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

HOWARD EUGENE MCNIER, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding Case No. 97B00072
SAN FRANCISCO STATE UNIVERSITY, COLLEGE OF BUSINESS, Respondent.	)	**Marvin H. Morse,** **Administrative Law Judge**

ORDER OF FURTHER INQUIRY
(December 22, 1997)

Appearances: **Howard Eugene McNier, *pro se***
Daniel E. Lungren, Attorney General for the State of California;
Richard G. Tullis, Deputy Attorney General

I. Introduction

Section 102 of the Immigration Reform and Control Act of 1986 (IRCA) enacted a new § 274B of the Immigration and Nationality Act (INA), codified as 8 U.S.C. § 1324b.[1]

On February 27, 1997, Howard Eugene McNier (McNier or Complainant), 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 bases of national origin and citizenship status, and retaliated against him by:

1) selecting for a full-time, tenure track, hospitality (hotel) management position Professor Hailin Qu (Qu), a less qualified applicant, who allegedly was not a work-authorized alien on the date he was selected, and by later obtaining fraudulent labor certifications for Qu;

[1]Title 8 U.S.C. § 1324b prohibits discrimination because of national origin or citizenship status. Among the individuals it protects from discrimination are U.S. citizens. 8 U.S.C. § 1324b(a)(3)(A). As amended, § 1324b also prohibits retaliation.

2) purposely and pretextually structuring requirements for the tenure track hospitality management position to include a PH.D. in Hospitality Management, a recently developed degree granted by a handful of graduate schools, unavailable at the time McNier earned his J.D. and M.B.A., to exclude McNier as a candidate, although McNier had successfully taught hospitality management for years at SFSU and consistently earned "Outstanding" evaluations, the Department Chair herself lacked this qualification, and Qu, who, at the time of his selection, lacked the PH.D., and

3) retaliating and attempting to intimidate him 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.

By Order Dismissing in Part and Ordering Further Inquiry (Order), 7 OCAHO 947 (1997), I dismissed McNier's claim of national origin discrimination because (a), 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 employees and (b), McNier's national origin discrimination claim overlaps a charge he filed relating to the same facts with the Equal Employment Opportunity Commission (EEOC).[2] 8 U.S.C.

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[2] On May 7, 1996, prior to filing his OCAHO Complaint, McNier filed Charge No. 37096046 with the EEOC San Francisco District Office. By agreement between EEOC and the California State Department of Fair Employment and Housing (Department), McNier's charge was automatically filed with the Department. On May 13, 1996, the Department issued a letter advising McNier of his right to sue in state court within one year pursuant to CAL. GOV. CODE § 12965(b).

By letter dated May 23, 1997, McNier advised that he filed suit in California Superior Court for the County of San Francisco on May 12, 1997 against the Trustees of the California State University, Sim, Leong, Wallace, and fifty (50) unnamed defendants. The state action charges race, age, and citizenship discrimination under 8 U.S.C. § 1324b, 38 U.S.C. § 4212, and CAL. GOV. CODE §§ 12940 (a), (h), and (f), and retaliation for whistle blowing under CAL. GOV. CODE §§ 1102.5 and 8547 *et seq.* McNier contends that:

> Defendant WALLACE mandated that a caucasian [sic] candidate would not be considered for the subject position, or any other position in the College of Business, and further stated: "I will hire a white guy over my dead body."

McNier v. Trustees of California State University et al., Complaint (May 12, 1997), at p. 6. McNier alleges that a PH.D. in Hospitality Management, "a requirement [for the position] that was not imposed upon minority applicants," was imposed upon *his* candidacy as "a pretext for discriminating against . . . [him] on the basis of his race and age." *Id.* According to McNier, such a degree is newly coined, and therefore was unavailable to candidates over 40 years old at the time most such candidates were pursuing graduate education. *Id.* McNier asserts that "he and other non-minority lecturers have been paid at a lower scale than minority lecturers, without any legitimate basis for doing so."

§§ 1324b(a)(2)(B), 1324b(b)(2). However, that Order retained ALJ jurisdiction over McNier's citizenship status discrimination and retaliation claims.

These issues survive the Order at 7 OCAHO 947: (1) Does 8 U.S.C. § 1324**b** contemplate liability on the part of individuals acting in the name of the employer?;[3] (2) Is SFSU sheltered

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Id.

[3]Citations to OCAHO precedents in bound Volumes I-V, ADMINISTRATIVE DECISIONS UNDER EMPLOYER SANCTIONS AND UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES LAWS, reflect consecutive decision and order reprints within those bound volumes; pinpoint citations to pages within those issuances are to specific pages, *seriatim*. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume V, however, are to pages within the original issuances.

