

No. 22 -

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In the  
Supreme Court of the United States

Paul C. Nordberg,

*Petitioner*

-v-

The Massachusetts Teachers' Retirement  
System

*Respondent*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the 1<sup>st</sup> Circuit

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#### APPENDIX ON APPEAL

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# **EXHIBIT #1**

Nordberg v. the Massachusetts  
Teachers' Retirement System;  
Case No. 19-40089-TSH; United  
States District Court for the  
District of Massachusetts  
– Worcester Division

**Memorandum and Order on**  
**Defendant's Motion to Dismiss;**  
Entered November 30, 2020

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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PAUL C. NORDBERG )  
Plaintiff, ) No. 19-CV-40089-TSH  
 ) Civil Action  
v. )  
THE MASSACHUSETTS )  
TEACHERS' )  
RETIREMENT SYSTEM ))  
Defendant.)

**MEORANDUM OF DECISION AND ORDER ON  
DEFENDANT'S MOTION TO DISMISS**

November 30, 2020

HILLMAN, DJ.

**Introduction**

Proceeding pro se, plaintiff Paul C. Nordberg (“Plaintiff”) brought this action against the Massachusetts Teachers’ Retirement System (“MTRS” or “Defendant”), alleging age discrimination claims pursuant to the Age Discrimination in Employment Act of 1967

(“ADEA”), 29 U.S.C. §§ 621-634, and under state law, Mass. Gen. Laws. c. 151B. This Order addresses Defendant’s motion to dismiss all claims pursuant to Fed. R. Civ. P. 12(b)(1). For the reasons stated below, the motion is granted.

### **Background**

Because Plaintiff appears pro se, we construe his pleadings more favorably than we would those drafted by an attorney. See *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S.Ct. 2197 procedural and substantive law. See *Ahmed v. Rosenblatt*, 118 F.3d 886, 890 (1st Cir. 1997).

Plaintiff is a teacher in Massachusetts whose pension benefits are administered by the MTRS.

Defendant MTRS is a state agency that administers the pension plan for public school teachers of every Massachusetts community except Boston. Plaintiff has contributed 11 percent of his gross salary towards his pension for the past 15 years.

Contributing to the MTRS is a condition of Plaintiff’s employment. Plaintiff is currently 73 years old. He alleges that the MTRS’s calculation of pension benefits discriminates against teachers who work beyond the age of 65. Specifically, he claims that the MTRS’s pension calculation formula “treats retirees better for each year they work beyond age [50] – but only up to age [65].” See Complaint ¶ 8. He alleges that he faces a financial penalty because he is older than 65 and has not yet retired.

In the spring of 2019, Plaintiff filed the same complaint with both the Massachusetts Commission Against Discrimination and the United States Equal Employment Opportunity Commission (“EEOC”), alleging that he suffered age-related discrimination “in connection with [his] pension rights and benefits with the [MTRS].” The EEOC informed Plaintiff that it would process his complaint on behalf of both agencies. On April 17, 2019, the EEOC notified Plaintiff that it was closing his case because it had “perceived no violations of law from the content of [his] complaint.”

On July 8, 2019, Plaintiff initiated this action, asserting age discrimination claims against the MTRS pursuant to the Age Discrimination in Employment Act of 1967 (“ADEA”), 29 U.S.C. §§ 621–634, and under state law, Mass. Gen. Laws c. 151B. He asks this Court to declare that the MTRS’s formula for calculating pension benefits violates both the ADEA and Mass. Gen. Laws c. 151B. Plaintiff further requests that this Court enter an order detailing how the MTRS should calculate his pension benefits when he eventually applies for retirement. Lastly, he requests that this Court award him \$300,000 in quantum meruit.

### **Discussion**

Defendant argues that MTRS is immune from ADEA liability under the Eleventh Amendment, and that the claim therefore fails under Rule 12(b)(1) for lack of subject matter jurisdiction. On a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the

plaintiff bears the burden of proving that the court has jurisdiction. *O'Toole v. Arlington Trust Co.*, 681 F.2d 94, 98 (1st Cir. 1982). Generally, a court should apply a standard of review “similar to that accorded a dismissal for failure to state a claim” under Rule 12(b)(6). *Menge v. N. Am. Specialty Ins. Co.*, 905 F.Supp.2d 414, 416 (D.R.I. 2012) (quoting *Murphy v. United States*, 45 F.3d 520, 522 (1st Cir. 1995)). A court confronted with a Rule 12(b)(6) motion “may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Educadores Puertorriquenos en Accion v. Hernandez*, 367 F.3d 61, 66 (1st Cir. 2004) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229 (1984)).

