UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

May 8, 1998

HOWARD EUGENE MCNIER, Complainant, v. SAN FRANCISCO STATE UNIVERSITY, COLLEGE OF BUSINESS, Respondent.	)))) 8 U.S.C. §1324b Proceeding) OCAHO Case No. 97B00072))))

ORDER FINDING SAN FRANCISCO STATE AN ARM OFTHE STATE, BUT INQUIRING FURTHER INTO THE VIABILITY OF THE *EX PARTE YOUNG* EXCEPTION TO SOVEREIGN IMMUNITY

I. *Introduction*

This case arises under §102 of the Immigration Reform and Control Act of 1986 (IRCA), which enacted a new §274B of the Immigration and Nationality Act (INA), codified as 8 U.S.C. §1324b. Section 1324b prohibits employment discrimination on the bases of national origin and citizenship status.[1]

On February 27, 1997, Howard Eugene McNier (McNier), a U.S. citizen and adjunct faculty member at San Francisco State University, College of Business (SFSU or Respondent), filed a Complaint in the Office of the Chief Administrative Hearing Officer (OCAHO). McNier contends that SFSU discriminated on the basis of

[1]As amended by §534(a) of the Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4578 (effective Nov. 29, 1990), §1324b(b)(5) also explicitly prohibits retaliation.

citizenship status[2] by: (1) denying him a tenure track position and preselecting a less qualified Asian applicant, Professor Hailin Qu (Qu), who was not work-authorized in the United States; (2) restructuring its requirements for the tenure track position in order to exclude McNier as a candidate, even though Qu himself did not meet such requirements; and (3) retaliating and attempting to intimidate McNier because he filed a discrimination charge.

By a subsequent pleading, McNier requests that three individuals, Janet Sim (Sim), Department Chair, Hospitality Management, College of Business, SFSU; Kenneth Leong (Leong), Department Chair, Accounting Department, College of Business, SFSU, and Arthur Wallace (Wallace), Dean, College of Business, SFSU, be added as individual respondents.

On December 22, 1997, by Order of Further Inquiry (Order), I directed the parties to brief a threshold jurisdictional issue of Eleventh Amendment immunity and two important questions relating to Qu's qualifications and authorization to work in the United States on April 9, 1996, the date Respondent selected him for the position.

In Response, McNier on February 5, 1998, filed a Supplemental Brief asserting that SFSU is not immune from suit "in a case seeking enforcement of federal immigration law," and that, even if it were, California waived its immunity "by adopting federal law into California law." (Complainant's Supplemental Brief, at 9).

On February 9, 1998, SFSU filed a Motion for Summary Decision, with supporting brief, reiterating that this proceeding is barred by the Eleventh Amendment because SFSU is an "arm of the state" and is protected by the doctrine of sovereign immunity. SFSU refuses to comply with the Order, withholds information as to Qu's qualifications and work-authorization status, and argues that "unless and

[2]McNier's original Complaint also claimed that SFSU discriminated against him on the basis of national origin. By Order Dismissing in Part and Ordering Further Inquiry, 7 OCAHO 947 (1997), I dismissed McNier's claim of national origin discrimination for two reasons: (1) an Administrative Law Judge (ALJ) has no jurisdiction over such a claim where the employer, as McNier concedes is the case with SFSU, employs more than fourteen individuals, and (2) McNier's national origin discrimination claim overlaps a charge he filed based on the same facts with the Equal Employment Opportunity Commission. 8 U.S.C. §§1324b(a)(2)(B), 1324b(b)(2). However, that Order retained jurisdiction over McNier's citizenship status discrimination claim.

until it has been determined that [SFSU] is not entitled to the protection of the Eleventh Amendment, the State asserts its constitutional immunity from discovery and trial and declines to respond to questions involving the underlying issues of possible liability in this proceeding." (Respondent's Responses to Interrogatories, Set No. 2, at 2).