For a decision holding that personal liability is contemplated in 8 U.S.C. § 1324**a** proceedings, *see United States v. Wrangler's Country Cafe, Inc. and Henry D. Steiben, Individually*, 1 OCAHO 138, at 935-936 (1990), 1990 WL 512125, at *5-6 (O.C.A.H.O.) ("The employer sanctions provisions of IRCA, as noted above, impose civil monetary penalties upon employers ***or their agents*** who hire non-U.S. citizens who are not work-authorized to work in the United States. The discrimination provisions of IRCA require employers ***or their agents*** to pay back pay and attorneys' fees to those employees who have been unlawfully denied employment") (emphasis added), *aff'd, Steiben v. Immigration and Naturalization Service*, 932 F.2d 1225, 1227, 1228 n.8 (8th Cir. 1991) ("requiring both the employer and the employer's agent to abide by IRCA will diminish the number of job opportunities for unauthorized aliens and thereby reduce the incentive to aliens to illegally enter or work in the United States"). The decision at 1 OCAHO 138 relies in part on the definition of employer at 8 C.F.R. § 274a (Control of Employment of Aliens) (1996) (emphasis added): "The term 'employer' means 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 United States for wages or other renumeration." While denial of the employer's request for summary judgment in an 8 U.S.C. § 1324**a** proceeding is not dispositive of the issue as posed in this § 1324**b** action, it is instructive.

Title 8 U.S.C. § 1324b(a)(1) states that it is "an unfair immigration-related employment practice for a *person or other entity* to discriminate." The Department of Justice implementing regulation, 28 C.F.R. pt. 44, provides no definition of person, entity, or employer. Section 1324b remedies include hiring and restatement of the victim of discrimination, with or without back pay. Suing an individual would not allow this -- an individual is not generally empowered to offer remedial employment for another person or entity. Furthermore, liability for civil money penalties runs only in favor of the government and would not benefit the putative victim.

One commentator points out that "[t]he issue of whether personal liability attached in a Title VII, ADA, or ADEA claim is [also] a matter of statutory interpretation. The legislative history of these statutes fails to show a clear sign of Congressional intent. Because these statutes use virtually the same definition of employer, courts routinely apply arguments regarding personal liability to all three statutes interchangeably." Rick A. Howard, *Debating Individual Liability Under Title VII . . .* ,19 AM. J. TRIAL ADVOC. 677, 678 (1996).

While 28 C.F.R. pt. 44 is silent as to whether individuals are included within the meaning of "person or other entity" for purposes of 8 U.S.C. §1324b, 8 C.F.R. § 274a -- for purposes of 8 U.S.C. § 1324a -- defines 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. . . ." Title VII defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person." 42 U.S.C. § 2000e(b) (1991).

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from liability by state sovereign immunity?; (3) Even if SFSU is otherwise sheltered by state sovereign immunity, has California consented to suit in 8 U.S.C. § 1324b discrimination actions?;[4] (4) On which ***precise date(s)*** did SFSU: (A) ***reach its decision(s) to hire Qu and***

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[3](...continued)

Title 8 U.S.C. § 1324(b)(i)(1) provides that a party may seek review of a § 1324b case "in the United States court of appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business." The Court of Appeals for the Ninth Circuit held in *Miller v. Maxwell's Intern., Inc.* that individuals cannot be adjudged personally liable for acts of employment discrimination under Title VII. *Miller v.* Maxwell's *Intern., Inc*., 991 F.2d 583 (9th Cir. 1993), *cert. denied sub nom. Miller v. LaRosa*, 510 U.S. 1109 (1994); *see* Henry P. Ting, *Who's the Boss?: Personal Liability Under Title VII and the ADEA*, 5 CORNELL J.L. & PUB. POL'Y 515 (1996) (finding *Miller* representative of both sides of the personal liability issue). While finding the argument for personal liability based on the "any agent" language "not without merit," the *Miller* court relied on *Padway v. Palches*, 665 F.2d 965, 968 (9th Cir. 1982) (holding that Title VII "speaks of unlawful practices by the employer and not . . . by officers or employees of the employer. Back pay awards are paid by the employer. The individual defendants cannot be held liable for back pay"). *See Meritor Sav. Bank v. Vinson, FSB*, 477 U.S. 57, 72 (1986) ("Congress' purpose in including 'agent' in the definition of employer was to define the scope of liability of the employer, [but] it said nothing about any liability on the part of the employee/agent"). The Sixth Circuit recently commented on *Miller*, concluding that in Title VII cases "the obvious purpose of this agent provision was to incorporate *respondeat superior* liability into the statute." *Walthen v. General Elec. Co.*, 115 F.3d 400, 405 (6th Cir. 1997). The parties, particularly McNier who has the burden of persuasion that 8 U.S.C. § 1324b authorizes personal liability, will presumably address the relevance of Title VII caselaw for purposes of resolving whether 8 U.S.C. § 1324b reaches personal liability.

[4]*See* CAL. UN. INS. CODE § 9601.7 (1997) (emphasis added), which incorporates by reference the notice requirement and certain discrimination prohibitions of IRCA, enacting, *inter alia*, § 274B of the INA, codified as 8 U.S.C. § 1324b:

> ***[I]t is a violation of both state and federal law to discriminate against job seekers on the basis of ancestry, race, or national origin.***

See also CAL. CONST. ART. 1 § 31 (DISCRIMINATION . . . IN PUBLIC EMPLOYMENT) (added by Prop. 209) (emphasis added):

> ***The state shall not discriminate*** against, ***or grant preferential treatment to***, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.
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> * * * *
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> "[S]tate" shall include . . . the state itself, any . . . . public university system, including the University of California . . . .

