UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

Brian P. Carr Plaintiff versus Sam Reed, in his official capacity as Secretary of State 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 representing in their official capacity as representatives of the State of Washington and, separately, as private individuals the Honorable Robert L. Harris, John F. Nichols, Barbara D. Johnson, Kenneth Eiesland, 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	Civil No. 3:07-cv-05260-RJB Plaintiff's Reply to Defendant Wanda Briggs' Motion for Summary Judgement and Motions to Dismiss Noting Date: October 19, 2007 Oral Argument: Plaintiff is amenable to oral argument at the pleasure of the court

In this reply, plaintiff urges the Court to deny the defendant's Motion for Summary Judgement and Motions to Dismiss submitted on September 27, 2007 on behalf of defendant Briggs.

History

The defendants have attempted to characterize this case as a relitigation of the plaintiff's divorce [M3 pg3ln4,15]. In reality, the divorce is an extremely peripheral issue [Dkt37[1] pg1, D2 ¶6] and the central issue is the Clark County Superior Court's efforts to avoid actually hearing domestic

1 Dkt37 refers to plaintiff's Reply Brief submitted on September 24, 2007, document 37.

violation matters [AC ¶1[2]] and their violations of the state constitution [AC ¶11,26-30, D2[3] ¶3,6]. While the defendant attempts to argue that there was no violation of the state constitution limit of '*not exceeding three in number*', with '*Melnick and Eiesland can be two of the three allowed*' [Dkt39[4] pg2ln23] there is unrefuted evidence of four such orders [D2 ¶6,pg5-26] (though in all likelihood there are at least eight such orders) and clear arguments as to the significance of these orders and that defendants Melnick and Eiesland had no jurisdiction and any orders they signed were void ab initio [AC ¶26,¶30].

Further, when the Clark County Superior Court directed the District Court to act without jurisdiction, it also required obstacles to appeal [AC ¶34-37,57-63, D1[5] ¶2,15-16, D2 ¶2-5] and created an environment where numerous statutes were ignored [AC ¶12,45-55]. The efforts to conceal these violations came to involve defendants in Washington Court of Appeals, Division II, Washington Supreme Court [AC ¶64-70, D2 ¶7-8, D3[6] ¶7, Dkt 27-2[7] pg60] and Washington Commission of Judicial Conduct [AC ¶95-96, D3 ¶1-5].

The failure of Clark County Superior Court to actually hear domestic violence matters and directing that they be processed by the District Court under the auspices of the Superior Court (and without the required jurisdiction to complete the matters) [D1 ¶18, D3 ¶6] has deprived numerous residents of Clark County (including the plaintiff) of their due process rights as these RCW 26.50 (domestic violence) matters impact life, liberty, and property and as the District Court does not have jurisdiction to resolve the matter [AC ¶96].

The defendants claimed the defense of Judicial Immunity from damages [M1[8] ¶C,pg9-11 M2[9] pg5-9], but relied on conclusory justifications and ignored the established criteria of '*the paradigmatic judicial acts involved in resolving disputes between parties who have invoked the*

2 AC refers to the Amended Complaint of August 15, 2007, document 21. For paragraphs below 89 and reliefs below 20, it also refers to the Complaint of May 23, 2007, document 1.
3 D2 refers to the Declaration of the plaintiff of September 24, 2007, document 36.
4 Dkt39 refers to Clark County's defendants' Reply Brief submitted on September 27, 2007, document 39.
5 D1 refers to the Declaration of the plaintiff of August 15, 2007, document 17.
6 D3 refers to the Declaration of the plaintiff of October 15, 2007.
7 Dkt27-2 refers to states' defendants' Declaration submitted on August 30, 2007 Exhibit E, Document 27-2.
8 M1 refers to states' defendants' Motion for Summary Judgment and Dismissal submitted on August 30, 2007, document 26.
9 M2 refers to Clark County's defendants' Motion for Summary Judgment and Dismissal submitted on August 31, 2007, document 29.

jurisdiction of a court' as described in *Forrester v. White*, 484 U.S. 219 (1988). In only one hearing of October 27, 2004 were there ever two parties before the court and in that case, defendant Melnick had no jurisdiction to issue orders of the Superior Court as described above. In all other cases there was only one party which reduced the role of the defendants to administrative decisions which does not afford the court absolute immunity but only qualified immunity (*Forrester v. White*, 484 U.S. 219 (1988)) which does not cover actions which '*violated clearly established law*', *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

The defendants similarly have invoked *Rooker-Feldman* Doctrine and Res Judicata but only made conclusory claims that the federal claims are inextricably intertwined [M1 ¶A-B,pg6-9]. The criteria for whether claims are inextricably intertwined was stated in *Doe & Assoc. Law Offices v. Napolitano*, 252 F.3d 1026, 1030 (9th Cir. 2001); Samuel v. Michaud, 980 F. Supp 1381, 1411 (D. Idaho 1996) with:

> *Where the district court must hold that the state court was wrong in order to find in favor of the plaintiff, the issues presented to both courts are inextricably intertwined.*

this is clearly not the case as elaborated in depth previously [Dkt37 pg2-7]. While the state's defendants have attempted to refute this through misquoting the plaintiff[10] it is clear that no actual decision of the state courts conflicts with the federal claims.

