

**UNPUBLISHED**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ABINGDON DIVISION**

<b>KENNETH G. FIELDS,</b>	)	
	)	
Plaintiff,	)	Case No. 1:02CV20213
	)	
v.	)	<b>OPINION AND ORDER</b>
	)	
<b>COMMONWEALTH OF VIRGINIA, ET</b>	)	By: James P. Jones
<b>AL.,</b>	)	United States District Judge
	)	
Defendants.	)	

*Hilary K. Johnson, Hilary K. Johnson, P.C., Abingdon, Virginia, for Plaintiff;  
Guy W. Horsley, Jr., Senior Assistant Attorney General of Virginia, Richmond,  
Virginia, for Defendants.*

In his Complaint, the plaintiff contends that he was denied medical leave while employed as a correctional officer by the Virginia Department of Corrections at its Keen Mountain Correctional Center in this judicial district. He asserts a violation of the Family and Medical Leave Act of 1993 (“FMLA”), 29 U.S.C.A. §§ 2601-2654 (West 1999 & Supp. 2002), (Count I) and a breach of contract (Count II). The defendants Commonwealth of Virginia, Department of Corrections, and Keen

Mountain Correctional Center, have filed a Motion to Dismiss based on the Eleventh Amendment to the Constitution.<sup>1</sup> The motion is now ripe for decision.<sup>2</sup>

As to Count I, following the filing of the defendants' motion the Supreme Court ruled that the Eleventh Amendment did not bar an action by a state employee to recover money damages for an alleged violation of the family-care leave requirements of the FMLA. *See Nev. Dep't of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1976 (2003). In a supplemental response, the defendants now expressly concede that based on the *Hibbs* decision, their Motion to Dismiss as to Count I ought to be denied.<sup>3</sup>

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<sup>1</sup> *See* U.S. Const. amend. XI (stating that “[t]he 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.”). In spite of its language, the Eleventh Amendment has been construed to prohibit suits against a state by its own citizens. *See Hans v. Louisiana*, 134 U.S. 1, 14-15 (1890).

<sup>2</sup> The motion has been briefed by the parties. I will dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not significantly aid the decisional process.

<sup>3</sup> *See* Defs.' Reply to Pl.'s Resp. to Defs.' Mot. to Dismiss ¶ 2. *Hibbs* involved only the family leave entitlement of the FMLA, *see* 26 U.S.C.A. § 2612(a)(1)(C) (West 1999), and not the employee medical leave provision involved in the present case, *see* 26 U.S.C.A. § 2612(a)(1)(D) (West 1999). Since the ability of Congress to abrogate Eleventh Amendment immunity in the FMLA depends upon the equal protection guarantee of the Fourteenth Amendment, the validity of such abrogation may be different as to the employee medical leave requirement. *See Kazmier v. Widmann*, 225 F.3d 519, 525 (5th Cir. 2000) (analyzing subsections (C) and (D) abrogation separately). Nevertheless, the defendants have conceded any defense of immunity, and the court should not sua sponte impose on a state an immunity defense raised but then withdrawn. *See Montgomery v. Maryland*, 266 F.3d 334, 337 (4th

In Count II of his Complaint the plaintiff contends that he was denied medical leave in violation of a Department of Corrections written policy. While the court would otherwise have supplemental jurisdiction to consider this state law claim under 28 U.S.C.A. § 1367(a) (West 1993) (providing for supplemental jurisdiction over claims that form part of the same case or controversy as the federal claim), this statute does not confer jurisdiction over nonconsenting state defendants in the face of Eleventh Amendment immunity. *See Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 541-42 (2002).

The Eleventh Amendment, absent waiver by the state or abrogation by Congress, bars a private action in federal court seeking a money judgment against a state. The fact that the state law claim may be enforced in state court does not constitute a state waiver of its Eleventh Amendment immunity. *See Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 306 (1990). For these reasons, the defendant Commonwealth of Virginia and its agencies are immune from suit as to the plaintiff's contract claim.

For the foregoing reasons, it is **ORDERED** as follows:

1. The Motion to Dismiss [Doc. No. 3] is denied in part and granted in part;
2. The Motion to Dismiss is denied as to Count I; and

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Cir. 2001), *remanded on other grounds*, 535 U.S. 1075 (2002).

3. The Motion to Dismiss is granted as to Count II and Count II is dismissed without prejudice.

ENTER: June 16, 2003

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United States District Judge