No. _____

In the Supreme Court of the United States

Bharani Padmanabhan MD PhD,
Petitioner

v.

Board of Registration in Medicine,
Respondent

On Petition for a Writ of Certiorari
to the Massachusetts Appeals Court
(21-P-0401)

APPENDIX INDEX

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-401

BHARANIDHARAN PADMANABHAN[1]

vs.

BOARD OF REGISTRATION IN MEDICINE.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Bharanidharan Padmanabhan, M.D., Ph.D., appeals from a Superior Court judgment dismissing his complaint against the Board of Registration in Medicine (board) for failure to state a claim on which relief can be granted. We affirm.

Background. The complaint, the allegations of which we take as true, Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011), asserted that in 2017, the board indefinitely suspended the plaintiff's license to practice medicine. In 2019, this court decided Bloomstein v. Department of Pub. Safety, 96 Mass. App. Ct. 257 (2019), which held that a State

[1] As is our custom, we spell the plaintiff's name as it appears in the complaint. We note, however, that the plaintiff's appellate submissions spell his first name as "Bharani."

agency had violated certain procedural provisions of G. L. c. 30A, § 11 (7) & (8), in suspending Bloomstein's construction supervisor license. Id. at 258, 261-262. The plaintiff here, believing that the board had committed the same or similar procedural violations in suspending his medical license, petitioned the board to reinstate his license. After some time passed without the board doing so, the plaintiff filed an action seeking damages for violations of his constitutional rights and for "consciously tortious" actions.

On the board's motion to dismiss, a judge ruled that the plaintiff's Federal constitutional claims, asserted under 42 U.S.C. § 1983, and his State constitutional claims, asserted under the Massachusetts Civil Rights Act (MCRA), G. L. c. 12, §§ 11H, 11I, failed because the board is not a "person" within the meaning of either of those statutes and thus retained sovereign immunity to liability thereunder. The judge further ruled that because the board was a public employer under the Massachusetts Tort Claims Act (MTCA), G. L. c. 258, it retained sovereign immunity from intentional tort claims. This appeal followed.

Discussion. We review the sufficiency of the complaint de novo. Curtis, 458 Mass. at 676. On appeal, the plaintiff argues that the board is not the type of State entity that is

immune from liability under § 1983 or the MCRA, or immune from intentional tort liability under the MTCA. We are unpersuaded.

1. Constitutional claims. It is settled that "[a]n agency of the Commonwealth is not a 'person' subject to suit for monetary damages under § 1983." Laubinger v. Department of Revenue, 41 Mass. App. Ct. 598, 601 (1996), citing Will v. Michigan Dep't of State Police, 491 U.S. 58, 70-71 (1989).[2] Likewise, as to the MCRA, "the Commonwealth, including its agencies, is not a 'person' subject to suit pursuant to G. L. c. 12, § 11H." Williams v. O'Brien, 78 Mass. App. Ct. 169, 173 (2010). See Commonwealth v. ELM Med. Lab., Inc., 33 Mass. App. Ct. 71, 75-80 & n.9 (1992) (MCRA did not waive sovereign immunity of State agencies).

Here, the board is a State agency exercising delegated legislative authority. See Levy v. Board of Registration & Discipline in Med., 378 Mass. 519, 522-526 (1979) (evaluating board's action based on principles generally applicable to public administrative agencies).[3] "The [b]oard . . . is a state

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[2] In Will, the United States Supreme Court interpreted the word "person" in § 1983 in light of, among other things, Congress's intention to preserve State sovereign immunity. 491 U.S. at 67.

[3] We reject the plaintiff's claim that because at the time Levy was decided, the name of the board included the phrase "and [d]iscipline," but no longer does, Levy is inapplicable. Contrary to the plaintiff's claim, the statute that removed that phrase from the board's name made no changes in the board's

agency," and thus is entitled to the Commonwealth's immunity under the Eleventh Amendment to the United States Constitution against suit in Federal court.[4] Bettencourt v. Board of Registration in Med. of the Commonwealth of Massachusetts, 721 F. Supp. 382, 384 (D. Mass. 1989), aff'd, 904 F.2d 772 (1st Cir. 1990). "[T]he doctrine of sovereign immunity bars the recovery of damages from the [b]oard, and the [b]oard members and their staff in their official capacities." Bettencourt v. Board of Registration in Med. of the Commonwealth of Massachusetts, 904 F.2d 772, 781 (1st Cir. 1990).[5]

Numerous statutory provisions show that the board is a State agency. Under G. L. c. 13, § 10, the board's members are appointed by the Governor, who may remove them "for neglect of duty, misconduct, malfeasance or misfeasance in office."[6] Under

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powers, duties, or status as a state agency. See St. 1979, c. 58.