See also CAL. GOV. CODE § 12940:

> It shall be an unlawful employment practice . . . [f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, marital status, or sex of any person . . . to refuse to hire or employ the person . . . or to bar or to discharge the person from employment . . . or to discriminate against the person in compensation or in terms, conditions or

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reject McNier*?,**[5] (B) extend an offer of employment to Qu?, and (C) inform McNier that he had not been selected?; (5) Was Qu work-authorized ***at the time SFSU selected Qu and rejected McNier?; (6) Did SFSU discriminate against McNier on the basis of citizenship status when it selected Qu?; (7) Did SFSU retaliate against McNier, or attempt to intimidate him, for filing a charge under § 1324b with the Department of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC)?

II. Procedural History and Discussion

On September 21, 1996, McNier filed a *pro se* charge with OSC. McNier alleged that SFSU University discriminated against him on the basis of citizenship status and retaliated against him for asserting rights protected by 8 U.S.C. § 1324b, as excerpted in the Order, 7

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[4](...continued)

> privileges of employment . . . [or] to print or circulate . . . any publication . . . which expresses, directly or indirectly, any . . . discrimination . . . .
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> "[E]mployer" means any person regularly employing one or more persons, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision thereof, and cities.

In construing § 12940, California courts look to federal law. *Periera v. Schlage Electronics*, 902 F. Supp. 1095 (N.D. Cal. 1995); *Greene v. Pomona Unified School Dist.*, 32 Cal. App. 4th 1216 (1995), 38 Cal. Rptr. 2d 770 (1995); *Carr. v. Barnabey's Hotel Corp*, 23 Cal. App. 4th 14 (1994), 28 Cal. Rptr. 2d 127 (1994); *Flait v. North American Watch Corp.*, 3 Cal. App. 4th 467 (1992), 4 Cal. Rptr. 2d 522 (1992). The antidiscrimination provisions of the California Code comprise a floor, not a ceiling. CAL. GOV'T. CODE § 12993 (CONSTRUCTION):

> The provisions [for fair employment] . . . shall be construed liberally for the accomplishment of the purposes thereof.

[5]McNier and SFSU both incorrectly focused on the date on which Qu assumed his duties at SFSU. More importantly, April 9, 1996, when the hiring committee reached its decision to hire Qu, is the critical date for determining whether McNier was the victim of discrimination. It is reasonable to infer that the date of Qu's selection was the date of McNier's actual rejection, for on that date, McNier's ascension to the position became an impossibility, foreclosed by the choice of Qu. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *United States v. Mesa Airlines*, 1 OCAHO 74, at 501 (1989), 1989 WL 433896, at *33 (O.C.A.H.O.) (the critical inquiry in a mixed motive case is "whether the illegitimate discriminatory motive was the motivating factor '*at the moment*' the adverse employment decision was made") (citation omitted), *aff'd sub nom. Mesa Airlines v. United States*, 951 F.2d 1186 (10th Cir. 1991). For a discussion of the implications of an alien's status at the time of the alleged discrimination for suit *see Pioterek v. Anderson Cleaning Systems, Inc.*, 3 OCAHO 590, at 4 (1993), 1993 WL 723364, at *3 (O.C.A.H.O.) (holding that under 8 U.S.C. § 1324b(a)(3) "[t]o be entitled to IRCA citizenship discrimination protection, an individual must be either a citizen or national of the United States, or an alien (1) admitted for permanent residence, (2) an IRCA amnesty applicant, (3) a refugee, or (4) an asylee" **at the time of discrimination**, and finding that otherwise work-authorized alien lacked standing at time of alleged discrimination to bring Complaint, and dismissing Complaint). *See also USA v. Auburn University*, 3 OCAHO 564, at 1618 (1993); 1993 WL 502300, at *2 (O.C.A.H.O.) (discussing "protected" aliens under § 1324b).

OCAHO 947, at 6-7. By letter dated January 30, 1997, OSC advised that it declined to file an OCAHO Complaint "at this time," having "determined that there is not reasonable cause to believe the charge is true . . . but that the investigation is not concluded and will continue during the following 90 day period of time." OSC informed McNier of his right to file a private action before OCAHO. 8 U.S.C. 1324b(d)(2). Within the month, McNier filed his OCAHO Complaint, *pro se*, as excerpted at 7 OCAHO 947, at 8. On March 27, 1997, SFSU filed its Answer to the Complaint, admitting that McNier applied for the advertised tenure-track faculty position "on or about November 10, 1995," and was not hired, but denying that it used or procured fraudulent labor certification documents, and denying that McNier was qualified for the position. Answer at ¶¶ 4, 5, 8, 9. SFSU's claim that McNier was not qualified must be evaluated in context of the laudatory reports accompanying SFSU's Answer to the Complaint, as excerpted at 7 OCAHO 947, at 8-9. SFSU contends that it did not assign McNier to teach Hospitality Management during the 1996-97 academic year because he was unavailable, and denies that it retaliated against him, but admits that the Dean removed from the College of Business fliers that stated "Hang in there Howard." Despite McNier's academic credentials and professional experience, summarized at 7 OCAHO 947, at 9-10, SFSU maintains he was unqualified for a full-time tenure-track faculty appointment in Hospitality Management, as discussed at 7 OCAHO 947, at 10.