This Order finds SFSU clothed in the protective mantle of sovereign immunity, but inquires further as to whether the *Ex parte Young* exception to sovereign immunity permits McNier to sue state officials acting as individual agents, *i.e.*, Sim, Leong, and Wallace, for prospective relief. The narrow *Ex parte Young* exception,[3] 28 S.Ct. 441 (1908), a legal fiction, permits actions against individuals in their official capacities where a plaintiff alleges an ongoing violation of federal law and seeks prospective injunctive relief, as distinct from monetary damages. *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 626 (9th Cir. 1989), *cert. denied sub nom. BP Exploration (Alaska), Inc. v. Baily*, 110 S.Ct. 1923 (1990). The U.S. Court of Appeals for the Ninth Circuit recently held that an action which impliedly requests consideration for a future position, or reinstatement to a position for which the applicant has been rejected, constitutes an action for prospective relief. *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 840 (9th Cir. 1997).

II. *Discussion and Order*

The determination of whether the doctrine of sovereign immunity protects SFSU from suit is a preliminary question of jurisdiction. The Supreme Court recently held that a court without proper jurisdiction "cannot proceed at all, but can only note the jurisdictional defect and dismiss the suit." *Steel Co. v. Citizens for a Better Env't*, 118 S.Ct. 1003, 1007 (1998). Thus, if jurisdiction is

[3]The *Ex parte Young* exception, 28 S.Ct. 441, 453–54 (1908), is predicated upon the notion that a state cannot authorize its agents to violate the Constitution and laws of the United States. The exception is "tailored to conform as precisely as possible to those specific situations in which it is necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States." *Papasan v. Allain*, 106 S.Ct. 2932, 2939 (1986) (quotation omitted) (*quoting Pennhurst State School & Hosp. v. Halderman*, 104 S.Ct. 900, 910 (1984), *citing Young*, 28 S.Ct. 441, 454 (1908)).

lacking, I cannot proceed to the merits of McNier's Complaint even if the merits question could be easily resolved. *Steel Co*., 118 S.Ct. at 1007.

Resolution of whether an ALJ has jurisdiction over McNier's claims under 8 U.S.C. §1324b requires answers to three questions:

- Is SFSU an "arm of the state" for purposes of sovereign immunity?

- Even if SFSU is an "arm of the state," has the state waived its immunity to suit in federal court?

- If SFSU is an "arm or the state," and if California has not waived its immunity to suit in federal court, may McNier obtain the benefit of the *Ex parte Young* exception to state sovereign immunity?

If SFSU is an "arm of the state," under the Ninth Circuit's "arm of the state" test and California statutory law (California Code), SFSU may be immune from suit, unless California waived its immunity. As discussed more fully below, I find that:

- SFSU is an "arm of the state" of California under both the Ninth Circuit test and the California Code, and

- California has not waived its immunity to suit in federal court, but

- the *Ex Parte Young* exception to sovereign immunity may be applicable to McNier's case.

A. *The Eleventh Amendment Shields SFSU From Suit Under 1324b*

The Eleventh Amendment to the Constitution of the United States withholds federal jurisdiction over suits against states. *Port Auth. Trans-Hudson Corp. v. Feeney*, 110 S.Ct. 1868, 1872 (1990); *Natural Resources Defense Council v. California Dep't of Transp.*, 96 F.3d 420, 421 (9th Cir. 1996). Specifically, the amendment provides:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

While the text of the amendment addresses only suits by a citizen of a state other than that against which relief is sought, the Supreme Court extended its reach to bar federal courts from deciding virtually any claim in which the state is a defendant. *Port Auth. Trans-Hudson Corp*., 110 S.Ct. at 1871; *Pennhurst State Sch. & Hosp. v. Halderman*, 104 S.Ct. at 907. There are two judicially recognized exceptions to this jurisdictional bar. First, Congress may abrogate state sovereign immunity. *Port Auth. Trans-Hudson Corp.*, 110 S.Ct. at 1871; *Dellmuth v. Muth*, 109 S.Ct. 2397, 2401 (1989). Second, states may consent to suit in federal court. *Port Auth. Trans-Hudson Corp.*, 110 S.Ct. at 1871; *Clark v. Barnard*, 2 S.Ct 878, 882 (1883).

