonunion employees and mandatory bar association dues could be used for speech that its members disagreed with. 772 F.2d at 1063. The Supreme Court has since made clear that

"the means of implementing First Amendment protections adopted in those decisions are neither applicable nor workable in the context of extracurricular student speech at a university." *Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 230 (2000). Thus, even if Defendants Wacker and Lee were aware of this obscure, out-of-circuit decision from 40 years ago, the legal analysis is inapplicable to Plaintiff's claims.

D. Denying Qualified Immunity for Officials Carrying Out the Letter of the Law Places an Untenable Burden on Individual Employees.

The law of qualified immunity does not require the harsh results that would befall Defendants Wacker and Lee because their actions, as Plaintiff alleges, were taken as required by a specific statutory mandate. Because Defendants Wacker and Lee acted in reliance on and pursuant to a statute, Plaintiff's claim can overcome their qualified immunity defense only if the challenged statute is "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." *Ness*, 11 F.4th at 921. As explained above, it is far from clear that the challenged statute is unconstitutional at all, much less "grossly" or "flagrantly" unconstitutional.

There are good reasons for this permissive standard. Without the grace to rely on all but the most egregious statutes, officials would be put in an impossible position whenever the constitutionality of a law was drawn into question. When considering immunity from liability under section 1983, the Supreme Court has noted that "[a] policeman's lot is not so unhappy that he must choose between being charged with

dereliction of duty if he does not arrest when he has probable cause and being mulcted[2] in damages if he does." *Pierson v. Ray*, 386 U.S. 547, 555 (1967). The same rationale applies here. If Defendants Wacker and Lee had defied the mandatory terms of section 136F.22, they surely would have risked the institutional and potentially personal liability to Students United. Nevertheless, because they complied with the statute, Plaintiff argues Defendants Wacker and Lee face liability.

But this Hobson's choice, in which state officials must guess the outcome of hotly contested constitutional issues and face personal liability if they predict incorrectly, is not the correct standard. *See Ness*, 11 F.4th at 921. Described most recently in *Ness*, compliance with a statute almost always shields individual-capacity defendants from liability.[3] *See Dillard*, 961 F.3d at 1052 (holding that qualified immunity protects all state officials except "the plainly incompetent or those who knowingly violate the law"). In this

[2] "Mulct" means "to punish by fine." Merriam-Webster Dictionary (available at https://www.merriam-webster.com/dictionary/mulct) (last visited August 18, 2024.

[3] Plaintiff's reference to the "just following orders" defense made by perpetrators of the Holocaust and My Lai massacre happens to illustrate this point. (*See* Opp. Mem. 24.) It is only in extreme cases that a law is so flagrantly unconstitutional that an official cannot rely on it, even without a court ever calling it into question. *See Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994) (stating that a law that "authorizes official conduct which is patently violative of fundamental constitutional principles, an officer who enforces that statute is not entitled to qualified immunity."). This case, in which the act authorized by the challenged statute was taking a small sum of money from Plaintiff and every other student as part of their tuition and fees and transmitting it to an organization that allegedly engaged in speech Plaintiff disfavors at some point thereafter, is not such an extreme case. Indeed, the Supreme Court's change of heart regarding certain compelled union dues is relatively recent, after specifically finding such arrangements constitutional 40 years earlier. *See Janus v. AFSCME, Council 31*, 585 U.S. 878 (2018) (overturning *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)).

case, where Defendants Wacker and Lee, neither of whom is trained as a constitutional lawyer, relied on a statute that had never been challenged in its 30 years of existence, and had no reason to question its existence, qualified immunity applies.

E. Plaintiff's Attempt to Recast Her Damages Claim as Equitable Relief is Unavailing.

Plaintiff argues qualified immunity does not apply because her damages claim is actually an equitable claim for disgorgement. (Opp. Br., 16.) "Disgorgement" is restitution measured by a defendant's wrongful gain. *Kokesh v. Securities & Exchange Comm'n*, 581 U.S. 455, 458–59 (2017). There is no allegation that Defendants Wacker or Lee pocketed the disputed fees or gained anything at all. Rather, at most, the allegations claim Defendants Wacker and Lee were merely a pass-thru as those fees went to Students United. (*E.g.*, Compl. ¶ 16.) In other words, accepting Plaintiff's allegations as true, there is nothing to disgorge personally from Defendants Wacker or Lee.