As discussed in the Order, 7 OCAHO 947, at 11-13, McNier's citizenship charge (including, inferentially, the claim of retaliation) withstood dismissal of his national origin charge. The Complaint satisfies the *McDonnell Douglas Corp. v. Green*[6]/*Texas Dept. of Community Affairs v. Burdine*[7] criteria for establishing a *prima facie* case of citizenship discrimination by demonstrating that: (1) he is a member of a protected class[8]; (2) the employer had an open position for which he applied; (3) he was qualified for the position; and (4) he was rejected under circumstances giving rise to an inference of unlawful discrimination on the basis of citizenship. *Lee v. Airtouch Communications, Inc.*, 6 OCAHO 901, at 11 (1996), 1996 WL 780148, at *9 (O.C.A.H.O.), *appeal filed,* No. 97-70124 (9th Cir. 1997). On the basis of the pleadings, McNier satisfied all four prongs of the test: (1) he is a United States citizen; (2) he applied for a tenured track position teaching hospitality management; (3) he successfully taught hospitality management for years at SFSU, and (4) he was rejected under circumstances giving rise to an inference of discrimination.

The Order asked the parties to brief several threshold issues: (1) whether 8 U.S.C. § 1324b contemplates actions against individuals because, where there is no suggestion of piercing a corporate veil, it is uncertain that 8 U.S.C. § 1324b contemplates suit against individuals who act in the name of an institutional employer; (2) whether the Eleventh Amendment to the U.S.

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[6] 411 U.S. 792 (1973).

[7] 450 U.S. 248, 253 (1981).

[8] McNier as a United States citizen is protected against employment discrimination. 8 U.S.C. § 1324b (a)(3)(A) ("'protected individual' means an individual who . . . is a citizen or national or the United States").

Constitution immunizes SFSU against 8 U.S.C. § 1324b liability,[9] and, if so, whether California has consented to suit on a § 1324b claim. The Order directed SFSU to provide factual information and documentation of its assertions.

As suggested at 7 OCAHO 947, at 14, 8 U.S.C. § 1324b is silent on the subject of State sovereign immunity. However, the United States Court of Appeals for the Tenth Circuit held that § 1324b does not reach State employment. *Hensel v. Office of the Chief Administrative Hearing Officer*, 38 F.3d 505, 507, 508 (10th Cir. 1994) (because § 1324b does not waive Eleventh Amendment immunity, such claims must be dismissed for want of jurisdiction). More recently, in a case unrelated to immigration law generally, or § 1324b liability specifically, the Supreme Court emphasized that Congress can only abrogate Eleventh Amendment immunity to suit in federal court "by making its intention unmistakably clear in the language of the statute." *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1123 (1996) (quoting *Dellmuth v. Muth*, 109 S.Ct. 2397, 2399-2400 (1989)). No such intention is manifest in § 1324b. But *Seminole* observed "an individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with the federal law." 116 S.Ct. at 1131, n.14.

On August 29, 1997, Daniel E. Lungren, Attorney General of the State of California, and Richard G. Tullis, Deputy Attorney General, filed a Respondent's Brief and Respondent's Responses to Interrogatories, in effect entering appearances on behalf of SFSU, and urged the forum to dismiss the action for want of jurisdiction. The Brief characterizes SFSU as "a subordinate governmental unit of the State of California," citing CAL GOV'T CODE § 811.2, and argues that an action under 8 U.S.C. § 1324b cannot be maintained against individual officials because the Ninth Circuit, in *Miller v. Maxwell's Intern, Inc.*, 991 F.2d 583 (9th Cir. 1993), *cert. denied sub nom. Miller v. LaRosa*, 510 U.S. 1109 (1994), holds that "under both Title VII and the Age Discrimination in Employment Act (ADEA), civil liability could not be

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[9]The Eleventh Amendment to the United States Constitution generally bars federal court jurisdiction over suits against states. U.S.C. Const. Amend. XI ("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"). While the amendment literally only addresses suits by a citizen of a state other than that against which relief is sought, the Supreme Court has extended this prohibition to suits by all persons against a state in federal court. *Port Auth. Trans-Hudson Corp. v. Feeney*, 110 S.Ct. 1868, 1871 (1990); *Pennhurst State School and Hospital v. Halderman*, 104 S.Ct. 900, 907 (1984); *Employees v. Missouri Dept. of Public Health and Welfare*, 93 S.Ct. 1614, 1615 (1973). 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 (1989). Secondly, states may consent to suit in federal court. *Port Auth. Trans-Hudson Corp.*, 110 S.Ct. at 1871; *Atascadero State Hospital v. Scanlon*, 105 S.Ct. 3142, 3146 (1985); *Clark v. Barnard*, 2 S.Ct. 878, 882 (1883).