McNier argues that IRCA abrogated Eleventh Amendment immunity, and that "California does not have [s]overeign [i]mmunity in a case seeking enforcement of federal immigration law." According to the Supreme Court, Congress may abrogate state sovereign immunity only by making its intention "unmistakably clear in the language of the statute." *Seminole Tribe of Fla. v. Fla. et al.,* 116 S.Ct. 1114, 1123 (1996); *Dellmuth*, 109 S.Ct. at 2400 *(quoting Atascadero State Hosp. v. Scanlon*, 105 S.Ct. 3142, 3146 (1985)). "[E]vidence of congressional intent must be both unequivocal and textual. . . . Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment." *Dellmuth*, 109 S.Ct. at 2401.

The starting point for statutory interpretation is the plain meaning of the text. *Hughey v. United States*, 110 S.Ct. 1979, 1982 (1990). Title 8 U.S.C. §1324b provides in pertinent part:

> It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual . . . with respect to the hiring, or recruitment . . . of the individual for employment . . . because of such individual's citizenship status.

8 U.S.C. §1324b (a)(1)(B). The critical phrase is "person or other en-

tity."[4] Section 1324b does not define "person" or "entity," and is silent as to sovereign immunity. Furthermore, nothing in IRCA — even by way of reference — suggests that a "person" or "entity" *could* include the state.[5] As a result, I simply cannot conclude that Congress "clearly" intended to abrogate Eleventh Amendment immunity in §1324b.[6]

That Congress made its intention to abrogate state sovereign immunity unequivocally clear in other employment discrimination statutes further underscores this conclusion. For example, the Supreme Court recognizes that Congress specifically abrogated the Eleventh Amendment in Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. §§2000e(a)–(f), by defining "person" to include "governments, governmental agencies, [and] political subdivisions" and "employee" to include individuals "subject to the civil service laws of a State government, governmental agency or political subdivision." *See Fitzpatrick v. Bitzer*, 96 S.Ct. 2666, 2668 n. 2, 2671

[4]Section 1324b does not use the term "employer." However, Department of Justice implementing regulations for the cognate provisions (§1324**a**) enacting liability for employing unauthorized aliens define "employer" as "a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the Unites States for wages or other remuneration." 8 C.F.R. §274a.1(g). The regulation instructs that "entity" means "any legal entity, including but not limited to, a corporation, partnership, joint venture, governmental body, agency, proprietorship, or association." Congress recently reexamined the phrase "entity" in the 1324**a** context, and in Section 412(d) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 specifically provided that "for the purposes of this section [1324**a**], the term 'entity' includes any entity in any branch of the ***Federal*** Government" (emphasis added). Specifying that the categories of employers embraced by the word "entity" includes federal entities, Congress nevertheless failed to mention states.

[5]Even though legislative history is generally not sufficient to override the plain meaning of statutory language, it is important to note the Conference Report accompanying the bill makes no reference to the Eleventh Amendment or sovereign immunity. Similarly, there is nothing in the floor debates which indicates that Congress addressed the possibility that the phrase "person or entity" encompasses a state.

[6]*See* Andrew M. Strojny, *Developments Concerning IRCA's Antidiscrimination Provision — What Is It, What Does it Do, and Does it Have Any Applicability to Work-Related Nonimmigrant Visa Programs?*, 10 GEO. IMMIGR. L.J. 371, 375–76 (1996) (noting that since *Hensel v. Office of the Chief Administrative Hearing Officer,* 38 F.3d 505, 507 (10th Cir. 1994)*, reh'g denied* (Nov. 21, 1994), no ALJ has assumed §1324b jurisdiction over a federal respondent). *See Kosathsko v. Internal Revenue Service*, 6 OCAHO 840 (1996) at 5–7. *Compare, Mir v. Federal Bureau of Prisons*, 3 OCAHO 510 (1993). *See also Iwuchukwu v. City of Grand Prairie*, 6 OCAHO 869 (Order of Inquiry) (1996) at 4. *But see Tadesse v. United States Postal Service*, 7 OCAHO 979 (1997) (assuming, *passim*, jurisdiction).

