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The Honorable Robert J. Bryan

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

Brian P. Carr,

Plaintiff,

v.

Sam Reed, in his official capacity as Secretary of the State of Washington, Wanda Briggs in her official capacity as Chair of the State of Washington Commission of Judicial Conduct, and Rob McKenna, in his official capacity as Attorney General of the State of Washington and, separately, as private individuals the Honorable Robert L. Harris, John F. Nichols, Barbara D. Johnson, Kenneth Eisland, Rich Melnick, John Hagensen, Kelli E. Osler, Joel Penoyar, (J.)C.C. Bridgewater, J. Robin Hunt, Gerry L. Alexander, Barbara Madsen, Mary E. Fairhurst, Susan Owens and James M. Johnson as well as other currently unnamed parties as determined by the Court,

Defendants.

NO. C07-5260RJB

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT WANDA BRIGGS' MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE

Hearing Date: October 19, 2007

I. INTRODUCTION

Plaintiff opposes the entry of summary judgment and dismissal of defendant Wanda Briggs on three grounds. First, he contends that state law requires the Commission on Judicial Conduct (“CJC”) to investigate and conduct hearings regarding every citizen complaint and that the alleged failure to do so was a violation of his federal rights. Second, he claims that the numerous decisions holding that state officials charged with policing professional ethics are immune from lawsuits do not apply to his claim against the CJC. Finally, he abandons his 42 U.S.C. § 1986 claim, the only basis for liability asserted against defendant Briggs, and claims he will amend his Amended Complaint yet again to avoid dismissal. None of these grounds is sufficient to defeat summary judgment.

Plaintiff also raises arguments that do not apply to this defendant’s Motion. These arguments consume the first four pages of his Opposition. They are, in effect, a sur-reply to the Motions brought by the other defendants, in clear violation of this Court’s Order of October 4, 2007. Defendants accordingly move to strike plaintiff’s brief (pages 1 through 4, up to “Argument 1”), pursuant to that Order and Local Rule 9(g).

II. ARGUMENT

A. Plaintiff Has No Standing to Pursue State Law Claims Against Defendant Briggs.

Plaintiff’s claim that state law mandates that the CJC investigate and conduct hearings on every complaint confirms that his claim rests solely on state law, is not cognizable under federal law and cannot vest this Court with jurisdiction. *See Pearson v. Brace*, 2007 WL 2972744 at *3, *4 (E.D. Cal. 2007) (copy attached as Attachment A, pp. 8-11):

[A] claim of legal malpractice usually presents only a state law claim that must be litigated in state court.

* * * *

Leave to amend should not be granted because plaintiff has not demonstrated that she can allege any federal claim that has an arguable basis in law and in fact. *See Hagans v. Levine*, 415 U.S. 528, 543, 94 S.G. 1372, 39 L.Ed.2d 577 (1974).

1 Whatever state law may require, there is no federal civil right to insist that a state agency
 2 pursue disciplinary action against another. *Doyle v. Oklahoma Bar Ass'n*, 998 F.2d 1559,
 3 1566 (10th Cir. 1993). This lack of standing that bars plaintiff in this case is based on the
 4 principle that no citizen has a federal right to compel the prosecution of another:

5 The United State Supreme Court has made it clear that a private citizen lacks a
 6 judicially cognizable interest in the prosecution or non-prosecution of another.

7 * * * *

8 The ordinary citizen does not have a general interest justifying a lawsuit based
 on the criminal prosecution or non-prosecution of another.

9 *Id.* at 1566-67 quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 619, 93 S. Ct. 1146, 1149
 10 (1973). Thus, whether vindicating his own interests or those of the “general public,” plaintiff
 11 lacks standing to pursue a federal civil rights action based upon the CJC’s allegedly wrongful
 12 decision to deny his complaints.

13 In addition, plaintiff’s own documents confirm he has no claim under federal or state
 14 law.¹ Exhibits E and F to his October 15, 2007 Declaration confirm that the CJC investigated
 15 his complaints and found them baseless:

16 The analysis for such a determination is complicated and reflects a
 17 fundamental limitation of the jurisdiction and function of the Commission.
 18 Generally, allegations that a judge (or judges in your case) misapplied the law
 19 is beyond the purview of the Commission’s function. The issue of whether a
 20 judge’s decision was legally correct is separate from the issue of whether the
 21 judge acted in accordance with the Code of Judicial Conduct. The
 22 Commission has no authority to act as a court of review, determining the legal
 or factual validity of any judge’s decision. Absent some objective evidence of
 improper influence or motive, the Commission cannot take action based on the
 legal decision made by a judge, even in cases where it might appear that
 decision was incorrect. Dissatisfaction with a legal decision must be remedied
 through the legal process, which is separate from the Commission’s
 jurisdiction.

23 Exhibit F (CJC Senior Investigative Counsel’s letter of June 25, 2007). This is consistent with
 24 the attached Declaration of Reiko Callner, CJC Executive Director, who confirms the CJC
 25 investigates each complaint, but has discretion to decide whether to charge a canon violation

26 ¹ All state law claims are barred by absolute immunity under RCW 2.64.080.

1 based upon the investigation. By investigating his complaints and exercising the discretion
2 not to pursue meritless allegations, the CJC fulfilled its mission under Washington law.