In this context, the July 3 order, 7 OCAHO 947, at 14, commented that, accordingly, it is necessary to determine: (1) if SFSU is an "arm of the state" for Eleventh Amendment purposes; (2) if so, whether California has waived SFSU immunity to federal judicial power over claims such as those which invoke § 1324b; and (3) even if California has not waived immunity, can individual State officials be held liable under § 1324b? Resolution of these questions is guided by Supreme Court and Ninth Circuit precedent, as well as by state law. If SFSU is ***not*** an arm of the State, or if California has waived immunity, I have jurisdiction.

assessed against individual employees." Brief at p. 4. Respondent contends that "it is clear that Congress did not intend in its enactment of section 1324b to impose the burden of litigating discrimination claims on small employers. It would therefore make no sense to impose civil liability on individuals who employ no employees at all." Brief at p. 5.

Respondent seeks to distinguish *Steiben v. Immigration and Naturalization Service*, 932 F.2d 1225, 1227, 1228 n.8 (8th Cir. 1991), which under the cognate employer sanctions statute, 8 U.S.C. § 1324a, and implementing regulation, 8 C.F.R. § 274a.1(g), defines employer to include "an agent or anyone acting directly or indirectly in the interest of the employer," and levied fines upon a corporation, chief executive officer, and proprietor who hired unauthorized aliens. The Respondent argues in effect that unlike the corporate officers in *Steiben*, the university employees McNier seeks to join are "low-level." However, I note that the Dean of the College of Business and Chairs of the Departments of Accounting and Hospitality Management -- the persons McNier wishes to join -- are arguably not "low-level."

Respondent does not address the *Ex parte Young*[10] exception to sovereign and official immunity recited in *Seminole* and its applicability to this case. This narrow exception permits actions against individuals in their official capacities where prospective injunctive relief, as distinct from monetary damages, is sought. *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 626 (9th Cir. 1989), *cert. denied sub nom. BP Exploration (Alaska), Inc. v. Baily*, 495 U.S. 904 (1990). This exception is available where the actions of the state officials are unreasonable in light of existing law. *Papasan v. Allain*, 478 U.S. 265, 277 (1986) (the *Young* exception is narrowly "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") (quotation omitted) (*quoting Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984), *citing Young*, 209 U.S. at 160). To invoke the *Young* exception, a Complainant must satisfy a two-part test: (1) the law governing the official's conduct must be reasonably established, and (2) the official could not have reasonably believed that his conduct was lawful. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993).

Respondent argues that SFSU is an "arm of the state," and a § 1324b action against it is therefore barred by the Eleventh Amendment. As authority, Respondent cites *Regents of the University of California et al. v. Doe*, 117 S.Ct. 900 (1997), which, however, explicitly declined to address the issue of whether a state university is an arm of the state because *certiorari* was not granted on that question. 117 S.Ct. at 905. Instead, the Court held that federal indemnification does not preclude a finding that a university is an arm of the state and reversed and remanded to the Ninth Circuit. 117 S.Ct. at 904. To date, the Ninth Circuit has not decided the remanded case.

Respondent also cites *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982), for the proposition that San Francisco State College, SFSU's physical predecessor, was an "arm of the

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[10] 209 U.S. 123, 159-60 (1908).

state," because the University of California was so regarded by the Ninth Circuit for the purposes of that case, and San Francisco State College, a smaller institution, at the time the case was decided, had less legislative autonomy than did the University of California. But Respondent ignores the Ninth Circuit's more recent determination that "in some, but not all of its functions [a state university] . . . is entitled to Eleventh Amendment immunity." *Doe v. Lawrence Livermore Nat. Laboratory*, 65 F.3d 771, 774, 775 (1995) (a state university system is "an enormous entity which functions in various capacities and which is not entitled to Eleventh Amendment immunity for all its functions," applying a five-factor test to determine whether entity is "arm of state": "[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 under the name of the state, and [5] the corporate status of the entity"). Because *Hayakawa* depends on an argument the Ninth Circuit recently rejected in finding a state university system not always and for all purposes an "arm of the state," and because *Hayakawa* concerned a campus that was SFSU's predecessor, the *Hayakawa* conclusion may be obsolete.

To support its contention that California has not waived immunity, Respondent also cites the Supreme Court's interpretation of 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") in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1983) (requiring "an unequivocal waiver specifically applicable to federal court jurisdiction" and failing to find a waiver of sovereign immunity when a state statute is silent as to federal venue).

In order to determine whether McNier's claims are compensable under 8 U.S.C. § 1324b, it is necessary to determine whether or not SFSU is ***now*** understood to be an "arm of the state." More information is needed -- specifically, (1) a description of SFSU's ***current*** legal status as delineated by the CAL. CODE, and a narrative describing in chronological order its evolution and relationship to the California State University and to the State of California, listing the circumstances under which SFSU is treated as a private party and those in which it is treated as an arm of the state; (2) application of the Ninth Circuit five-factor test, described *supra*; and (3) up-to-date Ninth Circuit jurisprudence regarding "arm of the state" doctrine in the forthcoming remanded *Livermore* decision.

In its Response to Interrogatories, SFSU provided these partially illuminating answers.

> (Q) When did SFSU reach its decision not to interview McNier, and inform McNier that he was not under consideration?
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> (A) On January 26, 1996, SFSU decided not to interview McNier, and informed him on April 19, 1996 that he was not under consideration.
>
> (Q) What was Qu's immigration and work-authorization status ***on those dates***?