[4] The Eleventh Amendment affirms "the fundamental principle of sovereign immunity." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98 (1984).

[5] In Padmanabhan v. Cambridge, 99 Mass. App. Ct. 332, 340-341 (2021), relying on reasoning in Bettencourt, our court concluded that the board's members and certain staff are entitled to quasi judicial absolute immunity -- an immunity not commonly extended to non-state actors.

[6] We are at a loss to understand the plaintiff's argument based on the language of G. L. c. 13, § 10, to the effect that the board "consist[s] of" seven persons appointed by the Governor. The plaintiff fails to explain how this language renders the board any less a State entity than other boards that have

G. L. c. 13, § 9 (a), the board serves in the Department of Public Health. Under G. L. c. 13, § 10A, the board's proposed regulations may be reviewed and approved or disapproved by the Commissioner of Public Health (commissioner). A variety of other statutes control the board's activities. See G. L. c. 13, § 9B; G. L. c. 112, §§ 2, 3-9B.

The plaintiff nevertheless asserts that G. L. c. 112, § 1, provides the defendant board with "statutory independence from the State," because that statute provides that the commissioner "supervises" the work of various other boards of registration, but merely "consults with" the chair of the defendant board. In view of the other statutes cited above, the words of G. L. c. 112, § 1, create no such independence.

The plaintiff next suggests that the board is not subject to sufficient State control to entitle the board to State-action antitrust immunity, as is required under North Carolina State Bd. of Dental Examiners v. Federal Trade Comm'n, 574 U.S. 494, 503-504 (2015) (Dental Examiners). The plaintiff fails to explain, however, why a board's entitlement to antitrust

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similar language in their enabling statutes. See, e.g., G. L. c. 13, § 16 (board of registration in optometry); G. L. c. 13, § 64 (board of registration of chiropractors).

immunity is necessarily coextensive with or determinative of that board's entitlement to sovereign immunity.[7]

The plaintiff also argues that, under G. L. c. 10, § 35M, the board is ensured "financial independence," and that this weighs against treating the board as a State agency entitled to sovereign immunity. See, e.g., Walter E. Fernald Corp. v. Governor, 471 Mass. 520, 524 (2015) (sovereign immunity serves, in part, to protect public treasury). The cited statute, however, does not by its terms give the board such independence; it allows the board to keep and expend specified portions of various revenue streams, but it does not allow the board to retain all of its revenues. Nor does it require the board to operate without annual appropriations from the State treasury; to the contrary, the board receives such appropriations. See, e.g., St. 2021, c. 24, § 2, item 4510-0723 (appropriating money from State's general fund for certain operations of board for fiscal year 2022).

In sum, the board retains State sovereign immunity. As an arm of the State, it is not a "person" and thus cannot be liable

[7] We need not and do not imply any view on whether the board here is entitled to antitrust immunity.

under § 1983 or the MCRA. The plaintiff's claims for damages for constitutional violations were correctly dismissed.[8]

2. Intentional tort claims. The plaintiff's claims against the board for intentional torts also fail. The board falls within the MTCA's definition of "[p]ublic employer," which includes, as relevant here, "the commonwealth . . . and any department, office, commission, committee, council, board, division, bureau, institution, agency or authority thereof" (emphasis added).[9] G. L. c. 258, § 1. The provisions of G. L. c. 258, §§ 1-8, waive a public employer's sovereign immunity to claims based on the negligence of that employer's public

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[8] To whatever extent the plaintiff sought to assert his State constitutional claims directly under the State Constitution rather than under the MCRA, dismissal of the claims was also proper. See Doe, Sex Offender Registry Bd. No. 474362 v. Sex Offender Registry Bd., 94 Mass. App. Ct. 52, 64-65 (2018).