By directing the District Court to RCW 26.50 (domestic violence) without jurisdiction, the Clark County Superior Court created an environment where other requirements of statutes and due process were ignored. In particular, the pervasiveness of sexual bias in the findings of the Clark

10 In document 37, plaintiff stated:

> It may be that the relief requested would invalidate the decisions of October 15, 2004 and October 27, 2005 in case 04-2-008824-4 on November 12, 2004 and January 19, 2005 in case 04-2-008908-9. However, it was never established who the deciding authority was for each decision and whether they had individual jurisdiction to make those decisions. If the individuals are found to not have had jurisdiction and were fraudulently submitting decisions of the Superior Court, then this court would not be invalidating any decisions of the state courts as those decisions were never made by any person capable of making such a decision.

However in document 43 the state's defendants stated:

> Indeed, plaintiff concedes his desire to overturn the state court rulings when he states that "It may be that the relief requested would invalidate the [state trial court's] decisions of October 27, 2005 (in case 04-2-008824-4 [and] on November 12, 2004 and January 19, 2005 in case 04-2-008908-9." Plaintiff's Brief, p. 2.

The quote is sloppy with needless inaccuracy, but the insertion of '*state trial court's*' contradicts the meaning of the statement in its entirety. A more accurate insertion would be '*fraudulent*'. It is sad when the defendants are reduced to altering the meaning of plaintiff's statements through misquotes.

County courts in these matters justifies the sealing of all records of these biased results [AC ¶71-82,rlf 14, D1 ¶18-26]. As the plaintiff is seeking different relief[11] based on new evidence, Res Judicata does not apply. Further, as only injunctive relief is sought from a constitutional question, neither Judicial Immunity nor the Eleventh Amendment arguments apply to this relief. This argument and relief stands unrefuted.

Due to the widespread lack of respect for the rule of law in the Washington state judiciary, two ancillary issues were raised in the Complaint. They challenged the requirement that judicial candidates be admitted to practice before the state courts and the requirement that petitions were only available to indigent individuals [AC ¶84-88,rlf17-18]. The basis for the relief sought in these two matters remains unchallenged as the defendants' Motion for Summary Judgment and Dismissal submitted on August 30, 2007 addressed issues unrelated to the Complaint [Dkt26 pg11¶D-pg13][12] While the Reply Brief raised new arguments [Dkt43 pg8¶D-pg10][13], they were not timely as plaintiff was never given an opportunity to respond.[14]

Argument 1

Investigations of Violations not Discretionary

The plaintiff made complaints to the Washington Commission of Judicial Conduct of violations by the defendants (those listed as private individuals) of the state and U.S. constitutions, the law, and their oaths of office. These were violations of Canon 1 which states 'Judges shall uphold the integrity and independence of the judiciary' and in comments 'Although judges should be independent, they must comply with the law'. The plaintiff also complained that the Defendants violated Canon 3, 'Judges shall perform the duties of their office impartially and diligently.' [AC ¶92, D3 ¶1-4]

11 In the previous litigation the plaintiff sought a review of the cases by the Clark County courts [D2 ExE pg26]. However, the relief sought in this matter is to seal the records of all such cases based on new evidence that was not available at the time of the previous litigation [AC ¶71-82,rlf 14, D1 ¶18-26].

12 Dkt26 refers to defendants' Motion for Summary Judgment and Dismissal submitted on August 30, 2007, document 26.

13 Dkt43 refers to defendants' Reply Brief submitted on September 27, 2007, document 43.

14 It appears that Mr. Clark still has not read the actual complaint in this matter as he refers to the arguments raised in the complaint as new arguments. For the restriction of petitions to indigent candidates this is particularly disingenuous as the relief sought (#18) does not challenge the requirement of petitions, but only broadens access to them.

Washington State Constitution - Article IV, Section 31 states:

> *Whenever* the commission receives a complaint against a judge or justice ... the commission *shall* first investigate the complaint ... *and then* conduct initial proceedings for the purpose of determining whether probable cause exists for conducting a public hearing or hearings to deal with the complaint....
>
> *Whenever* the commission concludes, based on an initial proceeding, that there is probable cause to believe that a judge or justice has violated a rule of judicial conduct..., the commission *shall* conduct a public hearing or hearings and *shall* make public all those records of the initial proceeding that provide the basis for its conclusion.
>
> Upon the completion of the hearing or hearings, the commission in open session *shall* either dismiss the case[15], or shall admonish, reprimand, or censure the judge or justice, or shall censure the judge or justice and recommend to the supreme court the suspension or removal of the judge or justice, or shall recommend to the supreme court the retirement of the judge or justice.