(A) San Francisco State did not know Professor Qu's citizenship status and work authorization status when it considered his candidacy.[11]

(Q) On what date did the hiring committee reach its decision to hire Qu?
(A) The hiring committee reached its decision to hire Qu on or about April 9, 1996.

(Q) When did the Dean approve this decision?
(A) NO REPLY

(Q) What was Qu's immigration and work-authorization status ***on those dates***?
(A) SFSU did not then know Qu's citizenship status or whether Qu was work-authorized.

(Q) What were Qu's qualifications on those dates?
(A) NO REPLY

(Q) Which universities award PH.D.'s in hospitality management?
(A) SFSU has no listing of all universities which award a PH.D. in Hospitality Management,[12] but appends a 1995 compilation by the Council on Hotel, Restaurant and Institutional Education (CHRIE).

(Q) When was the first PH.D. awarded from each?
(A) SFSU has no information as to when these institutions first began awarding this degree.

(Q) Do the Chair and Director of the Hospitality Management Department hold a PH.D. in Hospitality Management?
(A) The present Chair of the Hospitality Management Department, Dr. Janet Sim, does not have a degree in Hospitality Management.

(Q) Have previous Chairs and Directors of the

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[11]McNier, however, maintains that the University was aware of Qu's status and colluded in obtaining a false work authorization during this period.

[12]The University's response is puzzling in light of its reliance on this degree as a mandatory condition of candidacy for the position in question.

Hospitality Management Department held PH.D.s in this subject?

(A) Dr. Jay Schrock, the past director of the Hospitality Management Department, does not have a degree in Hospitality Management.

(Q) List the names and terminal degrees of *all* Hospitality Management faculty, past and present;[13]

(A) Professor Qu has a PH.D. in Hotel, Institutional, and Restaurant Management.

(Q) List McNier's total SFSU compensation during each academic year.

(A) SFSU provides a summary of McNier's annual gross salary per academic year:

Academic Year	Annual Gross Salary
91-92 only)	$17,412 (Spring semester
92-93	$34,824 (full time)
93-94	$36,101 (full time)
94-95	$37,560 (full time)
95-96	$39,828 (full time)
96-97	$40,645.80 ('95 Fall, full time Spring)

On August 29, 1997, McNier filed Complainant's Brief, which argues that under the rule of *Janken v. G.M. Hughes Electronics*, 46 Cal. App. 4th 55, 62 (1996), 53 Cal. Rptr. 2d 741 (1996), the California legislature places "individual supervisory employees at risk of personal liability for personal conduct constituting harassment" as distinct from discrimination. McNier characterizes Dean Wallace's destruction of his supporters' signs and threats of criminal prosecution of McNier's supporters as retaliatory harassment. McNier depicts Chair Sim's failure to invite him to faculty meetings and Leong's retroactive reduction of his pay per course as retaliatory harassment giving rise to personal liability under state law. McNier interprets CAL. GOV'T CODE § 818 as providing sovereign immunity from punitive damages only for "public [institutional] entities," not public employees. *Runyon v. Superior Court*, 187 Cal. App. 3d 878 (1986), 232 Cal. Rptr. 101 (1986). McNier also contends that state discrimination complaint forms contemplate personal liability, citing California Department of Fair Employment and Housing Form 300-03, "Complaint of Discrimination," which, following a blank space, recites: "named is the employer . . . state or local government agency or individual who discriminated against me." McNier argues that the clear language of § 1324b(a)(1) on its face ("person or other

[13]Because SFSU's pleadings describe the Hospitality Management program as of recent vintage, answering this question this should have been no hardship.

entity") contemplates personal liability for discriminatory acts, citing as authority Henry P. Ting's article, *Who's the Boss?: Personal Liability Under Title VII and the ADEA*, 5 CORNELL J.L. & PUB. POL'Y 515, 539 (1996) ("'or' . . . indicat[es] either of the words or phrases may be employed without the other"). McNier reasons that the 8 C.F.R. § 274a definition of "person or other entity" as "agent or anyone acting directly or indirectly in the interest thereof," endorsed by the *Steiben* court, should be imported when interpreting § 1324b. To do otherwise, argues McNier, would thwart the public policy evinced by IRCA.

McNier contends that the California Tort Claims Act consents to suits against "public entities." CAL. GOV'T CODE § 810 *et seq.* "Public entity" includes the state itself. CAL. GOV'T CODE § 811.2. Because public entity tort liability is statutory, "the rule is liability and immunity is the exception." *Virginia G. v. ABC Unified School Dist.*, 15 Cal. App. 4th 1848, 1855 (1993), 19 Cal. Reptr. 2d 671, 675 (1993); *see also Scott v. County of Los Angeles*, 27 Cal. App. 4th 125, 140, 143, 32 Cal. Reptr. 2d 643, 650, 652 (1994). McNier argues that because the California Code (a) incorporates by reference the notice and some discrimination prohibitions of IRCA, enacting *inter alia* 8 U.S.C. § 1324b (CAL. UN. INS. CODE § 9601.7 ("it is a violation of both state and federal law to discriminate against job seekers on the basis of ancestry, race, or national origin")); (b) prohibits as unlawful employment practices refusal to hire "because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, marital status, or sex of any person" (CAL. GOV'T CODE § 12940); and (c) provides that its fair employment provisions "shall be construed liberally," the State consents to suit under § 1324b (CAL. GOV'T CODE § 12993).