(1976). In contrast, the Court declined to hold that Congress abrogated Eleventh Amendment immunity in the Education of the Handicapped Act, *as amended*, 20 U.S.C. §1400, *even though the statute repeatedly referred to states*, reasoning that: "[w]e find it difficult to believe that the 94th Congress, taking careful stock of the state of Eleventh Amendment law, decided it would drop coy hints but stop short of making its intention manifest." *Delmuth*, at 109 S.Ct. 2401–02.

The only federal circuit decision to address whether IRCA abrogates Eleventh Amendment immunity holds that §1324b does not reach state entities. *Hensel v. Office of the Chief Administrative Hearing Officer,* 38 F.3d 505, 507 (10th Cir. 1994*), reh'g denied* (Nov. 21, 1994). The Tenth Circuit noted the explicit Congressional abrogation of Eleventh Amendment immunity in the Americans with Disabilities Act, 42 U.S.C. §12202: "A State shall not be immune under the eleventh amendment to the Constitution of the Unites States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." *Hensel*, 38 F.3d at. 508. Unable to find any similar textual reference in IRCA, the court refused to conclude that the phrase "person or other entity" was intended to subject the state to suit in federal court. *Id*.

B. *Under the Ninth Circuit Test, SFSU Is an "Arm of the State" of California*

The Eleventh Amendment not only bars suits against a *state* in federal court, but suits against "arms of the state" as well. *See Will v. Michigan Dep't of State Police*, 109 S.Ct. 2304, 2312 (1989). It follows that if SFSU is an "arm of the state" for Eleventh Amendment purposes it is not a "person or other entity" under §1324b. *See Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989) (because the University of California at Los Angeles was an "arm of the state" under the Eleventh Amendment, it was not a person within the meaning of 42 U.S.C. §1983). Before deciding whether an entity is an "arm of the state" so as to successfully invoke Eleventh Amendment immunity, courts focus on the relationship between the state and the entity. *See Regents of Univ. of California v. Doe*, 117 S.Ct. 900, 904 (1997). A state that is the "real, substantial party in interest," may invoke sovereign immunity from suit even though a state entity and not the state itself is the named party. *Regents of Univ. of* California, 117 S.Ct. at 903–904 (*quoting Ford Motor Co. v. Department of Treasury of State of Ind.*, 65 S.Ct. 347, 350–51 (1945)).

Although the question of whether a state entity is protected by Eleventh Amendment immunity is one of federal law, provisions of state law are critical to the federal analysis. The Ninth Circuit applies a five-part test to evaluate a litigant's claim that it is an "arm of the state" entitled to Eleventh Amendment immunity. The five factors are:

> [1] whether a money judgment would be satisfied out of state funds,
>
> [2] whether the entity performs central governmental functions,
>
> [3] whether the entity may sue or be sued,
>
> [4] whether the entity has power to take property in its own name or only [in] the name of the state, and
>
> [5] the corporate status of the entity.

Durning v. Citibank, N.A., 950 F.2d 1419, 1423 (9th Cir. 1991) (*quoting Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th Cir. 1988)).

To evaluate these factors, federal fora look to how state substantive law treats the entity in question. *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 97 S.Ct 568, 572–73 (1977). Utilizing state statutory law, and applying the Ninth Circuit's five factors to McNier's case, I find that SFSU is indeed an "arm of the state" of California.

1. *Under the Treasury Test, SFSU is an "Arm of the State"*

The first inquiry, often called the "**treasury test**," is "whether a judgment against the defendant entity under the terms of the complaint would have to be satisfied out of the limited resources of the entity itself or whether the state treasury would also be legally pledged to satisfy the obligation." *Durning*, 950 F.2d at 1424. The Ninth Circuit recently reaffirmed that the first inquiry is "most important" to the analysis. *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 838, 839 (9th Cir. 1997) (*citing Durning*, 950 F.2d at 1424).