The ADEA makes it unlawful for an employer “to fail or refuse to hire ... any individual or otherwise discriminate against any individual ... because of such individual's age.” 29 U.S.C. § 623(a)(1). As a branch of the Commonwealth, MTRS is immune from private suit for damages in federal court under the Eleventh Amendment. *Hudson Sav. Bank v. Austin*, 479 F.3d 102, 105–06 (1st Cir. 2007). There are situations where a state may be subject to suit, such as where Congress abrogates its immunity or where the state has consented to be sued. *Id.* But the ADEA does not abrogate the Commonwealth's sovereign immunity. *Kimel v. Fla. Bd. of Regents*, 528U.S. 62, 90–91, 120 S.Ct. 631 (2000)

This means that unless a state consents to being sued, the “[s]tate is immune from suits brought in federal courts by her own citizens as well as by citizens of another State.” *Edelman v. Jordan*, 415 U.S. 651, 662–63, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). The defendants argue, correctly, that the states have not given up their immunity for suits brought under the ADEA. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 92, 120 S.Ct. 631 (2000) (“[T]he ADEA does not validly abrogate the States’ sovereign immunity.”).

Plaintiff also seeks relief under state anti-discrimination law, Mass. G.L c. 151B against the MTRS. Although there is supplemental jurisdiction over these claims, the court must determine if the Eleventh Amendment bars the exercise of this jurisdiction.

Specifically, the Eleventh Amendment prohibits federal courts from hearing cases brought against states or their officers under state law. This prohibition may be lifted if the relevant state law contains a provision specifically authorizing suit against the state to proceed in federal court. M.G.L. c.151B does not contain such a provision. The First Circuit has held that Eleventh Amendment Immunity bars plaintiffs from asserting Chapter 151B claims against State defendants in federal courts. See *Lopez v. Massachusetts*, 588 F.3d 69,73 n.1 (1st Cir. 2009), citing *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 121, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984).

Accordingly, the state law claim under c. 151B must be dismissed.

Conclusion

For the reason's set for above, Defendant's Motion to Dismiss (Docket No. 12) is granted.

SO ORDERED.

/s/ Timothy S. Hillman

TIMOTHY S. HILLMAN

DISTRICT JUDGE

## **EXHIBIT 2**

**Nordberg v. the Massachusetts  
Teachers' Retirement System;  
Case No. 19-40089-TSH; United  
States District Court for the  
District of Massachusetts –  
Worcester Division**

**Clerk's Order of Dismissal entered  
on November 30, 2020**

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Nordberg, )  
Plaintiff, )  
 ) CIVIL ACTION  
V. )  
 ) NO. 19-40089-  
The Massachusetts ) TSH  
Teachers' Retirement )  
System, )  
Defendant, )

## ORDER OF DISMISSAL

Hillman, D. J.

In accordance with the Court's Memorandum and Order dated 11/30/20, granting

the defendant's motion to dismiss, it is hereby ORDERED that the above-entitled action be and hereby is dismissed.

By the Court,

11/30/20 /s/ Martin Castles

Date Deputy Clerk

## **EXHIBIT #3**

Paul C. Nordberg -v- the  
Massachusetts Teachers'  
Retirement System; Case No.  
21-1006; United States Court of  
Appeals for the 1st Circuit

Judgement Entered on October  
20, 2021 – affirming the  
dismissal of the lawsuit by the  
District Court

**United States Court of Appeals  
For the First Circuit**

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No. 21-1006

PAUL C. NORDBERG,

Plaintiff - Appellant,

v.

THE MASSACHUSETTS TEACHERS'  
RETIREMENT SYSTEM,

Defendant - Appellee.

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Before

Lynch, Thompson and Kayatta,

Circuit Judges.

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**JUDGMENT**

Entered: October 20, 2021

Plaintiff-appellant Paul C. Nordberg filed a suit alleging age discrimination against defendant-appellee, the Massachusetts Teachers' Retirement System (MTRS) in the United States District Court for the District of Massachusetts. Nordberg alleged

that the formulas used by the MTRS to determine retirement benefits unfairly disfavor older workers.

