UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

MICHAEL E. WEAVER, Plaintiff, v. MADISON CITY BOARD OF EDUCATION, *et al.*, Defendants.	)	Civil Action No. 5:11-cv-03558-TMP

UNITED STATES' RESPONSE TO DEFENDANTS' RULE 72 OBJECTIONS TO THE REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE PUTNAM

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, the United States, by and through its undersigned counsel, respectfully submits this response to defendants' (the Board's) Objection to Magistrate Judge Putnam's Report and Recommendation.

ARGUMENT

In his Report and Recommendation,[1] Judge Putnam recommended that this Court deny the Board's motion to dismiss for lack of subject matter jurisdiction.

[1] Judge Putnam originally designated his opinion as a "Memorandum Opinion," but, upon recognizing that the parties had in fact not consented to his exercise of dispositive jurisdiction, redesignated it as a "Report and

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Judge Putnam correctly rejected the Board's contention that it is immune from suit under USERRA by virtue of the Eleventh Amendment. This Court should adopt Judge Putnam's Report and Recommendation. As the United States explained in its Brief as Intervenor (Doc. 41, attached), and as Judge Putnam rightly concluded, the Board is not an "arm of the state" for Eleventh Amendment purposes.

The Board's objections to the Report and Recommendation – like its briefs in support of its motion to dismiss – fail to come to grips with the fact that *Stewart* v. *Baldwin County Board of Education*, 908 F.2d 1499 (11th Cir. 1990), forecloses its argument. Judge Putnam "assigned controlling weight" (See Doc. 58 at 3) to *Stewart* because *Stewart* is in fact controlling. See Doc. 50 at 9-20 (Magistrate's Report and Recommendation); Doc. 41 at 6-16 (United States' Brief as Intervenor). The Eleventh Circuit in *Stewart* considered the same issue this Court must decide here: whether a local school board in Alabama is an arm of the state for Eleventh Amendment immunity purposes. The court of appeals held that the school board was not an arm of the state for Eleventh Amendment purposes. *Stewart*, 908 F.2d at 1511. *Stewart* has not been overruled. Nor have the legally relevant

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Recommendation." See Docs. 50 & 53.

characteristics of local school boards in Alabama changed so as to cast doubt upon *Stewart*'s continued applicability.[2]

The Board claims that recent Eleventh Circuit decisions provide this Court a "clear invitation to depart from *Stewart*." See Doc. 58 at 15 (internal quotation marks omitted). As Judge Putnam recognized, however, the only way for this Court to "depart from" an Eleventh Circuit decision that is directly on point is to ignore it or implicitly overrule it, and this Court is not permitted to do either. Doc. 50 at 12.

In any event, the recent decisions the Board points to do not conflict with *Stewart*. As explained in the United States' Brief as Intervenor (Doc. 41 at 12-16), the Eleventh Circuit's decision in *Versiglio* v. *Board of Dental Examiners of*

[2] Indeed, Judge Putnam gave the Board's argument too much credit when he said that *Ex parte Hale County Board of Education*, 14 So. 3d 844 (Ala. 2009) – an Alabama Supreme Court decision recognizing "'arm of the [s]tate' immunity under § 14 of the Alabama Constitution" for local school boards – represents a "significant change in the law." Doc. 50 at 14. *Hale* only expanded a state-law sovereign immunity that already existed for local school boards when *Stewart* was decided. When *Stewart* was decided, as now, local school boards were immune under the Alabama Constitution from state-law tort actions seeking recovery for employment discrimination. See Doc. 50 at 21-22 (recognizing this fact). Moreover, the defendant in *Stewart* made the same argument the Board is making here – that it should be granted Eleventh Amendment immunity because it had state-law immunity. See *Stewart*, 908 F.2d at 1510 n.6. The Eleventh Circuit expressly rejected that argument. *Ibid.*

Alabama, 686 F.3d 1290 (11th Cir. 2012), is readily distinguishable from and does not implicitly overrule *Stewart*.