The Ninth Circuit, in *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982), held that San Francisco State College, SFSU's physical predecessor, was an "arm of the state." In *Jackson*, the court found the most crucial question under the Eleventh Amendment to

be whether "the named defendant has such independent status that a judgment against the defendant would not impact the state treasury." *Jackson*, 682 F.2d at 1350. The court upheld the district court's determination that San Francisco State College was a "dependent instrumentality of the state," and lacked the requisite autonomy to be independently liable. *Id*. The court concluded that San Francisco State College was an "arm of the state" and shielded by California's Eleventh Amendment immunity:

> Although this court has not [yet] ruled upon the Eleventh Amendment status of the California State College and University system, the University of California and the board of Regents are considered to be instrumentalities of the state for purposes of the Eleventh Amendment. . . .
>
> As California cases indicate, California State Colleges and Universities have even less autonomy than the University of California. *Slivkoff v. Cal. State University and Colleges*, 69 Cal.App.3d 394, 400, 137 Cal.Rptr. 920, 924 (2d Dist. 1977).
>
> Unlike the University of California, the California State University and Colleges are subject to full legislative control. . . . No . . . autonomy is accorded by the Constitution to the State University and Colleges. They have only such autonomy as the Legislature has seen fit to bestow.

Jackson, 682 F.2d at 1350.

In *Mitchell v. Los Angeles Community College Dist*., 861 F.2d 198, 201 (9th Cir. 1988), the court reaffirmed its conclusion that California state colleges and universities as "dependent instrumentalities" are "arms of the state." *See also Slivkoff v. California State Univ. and Colleges*, 69 Cal.App.3d 394, 400, 173 Cal.Rptr. 920, 924 (1977) ("California state universities and colleges are subject to full legislative control"), and *Poschman v. Dumke*, 31 Cal.App.3d 932, 942, 107 Cal.Rptr. 596, 603 91973) ("The Trustees of California State Colleges are a state agency created by the Legislature").

California's *current* statutory law further compels the conclusion that California State University (Cal State) and its San Francisco campus[7] are "arms of the state." For example:

[7]The California State University (Cal State) embraces SFSU. CAL.EDUC.CODE §89001 (West 1998). Accordingly, references to Cal State are understood to include SFSU.

- California law specifically authorizes the trustees of Cal State to pay settlements and judgments by certifying them for payment by the Controller from appropriations in the state treasury. CAL. EDUC. CODE §89750.5 (West 1998).

- The Code further requires the Cal State Controller to "draw warrants on the treasurer for payment of money directed by law to be paid out of the State Treasury." CAL. GOV. CODE §12440 (West 1998).

Thus, any monetary judgment against SFSU for IRCA violations would indeed be satisfied out of California's state treasury.

However, it is significant that the Ninth Circuit did not literally conclude that a state university would *always* be entitled to Eleventh Amendment immunity simply because a judgment against a defendant would have to be paid out of the state treasury. *Mitchell*, 861 F.2d at 201. Even though the Ninth Circuit considers state liability the "most important" of the enumerated factors, it does not dispose of the issue.[8] As a result, I must consider the other factors of the Ninth Circuit's test.

2. *SFSU Performs Central Government Functions and Therefore Is An "Arm of the State"*

Cal State provides public education on both the undergraduate and graduate levels. Cal. Educ. Code §§66010, 66201. The Ninth Circuit has found the regulation of public education to be "an important central government function." Doe, 65 F.3d 771, 775 (1995).

3. *Suits Against SFSU Are, by Statute, Suits Against the State Itself*

California by statute provides that suits against Cal State and its campuses are suits against the state. CAL. GOV. CODE §900.6 (West 1998). *See Native American Heritage Comm. v. Board of Trustees*, 51 Cal.App.4th 675 (1996) (holding Cal State's Long Beach campus to be a state agency with no standing to raise a constitutional challenge to acts of another state agency).