II. PLAINTIFF'S ARGUMENT ON SOVEREIGN IMMUNITY IS COMPLETELY UNSUPPORTED.

Seeking to preserve her claims against SCSU and the Official Capacity Defendants for potential appeal, Plaintiff suggests they would be viable if the U.S. Supreme Court simply accepts her invitation to use this case as a litigation vehicle to "reconsider *Edelman*, *Quern*, *Pennhurst*[4], *Will* and their progeny…" (Opp. Br., 35.) Plaintiff concedes, however, that the only potential exception to sovereign immunity, *Ex parte Young*, does not apply to

[4] Plaintiff never explains why *Pennhurst* makes her list of targeted precedent, and never cites the full legal citation. She also never explains why it deserves to be overturned, and never explains why doing so would necessarily resuscitate her non-viable claims here. *See generally*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, (1984).

this case because she only seeks retrospective relief. (Opp. Br., 32.) But despite Plaintiff's disclaimer, overturning *Edelman*, *Quern*, *Pennhurst*, *Will* and their progeny would render *Ex parte Young* a dead letter.

Sovereign immunity is among the oldest legal doctrines in American jurisprudence. "Sovereign immunity principles enforce an important constitutional limitation on the power of the federal courts." *Sossamon v. Texas*, 563 U.S. 277, 284 (2011). Since the formation of the United States, it has consistently protected the sovereign states and their instrumentalities from suit in federal court, except with their consent or in cases for prospective injunctive relief that will not affect state coffers. The Supreme Court has made clear that States can only be sued in federal courts for prospective declaratory or injunctive relief. *Ex Parte Young*, 209 U.S. 123, 159-60 (1908). But *Ex Parte Young* does not authorize Article III courts to order States to pay money, even when such orders are framed in equitable terms. *Edelman v. Jordan*, 415 U.S. 651, 664 (1974). Thus, requiring payment of retroactive damages from state treasuries, nominal or not, attacks the doctrinal foundation on which *Ex Parte Young* rests. *Edelman*, 415 U.S. at 664; *Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 124-35 (1984); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989).

Additionally, Plaintiff's claim that seeking nominal damages is sufficient to plead an injury-in-fact for Article III standing purposes does not affect the sovereign immunity analysis because she concedes that the relief she seeks if retrospective. (Opp. Br., 33-34) (citing *Uzuegbunam v. Preczewski*, 592 U.S. 279, 290 (2021)). Absent a state's waiver of sovereign immunity, a plaintiff may only bring claims against state officials in federal court

when she alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. *281 Care Committee v. Arneson*, 638 F.3d 621, 632 (8th Cir. 2011). And, even if a plaintiff establishes Article III standing, their claim may nevertheless be barred by sovereign immunity because the analyses are independent and conceptually distinct from each other. *218 Care Committee* v. *Arneson* ("*Care Committee II*"), 766 F.3d 774, 796-97 (8th Cir. 2014) (finding plaintiffs established Article III standing but dismissing case because plaintiffs could not establish *Ex parte Young* exception to sovereign immunity).

Finally, Plaintiff correctly notes that "Congress can abrogate sovereign immunity." (Opp. Br. 33-34 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).) But this simply underscores the fact that Plaintiff's remedy in this case, whether seeking modification of the underlying state statute or an explicit abrogation of sovereign immunity, is legislative not judicial.

CONCLUSION

Plaintiff seeks damages the State Defendants and a declaration that they violated her constitutional rights in the past. But rather than stating a cognizable claim for relief, Plaintiff pleaded paradigmatic examples of claims barred by sovereign and qualified immunity. Accordingly, all claims against the State Defendants must be dismissed.

Signature is on the next page.

Dated: August 19, 2024

Respectfully submitted,

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