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

KYLEE MCLAUGHLIN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a constitutional state agency, LINDSEY GRAY-WALTON, in her official and individual capacities, and KYLE WALTON, in his official and individual capacities,	)	Case No.: CIV-21-539-HE
	)	
Defendants.	)	

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

NOW INTO COURT comes Plaintiff Kylee McLaughlin and files this Response to Defendant's Motion to Dismiss.

INTRODUCTION

The motion brought by the Board of Regent of the University of Oklahoma ("O.U.") is focused almost entirely on the Eleventh Amendment. The only cause of action where the Board of Regent is named directly is the 5th Count, pursuant to 70 Okla. Stat. § 2120. There was a scrivener's error in the caption of the 3rd Count (Intentional Infliction of Emotional Distress), where, after specifying Lindsey Gray-Walton and Kyle Walton, the caption says "against all defendants." However, if one reads the body of the 3rd Count, as well as its prayer for relief, one can plainly see that it does not name O.U.

ARGUMENTS AND AUTHORITIES

I. PLAINTIFF'S CLAIMS AGAINST DEFENDANTS ARE NOT BARRED BY THE ELEVENTH AMENDMENT.

The state waived its Eleventh Amendment immunity pursuant to 70 Okla. Stat. § 2120. Defendants argue that the Eleventh Amendment bars Plaintiff's suit against them. *See* Def. Motion to Dismiss at p. 3. There are several ways in which immunity may be waived. A state may be held to have waived its immunity if it voluntarily invokes the jurisdiction of a federal court. *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-76 (1999). Further, a state waives its immunity if it "makes a clear declaration that it intends to submit itself to [a federal court's] jurisdiction." *Id.* A state can declare its "intent to submit to suit by impliedly or constructively waiving its immunity if the declaration is clear and altogether voluntary." *MCI Telecomm. Corp. v. Public Serv. Comm. of Utah*, 216 F.3d 929, 935 (10th Cir. 2000) (citing *Coll. Sav. Bank* for overruling the constructive waiver doctrine of *Parden vs. Terminal Ry. of Ala.*, 377 U.S. 184, (1964), but recognizing that a state may still constructively or impliedly waive its immunity in certain circumstances).

Consistent with Supreme Court precedent, this Court should find that Oklahoma waived its Eleventh Amendment immunity by enacting 70 Okla. Stat. § 2120. In *Smith v. Reeves*, 178 U.S. 436, 441 (1900), the Supreme Court analyzed whether a state's creation of a cause of action to recover improperly paid taxes provides evidence of consent to suit in state courts only, to the exclusion of federal courts. The Court ultimately concluded that California had consented to be sued only in its own courts, despite the fact that this limitation was not expressly declared in the statute. The Court reasoned that "the requirement that the aggrieved taxpayer shall give notice of his suit to the comptroller, and the provision that the treasurer may at the time he demurs or answers demand that the action be tried in the superior court of the county of Sacramento,"

evinced the state's intent to have proceedings conducted exclusively within its own tribunals. *Id.* at 441 (internal quotation marks omitted). With regard to 70 Okla. Stat. § 2120, there is no requirement of a pre-suit notice to a state official and no special provision on venue choice available to a defendant post-filing.

Although *Smith* was decided more than one hundred years ago, it still retains vitality and is applicable to this case. *See Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944)[1]; *see also Coll. Sav. Bank*, 527 U.S. 666, 676 (1999) (citing *Smith*). It is true that whenever an enactment by a state legislature allows a suit against the state, federal courts will not automatically read the consent to embrace federal as well as state courts. At the same time, if the state law at issue does not specifically indicate the state's willingness to be sued in federal court, "other textual evidence of consent to suit in federal courts may resolve that ambiguity and sufficiently clearly establish the scope of the [s]tate's more general consent to suit. *See Port Authority Corporation v. Feeney*, 495 U.S. 299, 306 (1990). In that respect, a close reading of 70 Okla. Stat. § 2120 would show that it provides a broad waiver of immunity that extends to federal courts.