[8]Cal State is not entitled to assert immunity blindly because it has been previously granted immunity in a variety of contexts. "The University [of California] is an enormous entity which functions in various capacities and which is not entitled to Eleventh Amendment immunity for all of its functions." *Doe*, 65 F.3d at 775, *cert denied,* 114 S.Ct. 1126 (1994). Moreover, Congress can always abrogate, and a state may at any time waive, Eleventh Amendment immunity.

4. *While Cal State May Hold Property in Its Own Name, Its Name "Belongs" to the State of California*

Although Cal State may hold property in its name, the name "California State University" is state property. CAL. EDUC. CODE §§89048, 89005.5.

5. *Cal State Has No Independent Corporate Status*

The Cal State system, of which SFSU is but one component, is itself a subordinate state agency with no independent corporate status. *Native American Heritage Comm. Board of Trustees*, 51 Cal.App.4th at 683–84. The system "shall be administered by a board designated as the Trustees of the California State University" which "shall succeed to the powers, duties, and functions with respect to the management, administration and control of the state colleges" formerly vested in the State Board of Education. CAL. EDUC. CODE §§66600, 66606.

Having analyzed and applied to the case at hand the five factors of the Ninth Circuit "arm of the state" test, I conclude that SFSU is an "arm of the state" of California, entitled to Eleventh Amendment immunity, unless California waives its immunity.

C. *California Has Not Explicitly Waived Its Sovereign Immunity and Is Therefore Immune From Suit*

Even though states and "arms of states" are generally immune from suit under the Eleventh Amendment, a state may consent to be sued in federal court. The state legislature, however, must unequivocally express its consent through the state constitution or a state statute. *Pennhurst State Sch. & Hosp. v. Halderman*, 104 S.Ct. at 907. In *Atascadero State Sch. & Hosp. v. Scanlon*, 104 S.Ct. 900, 907 (1984), the Supreme Court interpreted CAL. CONST. art. III, §5 ("Suits may be brought against the State in such manner and in such courts as shall be directed by law") to require "an unequivocal waiver specifically applicable to federal court jurisdiction" and failed to find a waiver of sovereign immunity where the state statute is silent as to federal venue.

McNier argues that even if SFSU is [otherwise] immune from suit under §1324b, California has waived its immunity and consented to be sued "by adopting federal law into California law." Although IRCA

is mentioned in the California Code, CAL. UN. INS. CODE §9601.7 (West 1998), there is no unequivocal waiver specifically applicable to federal court jurisdiction. Rather, §9601.7 of the California Unemployment Insurance Code merely requires that agencies and organizations contracting with the Employment Development Department post a notice advising workers that employment services are not available for illegal workers. There is nothing in that section, or in the entire California Code, which states or implies that a §1324b suit can be brought against California in a federal forum. I conclude, therefore, that California has not waived its Eleventh Amendment immunity. Accordingly, I lack jurisdiction to hear McNier's claim against SFSU.

III. *Directives to the Parties*

A. *Parties Shall Brief the Issue of the Application of the* Ex Parte Young *Exception to Sovereign Immunity by June 1, 1998*

The conclusion that I lack jurisdiction over SFSU for §1324b violations does not resolve the Eleventh Amendment immunity issue in its entirety. There is one exception to the general rule that states or "arms of the state" are immune from suit in federal court. As the Ninth Circuit recently held:

> When sued for prospective injunctive relief, a state official in his official capacity is considered a "person" for §1983 purposes. . . . In what became known as . . . the *Ex parte Young* doctrine, *see Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), a suit for prospective injunctive relief provides a narrow, but well-established, exception to Eleventh Amendment immunity.

Doe, 131 F.3d at 838. The court emphasized that the *Ex parte Young* exception is still viable where "a plaintiff alleges an ongoing violation of federal law, and where the relief sought is prospective rather than retrospective." *Id*. (*quoting Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S.Ct. 2028, 2034–36 (1997)).