The defense filed a motion to dismiss, arguing that, under the Eleventh Amendment to the United States Constitution, sovereign immunity protected the MTRS from being sued in federal court. Nordberg opposed the motion.

The district court agreed with the defense and granted the motion to dismiss. This appeal followed.

Nordberg has filed an opening brief. The defense has filed a motion for summary disposition, arguing that there is no substantial argument for challenging the district court's judgment of dismissal. Nordberg has filed a written opposition to the motion.

Under this court's precedent, an inquiry into the status of an entity like the MTRS begins with an examination of what have been termed "structural indicators": the "characterization" of the entity under state law; the "nature of its functions" under state law; the entity's "overall fiscal relationship" with the state; and the degree of "control" the state exercises over the entity's "operations". See *Grajales v. Puerto Rico Ports Auth.*, 831 F.3d 11, 18 (1st Cir. 2016). A review of the relevant provisions in the statutory and regulatory laws of Massachusetts shows that the MTRS is one of many public-employee retirement programs subject to supervision by the state's "Public Employees Retirement Administration Commission" (PERAC). See Mass. Gen. Laws ch. 7, §§ 49 & 50; ch. 15, § 16; ch. 32, §§ 2, 5 & 21; 840 Code Mass. Regs. § 14.02. The assets and

funds for which the MTRS is responsible are held in the "Pension Reserves Investment Trust Fund" (PRIT), under the "general supervision" of the "Pension Reserves Investment Management Board" (PRIM). See Mass. Gen. Laws ch. 32, §§ 22 & 23.

The state government's structural apparatus around the MTRS is quite considerable. The MTRS is not separately incorporated, and four of its seven board members are government appointed (with two elected seats and a single seat filled by the selection of the other six members).

The "nature of [the MTRS's] functions" is akin to that of a conventional government agency. It serves to provide a gainful and honest program of retirement benefits to a subset of government employees (school teachers), subject to the supervision of the PERAC and with relevant funds and assets held by the PRIT/PRIM. The MTRS's "fiscal relationship" with the state is indicated by its receipt of several million dollars annually for its operating budget. As for the "control" exercised over operations, it appears the state government exercises a degree of "control" over the "operations" of the MTRS that is most consistent with the MTRS being an arm of the state.

This conclusion flows from

- (i) the particularized specification of the duties of the MTRS and the composition of the MTRS board,
- (ii) (ii) the required supervision of the MTRS by the PERAC, and

(iii) the mandatory reliance on the PRIT/PRIM for holding the funds and assets of the MTRS.

Since the sum of the "structural indicators" tilts decisively in favor of the MTRS sharing in the sovereign immunity of the state government of Massachusetts, there is no need for further inquiry. See Grajales, 831 F.3d at 18. The district court's dismissal of the suit on the basis of the Eleventh Amendment was correct.

The defense motion for summary disposition is granted, and the judgment is summarily affirmed.

By the Court:

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## **EXHIBIT 4**

**Paul C. Nordberg -v- the  
Massachusetts Teachers'  
Retirement System; Case No.  
21-1006; United States Court of  
Appeals for the 1st Circuit**

**ORDER of the Court entered on  
February 14, 2022 DENYING  
rehearing**

United States Court of Appeals  
For the First Circuit

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No. 21-1006

PAUL C. NORDBERG,

Plaintiff - Appellant,

v.

THE MASSACHUSETTS TEACHERS'  
RETIREMENT SYSTEM,

Defendant - Appellee.

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Before

Lynch, Thompson and Kayatta,  
Circuit Judges.

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## **ORDER OF COURT**

Entered: February 14, 2022

Following summary affirmance for the defendant-appellee, plaintiff-appellant Paul C. Nordberg has requested rehearing by the decisional panel. We have considered carefully each of the points Nordberg presses. The factual points Nordberg presses, even if treated as true, do not alter our conclusion that affirmance was in order, nor do the legal points addressed in the rehearing petition.

The petition for panel rehearing is denied.

By the Court:

Maria R. Hamilton, Clerk

cc:

Paul C. Nordberg

Cassandra Bolanos

Elizabeth A. Kaplan