[9] We reject the plaintiff's argument, based on FBT Everett Realty, LLC vs. Massachusetts Gaming Comm'n, 489 Mass. 702, 719-720 (2022) (FBT), that the board enjoys the same level of financial and political independence as the Massachusetts Port Authority (MassPort) and therefore is an "independent body politic and corporate" that is excluded from the definition of "public employer" in G. L. c. 258, § 1. MassPort's organic statute expressly establishes it as a "body politic and corporate," St. 1956, c. 465, § 2, with the power to sue and be sued in its own name, to issue revenue bonds, to represent itself in litigation, and to acquire real property in its own name. See FBT, supra at 720-722. None of these things is true of the board. The plaintiff also asks us to take judicial notice of the principles of statutory interpretation set forth in Markham v. Pittsfield Cellular Tel. Co., 101 Mass. App. Ct. 82 (2022). We have considered those principles in reaching our decision.

employees,[10] but do not waive immunity to intentional tort claims. See G. L. c. 258, § 10 (c). See also Shapiro v. Worcester, 464 Mass. 261, 270 (2013) (MTCA is not a blanket waiver; "[i]t specifically exempts certain categories of conduct that continue to enjoy the protection of sovereign immunity"). The intentional tort claims against the board were therefore properly dismissed.

We have not overlooked the plaintiff's remaining arguments, including that § 1983 claims do not require the exhaustion of administrative remedies, and that Bloomstein, 96 Mass. App. Ct. 257, rendered the board's indefinite suspension decision void. Rather, "[w]e find nothing in [those arguments] that requires discussion," given the separate grounds on which we have concluded above that the plaintiff's complaint was

[10] Notably, under G. L. c. 13, § 9C, "[t]he members of the boards of registration shall be public employees for the purposes of chapter 258 for all acts or omissions within the scope of their duties as board members."

defective. Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).

Judgment affirmed.

By the Court (Blake, Sacks & D'Angelo, JJ.[11]),

Joseph F. Stanton

Clerk

Entered: June 13, 2022.

[11] The panelists are listed in order of seniority.

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APPENDIX B

Dolk 12/11/2020

12.0

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 20-00566

BHARANIDHARAN PADMANABHAN

vs.

BOARD OF REGISTRATION IN MEDICINE

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS

The plaintiff, Bharanidharan Padmanabhan, brings this suit against the defendant, Board of Registration in Medicine ("Board"), alleging that the Board is liable under 42 U.S.C. § 1983 and the Massachusetts Civil Rights Act ("MCRA") because it improperly suspended his medical license. He further alleges that the Board is liable because it committed "an intentional tort of violating another's constitutional rights." The matter is before the Court on the Board's Motion to Dismiss the complaint pursuant to Mass. R. Civ. P. 12(b)(1) and 12(b)(6). After review of the parties' submissions, and after oral argument during which the *pro se* plaintiff and the defendant's counsel appeared virtually before the court, now, for the following reasons, the Board's Motion to Dismiss is **ALLOWED**.

BACKGROUND

The following factual allegations are taken from the complaint and documents attached thereto.

At some point before 2017, two doctors reported the plaintiff to the Board, alleging that he had misdiagnosed and mismanaged the medications for two patients. The Board began an investigation into the allegations against the plaintiff.

On May 11, 2017, the Board issued a Final Decision and Order ("Order"). The Order stated that the plaintiff had "rendered substandard care to two patients, . . . maintained substandard medical records for seven patients, . . . and dispensed controlled substances after his Massachusetts Controlled Substances Registration (MCSR) expired." See Complaint Exh. 1. The Order concluded that "[b]ased on the [plaintiff's] committing two acts of negligence . . . and engaging in a pattern of negligent record-keeping," the Board would suspend the plaintiff's medical license indefinitely. *Id.* The Order stayed the suspension for sixty days to allow the plaintiff to enter into a Board-approved probation agreement. The plaintiff did not do so, and on July 12, 2017, the Board informed the plaintiff that the stay had been lifted and his license suspended.

On November 3, 2019, the plaintiff filed a Petition for Reinstatement of Active License ("Reinstatement Petition") with the Board, claiming that the Board's findings were erroneous and that the Board had violated its own regulations by imposing an indefinite suspension without providing written reasons. In response, Board counsel sent the plaintiff the May 11, 2017 Order and referred him to the instructions within the Order as to how to pursue a stay of his license suspension.

The plaintiff filed the instant complaint on June 18, 2020 alleging the Board committed an unlawful taking of his medical license under the Massachusetts Constitution and under the Fifth and Fourteenth Amendments to the United States Constitution, violated his First Amendment right to express his opinion on a patient's MRI brain scan,[1] and committed "an intentional tort of violating another's constitutional rights." He seeks monetary damages for compensation lost as a result of his license suspension.