A. Provisions of 70 Okla. Stat. § 2120 Contemplate a Federal Cause of Action.

70 Okla. Stat. § 2120 at subsection (G)(3) explicitly recognizes the possibility of a federal claim being filed pursuant to the statute:

> **If a public institution of higher education is sued for an alleged violation of First Amendment rights, a supplementary report with a copy of the complaint, or any amended complaint, shall be submitted to the Governor and the Legislature within thirty (30) days.**
>
> ***See* 70 Okla. Stat. § 2120(G)(3).**

[1] A foreign insurance company brought suit in an Oklahoma federal court against the Oklahoma Insurance Commissioner to recover payments pursuant to a state statute which levied a tax on premiums received by foreign insurance companies in the state. Citing *Smith v. Reeves*, 178 U.S. 436 (1900), the Supreme Court found that the state had consented to its being sued only in its own courts.

The law expressly contemplates that aggrieved parties may pursue a First Amendment claim, which is a federal claim. Assuming, *arguendo*, that 70 Okla. Stat. § 2120 provides no waiver of Eleventh Amendment immunity, plaintiffs would be left to litigate a federal claim in state court regardless of its federal nature. Insisting on a federal court to decide federal law claims is not an insignificant consideration. *See* John F. Preis, *Reassessing the Purposes of Federal Question Jurisdiction*, 42 Wake Forest L. Rev. 247, 279 (2007) (the "average federal appellate judge has seven times more experience with federal questions than the average state appellate judge"). Pursuing federal claims in state court would entail losing federal expertise. *Bergemann v. R.I. Dep't of Envtl. Mgmt.*, 665 F.3d 336, 342 (1st Cir. 2011). In effect, one of the principal purposes of a federal court system is to provide a federal forum for the assertion of federal claims. Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute – A Constitutional and Statutory Analysis*, 24 Ariz. St. L.J. 849, 863-64 (1992). While it is true that state courts are also generally available in federal question cases, forcing a plaintiff in a federal question case to litigate in state court denies the plaintiff a federal forum for a federal claim. Here, 70 Okla. Stat. § 2120 recognizes that causes of action grounded in the First Amendment may be leveled against Oklahoma institutions of higher education, and this Court should construe the statute in a way that would not discourage plaintiffs from choosing a federal forum for a federal claim.

B. The Drafter of 70 Okla. Stat. § 2120 Intended That Eleventh Amendment Immunity Be Waived.

The legislative history of 70 Okla. Stat. § 2120 indicates that the enactment contemplates the state's waiver of Eleventh Amendment immunity. When State Senator Julie Daniels of Tulsa introduced the measure that eventually got enacted as 70 Okla. Stat. § 2120, the text of the legislation, at subsection "J", specifically provided for waiving Eleventh Amendment immunity:

> **The state waives immunity under the Eleventh Amendment to the United States Constitution and consents to suit in a federal court for lawsuits arising out of this section. A public institution of higher education that violates this act is not immune from suit or liability for the violation.**

***See* Senate Bill No. 361 – Senate Floor Version (Feb. 26, 2019).**[2]

An amendment was then introduced by Sen. Daniels on March 13, 2019, striking the above language. When asked to explain her amendment on the Senate floor, Senator Daniels stated that she removed the above provisions "after discussions with representative of O.U. and O.S.U." *See* Live Chamber, Meeting in Senate, Mar. 13, 2019, 1:26 P.M. – 2:55 P.M. at 1:51:07.[3] The Senator did not state what the substance of these discussions was, nor did she say that it was undesirable for the legislation to allow a plaintiff an opportunity to pursue a First Amendment claim in federal court.