By letter filed September 15, 1997, McNier disputes the factual accuracy of Respondent's Answers to Interrogatories, and correctly observes that Respondent provided Qu's current resume, not the documents submitted by Qu prior to April 9, 1996, the date on which Respondent made its determination to hire Qu. Disputing the hair-splitting, legalistic nature of answers to interrogatories, McNier correctly observes that neither Chair Sim nor former Chair Schrock has a PH.D. in Hospitality Management, the lack of which scuttled McNier's candidacy, and that no one who has taught in the Hospitality Management Department, with the exception of Qu, has ever had such a degree. McNier alleges that Respondent attempts to mislead this forum by not including, despite our command to do so, the names of adjunct (temporary) faculty, who, presumptively, like Sim, Schrock, and McNier, lacked this degree.

By submission dated October 6, 1997, McNier updated Complainant's Brief, calling attention to *Reno v. Baird*, 57 Cal. App. 4th 1211, (1997), 67 Cal. Rptr. 2d 671 (1977), *review filed* (Oct. 21, 1997), a September 24, 1997 decision of the California Court of Appeal, First Appellate District, which rejected, and held as wrongly decided, *Janken v. G. M. Hughes Elec.*, 46 Cal. App. 4th 55, 53 Cal. Rptr. 2d 741, upon which Respondent relies in its Brief. *Reno v. Baird* holds that a supervisor is liable in an individual capacity for both harassment and discriminatory hiring and firing under California law:

> [T]he goals of the FEHA to eliminate discriminatory practices and

> to "safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement" . . . are advanced by permitting lawsuits . . . against the supervisory agents committing the unlawful discrimination and the employer.

Reno v. Baird, 57 Cal. App. 4th at 1238, 67 Cal. Rptr. at 688. *Baird* notes that "federal courts have not reached consensus regarding a supervisor's personal liability, and the United States Supreme Court has yet to rule on this question." 57 Cal. App. 4th at 1228, 67 Cal. Rptr. 2d at 682.

III. Directives to the Parties

A. Respondent Should Explain Professor Qu's Work-Authorization Status on April 9, 1996

Respondent denies knowing Qu's work-authorization status on April 9, 1996, the date on which it appears to have reached its decision to hire Qu. McNier's case may 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,[14] nothing in IRCA obliges an employer to select a United States citizen over an equally qualified work-authorized alien. *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), 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).

Respondent's contention that it was and is unaware of Qu's immigration status as of the time it hired him (on or about April 9, 1996) may invite the inference that he was not work-

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[14] *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.

authorized, in light of the documents submitted as Attachments to its Answer. These Attachments include 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."

According to Qu's Curriculum Vitae, he studied in the United States from January 1987 to December 1992, receiving his B.S. from Northern Arizona University, and a M.S. and PH.D. from Purdue, and during this time he worked as an Academic Assistant to the Dean at Northern Arizona University and as a Teaching Assistant, Research Assistant, and Head of the International Language School and Married Student Housing at Purdue University. Qu's prior employment suggests work-authorization, at least during this period. SFSU will be expected to provide an explanation as to its understanding of Qu's work eligibility on April 9, 1996, in order to avoid the inference that he was not eligible for employment in the United States at the time of the hiring decision.

B. Each Party Should Provide a Supplemental Brief on the Issues of Personal Liability and Sovereign Immunity

Respondent requests dismissal for lack of "jurisdiction" (presumably because SFSU is an "arm of the state"). However, *pro se* pleadings are liberally construed under a "less stringent standard" than are those of represented complainants. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1971). Accordingly, "dismissal without leave to amend is improper unless it is clear . . . that the complaint could not have been saved by amendment" or "it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts that could be proved." *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996); *Kelson v. City of Springfield*, 767 F.2d 651, 653, 656 (9th Cir. 1985). Dismissal would be premature, because, *inter alia*, Respondent has not provided sufficient information to permit a determination of Qu's eligibility for employment on April 9, 1996, and because the record remains uninformed as to personal liability and sovereign immunity.

1. Supplemental Briefs Should Address the Issue of Personal Liability, with Particular Reference to 8 U.S.C. § 1324b of Its Legislative History, and Federal Caselaw, with Particular Attention to *Sofamor Danek, Ex parte Young,* and *Seminole*

Addressing the issue of state officials' personal liability for violation of 8 U.S.C. § 1324b,

the parties should discuss the legislative history of the statute, relevant federal jurisprudence, recent Ninth Circuit decisions, including *Sofamor Danek*, *supra*, with particular attention to the doctrine of *Ex parte Young*, *supra*, and *Seminole*, *supra*.

2. Supplemental Briefs Should Address the Issue of Sovereign Immunity

The parties are referred to the Order finding jurisdiction in *Iwuchukwu v. City of Grand Prairie*, 6 OCAHO 915 (1997), 1997 WL 176857 (O.C.A.H.O.). As a model for their responses, they are also referred to the analysis of *Lynch v. San Francisco Housing Authority*, 55 Cal. App. 4th 527, 622, 626 (1997), 65 Cal. Rptr. 2d 620, 627 (1997) (city housing authority not arm of state for purposes of Eleventh Amendment immunity from § 1983 suit), and shall provide answers, with particular reference to the CAL. CODE and caselaw to questions enumerated in Section IV, Order.