[1] The complaint does not explain what the plaintiff's opinion was or how the Board violated his right to express it.

DISCUSSION

In reviewing a motion to dismiss under either Mass. R. Civ. P. 12(b)(1) or 12(b)(6), the Court accepts as true the factual allegations in the plaintiff's complaint, as well as any favorable inferences reasonably drawn from them. *Ginther* v. *Commissioner of Ins.*, 427 Mass. 319, 322 (1998). The plaintiff's complaint must state factual "allegations plausibly suggesting (not merely consistent with) an entitlement to relief" for the statement of the claim to have "enough heft to show that the pleader is entitled to relief." *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007). That means that the "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . . ." *Id.* "While 'detailed factual allegations' are not required at the pleading stage, mere 'labels and conclusions' will not survive a motion to dismiss." *Burbank Apartments Tenant Ass'n* v. *Kargman*, 474 Mass. 107, 116 (2016), citing *Iannacchino*, 451 Mass. at 636.

The Board contends that the plaintiff's civil rights claims seeking monetary damages under 42 U.S.C. § 1983 and the MCRA against the Board, which is , in all but its title, defined as an "agency" of the Commonwealth, must be dismissed because those claims are barred by the doctrine sovereign immunity. The Court agrees.

Section 1983 permits a civil suit against a "person," acting under color of law, who deprives another of any "rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Similarly, the MCRA permits suit where a plaintiff can show his rights have been interfered with by a "person" within the meaning of the act. See *Williams* v. *O'Brien*, 78 Mass. App. Ct. 169, 173 (2010). An agency of the Commonwealth is not a "person"

subject to suit for monetary damages under § 1983 or the MCRA. See *id.*; *Laubinger* v. *Department of Revenue*, 41 Mass. App. Ct. 598, 601 (1996). The Board is an agency of the Commonwealth. See G. L. c. 30A, § 1(2) (defining "agency" to include "any . . . board . . . of the state government . . . authorized by law to make regulations or to conduct adjudicatory proceedings."); *Bettencourt* v. *Board of Registration in Med.*, 721 F. Supp. 382, 384 (D. Mass. 1989), *aff'd*, 904 F.2d 772 (1st Cir. 1990) (noting Board of Registration in Medicine is a state agency). By statutory definition, the Board is considered an agency of the Commonwealth for these purposes. Accordingly, the plaintiff cannot maintain a claim against the Board under § 42 U.S.C. 1983 or under the MCRA.[2] See *Howcroft* v. *Peabody*, 51 Mass. App. Ct. 573, 583 n.15, 591-592 (2001) (affirming summary judgment on plaintiff's First Amendment claim brought under § 1983 and the MCRA because the city and defendants in official capacities were not "persons" under § 1983 or MCRA).

The plaintiff takes issue with this reading of the law. Citing *North Carolina Bd. Of Dental Examiners* v. *Federal Trade Commission*, 574 U.S. 494 (2015) ("*Dental Examiners*"), the plaintiff argues that the Board is not entitled to sovereign immunity because it is an independent licensing board with no active supervision by the Commonwealth. *Dental Examiners* is legally and factually distinguishable to the instant matter and thus is neither persuasive nor controlling authority. In *Dental Examiners*, the Supreme Court considered "whether the [North Carolina Board of Dental Examiners'] actions are protected from the federal Sherman Act regulation, under the doctrine of state-action antitrust immunity . . . ." *Id.* at 499. In the instant case the Board acted within its statutory authority governing the licensure of physicians under

[2] There are no allegations supporting the plaintiff's argument that the Board may have been acting as a "market participant" as opposed to on behalf of the Commonwealth when it suspended his license. See *Spence* v. *Boston Edison*, 390 Mass. 604, 609-610 (1983).