The fact that the waiver of Eleventh Amendment immunity is not expressly mentioned in the statute is not dispositive. State law does not itself confer jurisdiction on federal courts – it only provides the necessary indicia of consent required by federal jurisdiction. *See* Jessica Wagner, Note, *Waiver by Removal? An Analysis of State Sovereign Immunity*, 102 Va. L. Rev. 549, 573 (2016). In this case, the drafter's original intent to waive Eleventh Amendment immunity, coupled with the statute's recognition of a federal cause of action, provide compelling indicia to the effect that federal jurisdiction over a § 2120 claim is authorized. The request for relief sought in the 5th Count of the Complaint is based on the harm Plaintiff incurred as a result of O.U.'s violation of 70 Okla. Stat. § 2120. The state here waived its Eleventh Amendment immunity by consenting to suit.

[2] Available at Oklahoma Legislature, Bill Tracking, http://webserver1.lsb.state.ok.us/2019-20bills/SB/sb361_sflr.rtf (last accessed July 13, 2021).
[3] Available at Oklahoma Senate, Live Chamber, https://oksenate.gov/live-chamber (last accessed July 13, 2021).

II. CLEAR TENTH CIRCUIT PRECEDENT HOLDS THAT ELEVENTH AMENDMENT IMMUNITY DOES NOT EXTEND TO A STATE EMPLOYEE SUED IN HIS INDIVIDUAL CAPACITY.

A state officer sued in his individual capacity enjoys no Eleventh Amendment immunity. *See Hafer v. Melo*, 502 U.S. 21, 30-31 (1991); *Papasan v. Allain*, 478 U.S. 265, 277 n. 11 (1986). Even in instances where state monies may ultimately be used to satisfy a judgment obtained against a state official sued in his individual capacity, a state cannot extend its sovereign immunity to its employees by voluntarily assuming an obligation to indemnify them. *Cornforth v. Univ. of Okla. Bd. of Regents*, 263 F.3d 1129 (10th Cir. 2001) (citing *Griess v. Colo.*, 841 F.2d 1042, 1045-46 (10th Cir. 1988)).[4] Here, in her Complaint, Plaintiff asserted claims against Lindsey Gray-Walton and Kyle Walton in their official and individual capacities. Causes of action seeking damages from Gray-Walton and Walton in their individual capacities are not barred by the Eleventh Amendment.

III. PLAINTIFF STATED A CAUSE OF ACTION UNDER 70 OKLA. STAT. § 2120.

The Court should not dismiss the claim against O.U. for Plaintiff's purported failure to plead facts upon which relief may be granted. "To survive a motion to dismiss [under Fed. R. Civ. P. 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949. Gauging the

[4] Circuit Courts of Appeals throughout the country are in unison on this point. *See Huang v. Johnson*, 251 F.3d 65 (2d Cir. 2001); *Sales v. Grant*, 224 F.3d 293 (4th Cir. 2000); *Hudson v. City of New Orleans*, 174 F.3d 677 (5th Cir. 1999); *Spruytte v. Walters*, 753 F.2d 498, 512 and n. 6 (6th Cir. 1985); *Benning v. Bd. of Regents*, 928 F.2d 775, 778-79 (7th Cir. 1991); *Okruhlik v. Univ. of Ark.*, 255 F.3d 615 (8th Cir. 2001); *Demery v. Kupperman*, 735 F.2d 1139, 1146-49 (9th Cir. 1984); *Jackson v. Ga. Dept. of Transp.*, 16 F.3d 1573, 1577-78 (11th Cir. 1994).

sufficiency of a complaint at the motion to dismiss stage is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 1950. When evaluating a motion to dismiss, the reviewing court "must liberally construe the pleading and make all reasonable inferences in favor of the non-moving party." *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1105 (10th Cir. 2017) (citing *Ruiz v. McDonnell*, 299 F.3d 1173, 1181 (10th Cir. 2002)). The standards applicable to review of a complaint on a Rule 12(b)(6) motion require that the Court accept all well-pleaded facts as true. *Poole v. Cnty. of Otero*, 271 F.3d 955, 961-2 (10th Cir. 2001). With these standards and the bases of Plaintiff's claim in mind, Plaintiff's complaint clearly satisfies the *Twombly-Iqbal* plausibility standard.