The Ninth Circuit construes a request for job reinstatement in a position for which an applicant has been rejected to constitute prospective injunctive relief. *Doe*, 131 F.3d at 840. For example, in *Doe*, the applicable case most recently decided by the Ninth Circuit, an applicant claimed his prospective employer revoked an accepted job offer because the employer believed the applicant would not attain a requisite national security clearance, a contingency of the job offer. The successful, but subsequently rejected, applicant sought ap-

pointment, or alternatively, reconsideration without reference to his eligibility for the security clearance. Holding such a request to be the sort of prospective relief not barred by the Eleventh Amendment, the court reasoned that:

> Doe's reinstatement would not serve as compensation for any past harm, unlike a damages award. Reinstatement would not compensate Doe for lost wages or lost time. . . . Rather reinstatement would simply prevent the prospective violation of Doe's rights which would result from denying him employment in the future. If Doe were reinstated, any salary received by him thereafter would have nothing to do with alleged past violation. Doe would be entitled to such salary for his work after reinstatement. Thus, while reinstatement would relate to the past violation, it would amount to relief solely for the past violation.

Id. at 841.

While the Eleventh Amendment bars McNier's request for backpay or other monetary relief, the *Ex parte Young* doctrine may provide him some redress. McNier seeks to add as individual respondents three individuals, Sim, Leong, and Wallace. Under the doctrine of *Ex parte Young*, these three agents could be required to reconsider McNier's application for a position without discriminatory animus. Assuming that McNier seeks to join these individuals in their official roles as SFSU "state" actors, *Ex parte Young* is applicable.[9]

To invoke *Ex parte Young*, McNier must meet a two-part test:

- The law governing the official's conduct must be reasonably established,[10] and

- The Complainant must demonstrate, other than by conclusory allegations, that the officials he seeks to join could not reason-

[9]Because SFSU is an "arm of the state" for purposes of Eleventh Amendment immunity, McNier is barred from seeking monetary relief in this federal forum. Because McNier may only seek prospective injunctive relief under *Ex parte Young*, and such relief could only be provided by SFSU's agents, I need not make a finding as to whether §1324b contemplates *per se* "individual" liability, as distinguished from individual agent liability .

[10]The "legal principles" governing official conduct must be firmly established at the time of the official's act. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). The threshold determination of whether the law governing the agent's alleged conduct is "clearly established" is a question of law for the court. *Id*.

ably have believed their conduct was lawful. *Harlow v. Fitzgerald*, 102 S.Ct. 2727, 2738 (1982); *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993).

McNier is invited to make this showing through a memorandum and exhibits, to be submitted by **June 15, 1998.** McNier must specify *what* alleged conduct by the state officials—his initial discrimination, retaliatory harassment, or both—might fall within the *Ex parte Young* exception. Then, to support this showing, and to withstand SFSU's Motion To Dismiss, McNier ***must*** provide some ***proof*** of discriminatory conduct beyond mere accusation. Such submissions may include third party affidavits regarding his alleged harassment by the three officials, or copies of e-mail, posters, and any other incriminating evidence to which McNier refers in his pleadings. SFSU shall respond to McNier's pleadings by no later than **July 8, 1998.**

B. *The* Ex Parte Young *Inquiry May Yet Be Avoided if SFSU can Demonstrate That Qu Was Work-Authorized on the Date He Was Selected and That There Was Open Competition for the Position; SFSU Is Once Again Ordered To Describe Its Agents' Understanding of Qu's Work-Authorization on April 6, 1996*

Respondent claims that Qu's work-authorization status on the date he was *selected* for purposes of employment discrimination is irrelevant. However, the Supreme Court has held that a discriminatory act takes place at the time the specific employment decision is made. *See Delaware State College v. Ricks*, 101 S.Ct 498, 504 (1980). Discrimination occurred, if at all, on the date that Qu was selected for the faculty position, because, on that date, McNier's ascension to the position became an impossibility. McNier's case may, therefore, depend on Qu's eligibility for employment in the United States as of the date he was selected. This is so because, although an employer has the right to do so,[11] nothing in IRCA obliges an employer to select a United States citizen over an equally qualified work-author-