Massachusetts state law. There is no interplay between state and federal regulation and specifically there are no antitrust claims at issue here, nor has the Board invoked state-action antitrust immunity. These distinctions compel the conclusion that *Dental Examiners* does not support the plaintiff's claims.[3]

With respect to the plaintiff's claim that the Board has committed an intentional tort by suspending his medical license, the complaint does not identify what intentional tort the Board allegedly committed and is devoid of factual allegations giving rise to a recognizable intentional tort. Moreover, the Court agrees with the Board that any claim that the Board committed an intentional tort is subject to dismissal under the Massachusetts Tort Claims Act ("MTCA"). Under the MTCA, a public employer is not liable for any claim arising out of an intentional tort. See G. L. c. 258, § 10(c). Nor is a public employer liable for "any claim based upon the issuance, denial, suspension or revocation . . . [of] any permit, license, certificate, approval, order or similar authorization." See G. L. c. 258, § 10(e). The Board is a public employer under the MTCA. See G. L. c. 258, § 1. Accordingly, the plaintiff's claim against the Board alleging an intentional tort for suspending his license must be dismissed.[4]

Finally, the plaintiff urges this Court to find that his complaint has stated viable claims against the Board by likening his case to those in *Bloomstein* v. *Department of Public Safety*, 96 Mass. App. Ct. 257 (2019). In *Bloomstein* the plaintiff claimed that the Board of Building Regulations and Standards violated G.L. c. 30A §11(8) when it failed to provide reasons for

[3] For the same reasons, the plaintiff's reliance on the Governor of the Massachusetts' Executive Order 567 is also misplaced. See Executive Order 567, § 1 (instructing the director of professional licensure and the commissioner of public health to carefully review "any act, rule, regulation, proposed by an independent licensing board that has the *potential to reduce competition* in a relevant market for professional services" and disprove any such measure that "may have an *anti-competitive effect*") (emphasis added).

[4] The Court further notes that the MTCA requires a claimant to present his claim in writing "within two years after the date upon which the cause of action arose." See G. L. c. 258, § 4. The Board suspended the plaintiff's license on July 12, 2017. According to the complaint, the plaintiff did not send his presentment letter until March 1, 2020.

increasing his general contractor supervisor license suspension, beyond that imposed by the hearing officer. G.L. c. 30A §11(8) requires: "[e]very agency decision shall be in writing or stated in the record. The decision shall be accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to the decision, unless the General Laws provide that the agency need not prepare such statement in the absence of a timely request to do so." Bloomstein successfully argued on appeal that the board's decision did not include the requisite statement of reasons for its decision to ***increase*** his suspension.[5] The Court's decision concludes that:

> [w]hile an agency's adoption of a hearing officer's decision satisfies the "statement of reasons" requirement of subsection 8, *Arthurs v. Board of Registration in Med.*, 383 Mass. 299, 315-316 (1981), the board here did something that was not based on reasons given by the hearing officer: it increased Bloomstein's suspension from three to twelve months. It gave no reason for this decision. Therefore, the part of the board's decision that increased the length of Bloomstein's suspension violated subsection 8.

[5] While not the stated basis for the decision, the Appeals Court observed that the Board did into review the evidence before imposing its decision to increase Bloomstein's suspension. The rather lax approach taken by the board is also apparent in its written decision. The board's decision, apart from boilerplate language regarding the case's procedural history and an aggrieved party's right to appeal, states in full:
"The [b]oard reviewed the [d]ecision and Bloomstein's 'Petition for Full Board Review' and a 'Petition for Appeal.' At the [b]oard's meeting on July 19, 2016, the [b]oard voted unanimously to direct the [h]earings [o]fficer to increase the suspension of Bloomstein's [license] to a one-year period. In all other respects, the [d]ecision stands. Accordingly, the suspension period that commenced on May 10, 2016 has been increased to run through May 10, 2017." The Appeals Court remanded the case because of what the board did not do (review the record) and did not explain (why without even reviewing the record it decided to increase the suspension) in its written decision as required under G.L. c. 30A §11(8).

Therefore, *Bloomstein* lends no support to the plaintiff's argument. There the Court held that by increasing the plaintiff's contract license suspension without providing reasons, the hearing officer violated G. L. c. 30A, § 11(8). *Id.* at 261-262. However, here the plaintiff has not challenged the Board's decision under G. L. c. 30A, § 14.[6] He does not claim he was not provided reasons for his suspension, rather he fundamentally disagrees with the reasons provided and he disagrees that his license should have been suspended at all. What further distinguishes the plaintiff's case is that his action before this court alleges civil rights violations and an intentional tort ; he has not brought an administrative law appeal. His claims before this court do not state plausible claims for relief because they are prohibited by law as explained above.

ORDER

For the foregoing reasons, the defendant's motion to dismiss is **ALLOWED**.

/s/Rosemary Connolly
ROSEMARY CONNOLLY
Justice of the Superior Court

DATE: December 11, 2020

[6] The Court notes that the time to file such an action has long passed. See G. L. c. 30A, § 14(1).