3 **B. Additionally, the CJC Staff Is Absolutely Immune From Liability in Damages or**
4 **Injunctive Relief.**

5 In her Motion, defendant Briggs cited eight decisions wherein federal courts all over
6 the country applied absolute quasi-judicial/prosecutorial immunity to the actions or inactions
7 of state agencies charged with policing and adjudicating alleged violations of professional
8 ethics. (Defendants' September 27 Motion at pp. 9-11).

9 Plaintiff attempts to distinguish this authority by claiming the cases concern the
10 private relationship between professionals and clients, not issues or relationships that affect
11 the public interest. (Plaintiff's October 15 brief at p. 8). This contention is factually and
12 legally incorrect. The Court knows full well that attorneys are all "officers of the court" and
13 not merely private citizens answerable to private sector clients. That is why we have bar
14 associations and similar commissions for other publicly licensed practitioners. The variety of
15 cases cited by defendant illustrate the many professions that are subject to different state
16 agency oversight: from judges to attorneys to veterinarians to zoning boards. All these
17 agencies are immune from federal claims arising out of their quasi-judicial or prosecutorial
18 discretionary functions. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-36, 113 S.G.
19 2167 (1993) (Extending immunity to officials other than judges is justified because their
20 decision are comparable to judges—they exercise "discretionary judgment" to resolve
21 disputes or determine rights.).

22 The immunity of the CJC's Chair, Wanda Briggs, is proven by the undisputed fact that
23 her agency had jurisdiction to hear plaintiff's complaints and the undisputed fact that the CJC
24 made a "judge-like" and/or "prosecutor-like" decision that they lacked merit. This immunity
25 defense absolutely insulates the decision-makers from vindictive and baseless litigation by
26 "sore losers."

1 **C. Plaintiff Has Abandoned His Only Federal Claim Against the CJC.**

2 At page 7 of his brief, plaintiff concedes he has no claim under 42 U.S.C. § 1986. As
 3 discussed in Defendants' Motion, however, the standing and immunity defenses apply to
 4 §§ 1983, 1985 and 1986 actions. (*See* authorities cited on p. 13 of Defendants' September 27
 5 Motion). Immunity from an award of injunctive relief, like damages, is precluded by the 1996
 6 amendments to 42 U.S.C. § 1983. *See also Wolfe v. Strankman*, 392 F.3d 358, 366 (9th Cir.
 7 2004). Therefore, no eleventh-hour plea for leave to amend and switch legal theories can save
 8 his claim against this defendant.²

9 **D. Plaintiff's Sur-Reply Arguments Should Be Stricken.**

10 Plaintiff unsuccessfully sought leave of court to file a "consolidated reply" to the
 11 Reply Briefs of the judicial defendants. In denying plaintiff's Motion, this Court warned him
 12 that he should limit himself to the "issues raised in Ms. Briggs' motion." (Order attached as
 13 Attachment B, p. 12). The arguments on the first four pages of plaintiff's October 15 brief
 14 ignore this Court's Order, contesting defenses (*res judicata* and *Rooker-Feldman*) not
 15 pertinent to defendant Briggs' Motion and reiterating his claims against co-defendants, not
 16 Ms. Briggs. Accordingly, pursuant to Local Rule 7(g), defendant moves to strike pages 1-4
 17 (up to "Argument 1") of plaintiff's brief.

18 **III. CONCLUSION**

19 Plaintiff lacks standing to bring a civil federal rights claim based on a state agency's
 20 performance of quasi-judicial functions governed by state law. Plaintiff's claim is also
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25 ² He offers to amend his complaint again. (Plaintiff's Brief at 7). However, such an amendment would
 26 be improper as amendment of pleadings is not allowed to pursue "futile" claims. *Miller v. Yokohama Tire Corp.*,
 358 F.3d 616, 622-23 (9th Cir. 2004); *Adamson v. Lockheed Martin Idaho Tech. Co.*, 20 Fed. Appx. 715, 719 (9th
 Cir. 2001).

1 defective because the CJC and its agents are immune from liability in damages or injunctive
2 relief. The Court should dismiss his claims with prejudice.

3 DATED this 18th day of October, 2007.

4 ROB MCKENNA
5 Attorney General

6
7 ss/William G. Clark
8 WILLIAM G. CLARK, WSBA #9234
9 Assistant Attorney General
10 Office of the Attorney General
11 800 Fifth Avenue, Suite 2000
12 Seattle, WA 98104-3188
13 Telephone: (206) 389-2794
14 Facsimile: (206) 587-4229
15 E-Mail: billc2@atg.wa.gov
16 Attorneys for State Defendants
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19
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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 2007, I electronically filed the foregoing **Reply in Support of Defendant Wanda Briggs' Motion for Summary Judgment and Motion to Strike** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

Bernard Veljacic
Clark County Prosecutor
Bernard.Veljacic@clark.wa.gov

Brian P. Carr
brian@brian.carr.name

ROBERT M. MCKENNA
Attorney General

/s/ William G. Clark
WILLIAM G. CLARK, WSBA # 9234
Attorney General of Washington
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
Telephone: (206) 464-7352
Facsimile: (206) 587-4229
E-Mail: billc2@atg.wa.gov
Attorneys for State Defendants