[11]*See* 8 U.S.C. §1324b(a)(4) ("[I]t is not an unfair immigration-related employment practice for a person or other entity to prefer to hire, recruit, or refer an individual who is a citizen or national of the United States over another individual who is an alien if the two individuals are equally qualified.").

ized alien.[12] On the other hand, if SFSU specifically tailored its position description to a non-work authorized alien's qualifications so as to exclude equally qualified U.S. citizens, such preselection may give rise to an inference of discriminatory preselection in violation of 8 U.S.C. §1324b. Preselection is probative of discrimination. *See Goostree v. State of Tennessee*, 796 F.2d 854, 861 (6th Cir. 1986).

Respondent's persistence in asserting that it was and is unaware of Qu's immigration status as of the time it hired him (on or about April 9, 1996) will invite the inference that he was not work-authorized.[13]

SFSU shall provide an explanation of Sim's, Leong's, and Wallace's understanding of Qu's work eligibility on April 9, 1996, in order to avoid the inference that they knew he was ineligible for employment in the United States at the time of the hiring decision.

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[12]*See Kamal-Griffin v. Curtis, Mallet-Prevost, Colt & Mosle*, 3 OCAHO 550, at 1488, 1489 (1993), 1993 WL 469344, at *21 (O.C.A.H.O.) ("While §1324b(a)(4) permits an employer to prefer a U.S. citizen or national over an 'equally qualified' alien, the statute does not require an employer to prefer a citizen over a non-citizen authorized to work in the United States . . . Likewise . . . IRCA does not require an employer to hire a protected individual who is authorized to be employed in the United States"), *aff'd*, 29 F.3d 621 (2d Cir. 1994) (Table); *United States v. General Dynamics Corp.*, 3 OCAHO 517, at 1183 (1993), *available in* 1993 WL 403774, at *39 (O.C.A.H.O.) ("IRCA does not require an employer to hire a U.S. worker over a non-U.S. worker who is authorized for employment in the United States. IRCA's legislative history reveals that the focus of the statue [sic] is to sanction employers for hiring unauthorized workers . . . [not] a mandatory preference for U.S. workers over authorized non-U.S. workers"), *aff'd sub nom. General Dynamics Corp. v. United States*, 49 F.3d 1384 (9th Cir. 1995); *United States v. Mesa Airlines*, 1 OCAHO 74, at 495, 496 (1989), 1989 WL 433896, at *52 (O.C.A.H.O.) ("to qualify for application of the statutory exception which permits an employer to prefer a U.S. citizen over an alien '. . . if the two individuals are equally qualified'" an employer must compare qualifications), *aff'd sub nom. Mesa Airlines v. United States*, 951 F.2d 1186 (10th Cir. 1991).

[13]*See* documents submitted as Attachments to Respondent's Answer, including an INS Notice of Action, Receipt No. WAC–96–178–50124, regarding SFSU's University Counsel's "Petition for a Nonimmigrant Worker," notice date: June 27, 1996, valid from 6/27/96 to 6/14/99; a second INS Notice of Action, Receipt No. WAC–97–021–51908, regarding SFSU's University Counsel's "Immigrant Petition for Alien Worker," notice date: November 7, 1996; and an INS Form I–9 dated July 30, 1996, which attests, under pain of perjury, that Qu presented to prove work eligibility an unexpired foreign passport with attached employment authorization, document no. 422160, expiration date: January 30, 1998, and that Qu is "An alien authorized by the Immigration and Naturalization Service to work in the United States . . . Admission Number WAC–96–1178–50124 expiration of employment authorization . . . 6/14/1999."

SO ORDERED.

Dated and entered this 8th day of May 1998.

MARVIN H. MORSE
Administrative Law Judge