IV. Order

Because, for the reasons already explained, it would be premature to dismiss the Complaint or otherwise adjudge liability, the parties will respond to the requests set out below by **February 6, 1998**:

(A) Respondent should supply information about Qu's authorization to work in the United States on April 9, 1996, and document Respondent's and its agents' knowledge of his status at that time, providing documentary materials relevant to this issue, including but not limited to departmental memos and INS communications, without regard to time frame;

(B) Respondent should advise of the date Qu's PH.D. was awarded, and provide copies of all correspondence and materials Qu submitted as part of his application for selection;

(C) Both parties should file supplemental briefs on the issues of personal liability and sovereign immunity, and provide their recommendation with explanation in support as to whether resolution of these issues and/or an evidentiary hearing as appropriate should be abated pending decision by the Ninth Circuit on the remand of *Regents of the University of California v. John Doe*, 117 S.Ct. 900 .[15]

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[15]The parties should consider relevant caselaw and commentary, including, but not limited to:

Seminole Tribe of Florida v. Florida, 116 S.Ct. at 1131 n.14 ("an individual can bring suit against a state official in order to ensure that the officer's conduct is in compliance with federal law [under *Ex parte Young*]");

Sofamor Danek Group v. Brown, 124 F.3d 1179, 1183-84, 1185 (9th Cir. 1997) (*affirming* District Court's denial of Director of State of Washington's Department of Labor and Industries'

(D) *Inter alia*, the supplemental briefs should address the following fact-specific questions:

(1) Would a money judgment against SFSU be satisfied from the state treasury? Who is "legally liable" for judgments against SFSU?

(2) Does SFSU perform central governmental functions?

(3) Can SFSU sue or be sued? If so, in whose name are such suits undertaken?

(4) Has SFSU power to take property in its own name or only in that of the State?

(5) What is the corporate status of SFSU?

(6) What degree of autonomy does SFSU enjoy?

(7) Is SFSU immune from State taxation?

(8) What percentages of SFSU's annual budget are derived or received

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motion to dismiss for lack of jurisdiction, and holding that the state official was subject to injunction where his action arguably violated federal statute, despite Eleventh Amendment immunity of State, as per *Ex parte Young*, because "a state officer acting in violation of federal law is considered stripped of his official or representative character and, consequently, is not shielded from suit by the state's sovereign immunity," *holding* that use of the word "person" in the Lanham Act plainly indicates Congressional intent to authorize suit against state officials, and *confirming* District Court determination that *Seminole* does not preempt application of the doctrine of *Ex parte Young*);

Lee v. Regents of the University of Nevada, 113 F.3d 1241 (9th Cir. 1997) (Table), 1997 WL 226511, at *1 (9th Cir. 1997) (Unpublished Disposition; citation permitted under Ninth Circuit Rule 36-3 under doctrine of law of the case) (*holding* that district court erred in dismissing § 1983 complaint against state officials acting in official capacities because "federal claims against officials acting in their individual capacities do not fall within the [Eleventh] Amendment's ambit" and that suit against state officials as individuals will be assumed where they are named in the complaint);

Deep Sea Research, Inc. v. Brother Jonathan, 102 F.3d 379, 383, 386 (9th Cir. 1996) (*affirming* District Court's determination that State of California must prove Eleventh Amendment immunity by preponderance of evidence); and

Kelly Knivalla, *Public Universities and the Eleventh Amendment*, 78 GEO. L.J. 1723 (1990) (under the *Ex parte Young* exception to sovereign immunity, "when a state official acts contrary to the federal constitution or laws, he is stripped of his official character and is no longer entitled to eleventh amendment immunity," but "any recovery is limited to prospective injunctive relief").

from the State treasury or State appropriations; tuition and fees; private grants; national, state, and local grants; and all federal sources? (List in order of magnitude.)

(9) What is SFSU's domain?

(10) Does SFSU have independent authority to raise funds?

(11) What is the extent of State control over SFSU fiscal affairs?

(E) The parties should also discuss, with particular application to the facts of this case, whether, by incorporating IRCA into its Code, California has consented to suit in federal court. CAL. UN. INS. CODE § 9601.7.

(F) The parties are encouraged to reach an agreed resolution of this dispute. Absent such a settlement or indicia of progress toward that result by February 6, 1998, my office shortly after that date will initiate scheduling of a telephonic prehearing conference (in aid of which, Respondent will identify by February 6, 1988, who among its attorneys will participate) to discuss evidentiary issues in light of the filings due by February 6, 1998, a discovery schedule, the development of fact stipulations, identification of anticipated witnesses, and, as may be appropriate, to schedule an evidentiary hearing in or around San Francisco, California.

SO ORDERED.

Dated and entered this 22d of December 1997.

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Marvin H. Morse
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Order Dismissing in Part and Ordering Further Inquiry were mailed first class this 22d day of December 1997 addressed as follows:

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