The Eleventh Circuit's decision in *Ross* v. *Jefferson County Department of Health*, 701 F.3d 655 (11th Cir. 2012), which was decided after the United States filed its Brief as Intervenor in this case, is also distinguishable and also does not implicitly overrule *Stewart*. In that case, the issue was whether an Alabama County Department of Health was an arm of the state for Eleventh Amendment purposes. The court of appeals held that it was. The court of appeals relied in part on its determination that "Alabama courts have uniformly treated county boards of health as state agencies." *Id.* at 659. But it also relied significantly on the fact that, in the area relevant to the plaintiff's claim, the decision maker was a person "defined by statute as a state officer." *Id.* at 660. Specifically, the plaintiff's claim was an employment discrimination claim and a state officer was the person empowered by state law to make the relevant employment decisions. *Ibid.* The individuals who made the employment decisions relevant to Weaver's claim are not statutorily defined as state officials.[3]

[3] The Board also claims (Doc. 58 at 13) that this "invitation" to diverge from the controlling precedent of *Stewart* was extended by *Federal Maritime Commission* v. *South Carolina State Ports Authority, et al.*, 535 U.S. 743 (2002), and *Williams* v. (continued…)

The Board also objects to Judge Putnam's functional approach to applying the Eleventh Circuit's test for assessing whether an entity is an arm of the state for Eleventh Amendment purposes. See Doc. 58 at 4-12. But that approach is consistent with Eleventh Circuit precedent. See *Abusaid* v. *Hillsborough Cnty. Bd. of Cnty. Comm'rs*, 405 F.3d 1298, 1303 (11th Cir. 2005) (assessing whether a particular entity was an arm of the state for Eleventh Amendment purposes "in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise") (quoting *Manders* v. *Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003)). In any event, that part of Judge Putnam's opinion – his alternative ruling that "[e]ven if the court were to assume that the result in *Stewart* is not binding," it would nonetheless conclude that the Board is not an arm of the state (Doc. 50 at 21-26) – is dicta since *Stewart* obviously is binding.

Additionally, the United States agrees with the plaintiff (Doc. 59 at 2) that Judge Putnam's statement (Doc. 50 at 4) that the Eleventh Amendment bars USERRA claims against states is erroneous. As explained in the United States'

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District Board of Trustees of Edison Community College, 421 F.3d 1190, 1194-1195 (11th Cir. 2005). The Board does not, however, discuss either case. In fact neither case implicitly overrules *Stewart* or provides any legal basis for failing to apply *Stewart*.

Brief as Intervenor (Doc. 41 at 21-34), Congress has the authority, pursuant to its War Powers, to subject state employers to private USERRA claims. The statement appears, however, to be merely a drafting error since Judge Putnam expressly declined to reach the War Powers issue (Doc. 50 at 2 n.3), and thus clearly did not intend to hold that the Eleventh Amendment categorically bars USERRA claims against states. The United States does not agree with the plaintiff's view (Doc. 59 at 2-3) that this Court should reach the War Powers issue. For the reasons set out in the United States' Brief as Intervenor (Doc. 41 at 1-3, 21-22), the most appropriate way to resolve this case is to simply rule (as the Report and Recommendation does) that the Board is not an arm of the state for Eleventh Amendment purposes.

CONCLUSION

This Court should adopt Judge Putnam's Report and Recommendation and rule that the Madison City School Board is not an arm of the state for Eleventh Amendment purposes. This Court may wish to clarify that its opinion does not decide whether Congress has authority under its War Powers to subject states to suit, and accordingly does not hold that the Eleventh Amendment categorically bars USERRA claims against states.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on July 12, 2013, the foregoing RESPONSE TO DEFENDANTS' RULE 72 OBJECTIONS TO THE REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE PUTNAM was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all counsel of record.

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