Defendants ask this Court to dismiss the count alleging a violation of 70 Okla. Stat. § 2120 under Fed. R. Civ. P. 12(b)(6), suggesting that Plaintiff has pleaded only that her off-campus expressions on ESPN's website resulted in retaliation, as opposed to on-campus expression. *See* Def. Motion to Dismiss at p. 8. Defendants next contend that Plaintiff failed to plead any violation of her protected speech by O.U. or its agents that took place on campus. *Id.* at p. 9. In this case, while some speech may have taken place off campus, the Complaint does state that Plaintiff was present on campus in her exercise of free speech and expression. Specifically, after watching the movie "13", Plaintiff's speech was on campus,[5] while the two emojis were

[5] Here is what the Complaint has alleged in regard to Plaintiff's expressive activity on-campus:
¶30. During the COVID 19 Pandemic in 2020, the schedule for the O.U. women's volleyball team changed dramatically in that the Defendants, for several months, emphasized discussions about white privilege and social justice rather than coaching volleyball. All members of the O.U. team were required to participate in these discussions and watch a Documentary called "13th" on racism and slavery.
¶31. On June 11, 2020, Plaintiff was asked by Defendant Kyle to give her opinion on the video which she did by stating: "that she agreed 100% that slavery was wrong and the slaves were mistreated; and, that statistics showed that. Plaintiff also expressed her opinion toward the end of the video that it was slanted "left" and that it took some shots at what President Trump said and compared it with beatings of Blacks from the 1960's. Plaintiff responded with appropriate non-racists comments that represented her opinions.
¶32. Pressed for more input Plaintiff offered comments directly from the movie that Black incarceration was higher than other racial groups while representing a smaller overall percentage of the population. She stated that they were incarcerated mostly for marijuana and drugs.

sent by her off-campus via the ESPN site. *See* Complaint at ¶36. The Complaint also states that while on campus Plaintiff "was pressed by O.U.'s Diversity, Equity and Inclusion to find a person with different political views and 'have a conversation' as homework." *Id.* at ¶26. The Complaint contains enough allegations of on-campus activity to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Consistent with 70 Okla. Stat. § 2120, Plaintiff has pleaded that she engaged in noncommercial expressive activity on campus but was not permitted to do so freely. Taking Plaintiff's assertions as true and resolving all inferences in Plaintiff's favor, this Court should conclude that the Complaint validly states a cause of action under 70 Okla. Stat. § 2120.[6]

CONCLUSION

For the foregoing reasons, Plaintiff Kylee McLaughlin requests that Defendant's Motion to Dismiss be denied in all respects. Plaintiff will also promptly move to correct the Complaint and remove the scrivener's error in the caption of the 5th Count.

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¶33. Plaintiff did as Defendant Kyle instructed and on June 11, 2020, she and other teammates met in a small pod to discuss this video and to play games.
¶33. Plaintiff did as Defendant Kyle instructed and on June 11, 2020, she and other teammates met in a small pod to discuss this video and to play games.
¶34. After the video conference, Sanaa' Dotson posted a tweet from account, @the_female_lead, in support of Black Lives Matter. She copied a tweet "screenshot" duplicating what the Plaintiff stated from the movie 13 and added: "things a racist person says" to it. She basically was calling the Plaintiff a racist. Defendant Gray-Walton was asked if the player would be held accountable for her social media posts. This was called to Defendant Gray-Walton's attention, she said it would be addressed, but was dismissed quickly.

[6] In their Motion, Defendants asserted the Governmental Tort Claims Act, 51 Okla. Stat. § 151, et seq., applies to this action. *See* Def. Motion to Dismiss at p. 2-3. Plaintiff denies that OGTCA applies, but since Defendants are not seeking dismissal on this basis, this issue is not addressed in the foregoing response.

/s/ Alexey Tarasov
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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2021 the attached pleading styled "Plaintiff's Response to Defendants' Motion to Dismiss" has been served via CM/ECF on:

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