(italics added by plaintiff). It is worthy of note that the constitutional charter for the Commission of Judicial Conduct (CJC) does not list any discretionary investigations. The CJC must investigate all allegations until it is determined whether or not there is probable cause of a violation. The CJC can not choose not to investigate an allegation simply because, for example, it is politically unwise. Further, the receipt of four appointment orders when the state constitution limits such orders to three certainly exceeds the requirements of probable cause.

The defendants misconstrue the relief sought as "*binding the CJC to initiate, pursue and impose sanctions, just because somebody "alleges" a violation of state or federal law.*" [M3[16] pg6ln10] when, in fact, the requirement to investigate is already imposed on the CJC by the state constitution. The relief sought only requires the CJC to pursue sanctions when there is probable cause of a violation of the law while the judge was performing official duties. Further, these sanctions can be as benign as censure. This requirement is a simple interpretation of the constitutional clause which allows the CJC to dismiss a case after investigating the allegations, further specifying that if the alleged violation of law

15 Presumably the justification for dismissing the case is due to some defect in the evidence of a violation as there is no other exception for this progression from the previous step in the process.

16 M3 refers to defendants' Motion for Summary Judgment and Dismissal submitted on September 27, 2007, document 41.

was conducted in an official capacity then dismissal is only possible when there is no probable clause. This is consistent with the oath of office of all government officials to support and uphold the constitution as that includes all statutes which are created in accordance with the constitution (i.e. the law). Turning a blind eye on violations of the law (as defined by the constitutions) is never acceptable under the oath of office.

The defendants argue that any actions taken by the CJC would have been ineffective [M3 pg5ln24-pg6ln2]. However, that is based on the faulty claim that the plaintiff is trying to relitigate his divorce [M3 pg3ln4,15] which is plainly false [Dkt37 pg1, D2 ¶6], **none** of the relief sought impacts the divorce in any way. Indeed, every citizen has an interest in the preservation of the rule of law. In particular, RCW 26.50.020 (6) requires '*An action under this chapter shall be filed in the county or the municipality where the petitioner resides*'. The residents of Clark County can only seek relief in Clark County and all petitions are exclusively processed by the District Courts as Superior Court matters and without jurisdiction for the resulting orders [D1 ¶18, D3 ¶6]. Clark County citizens including the plaintiff are deprived of a forum for resolving these matters. Returning the Clark County judiciary to the rule of law would benefit all citizens of Clark County.

While the plaintiff has not applied with another RCW 26.50 (domestic violence) petition since the Clark County courts have changed the manner in which they act without jurisdiction, it is not necessary to apply under circumstances when it is clear that government officials are acting outside of the law, *U.S. v. Lee 106 U.S. 196*, 199-201 (1882). The plaintiff demonstrated that domestic violence petitions are routinely processed improperly by the District Court and this is sufficient to seek relief for a forum where the issues can be resolved under the rule of law [D1 ¶18, D3 ¶7]. Further the relief sought in the Complaint specifically seeks a forum where the plaintiff can be heard in accordance with due process and the rule of law [AC rlf7].

The defendants also seem to allude that the actions of the CJC are ineffective at correcting the problems which they address, but a review of the actions resolved in 2006 include:

1. CJC No. 4453-F-128
2. CJC No. 4780-F-126
3. CJC No. 4952-F-131
4. CJC No. 4939-F-130
5. CJC No. 4880-F-129
6. CJC No. 4185-F-125
7. CJC No. 4475-F-119
8. CJC No. 4411-F-127

all of which were successfully resolved with all expectations that the offending actions will not be continued. Indeed it could be the effectiveness of the CJC at dealing with violations of the code of conduct (when they choose to act) that causes the defendants to oppose this relief. In case CJC No. 4072-F-109, the CJC successfully initiated the process of disciplining a member of the Washington Supreme Court, though in this case it is hard to comprehend the basis for the complaint (see the dissent)[17].

Argument 2

42 U.S.C. § 1986 Does Not Apply

The defendants correctly argue that 42 U.S.C. § 1986 does not apply as it only provides for damages as relief and defendant Briggs was listed in the Amended Complaint and served in her official capacity only. Damages are only sought in relief sixteen and that only applies to defendants listed as private individuals which does not include defendant Briggs. As such, paragraph 95 of the Amended Complaint should be amended to delete the middle sentence of the paragraph if the court so chooses (the plaintiff will submit an amended complaint with the leave of the court). However, this does not impact the relief sought as paragraph 96 justifies relief nineteen based on violations of the Fourteenth Amendment rights of plaintiff and other residents of Clark County.

Argument 3

Cases Cited Do Not Apply

The defendants cite numerous cases about state bar associations having discretion to pursue

17 As Justice Sanders simply visited a state prison and spoke with some of the in-mates who might, at some future date, appear before him and then notified the appropriate parties and recused himself when that actually transpired, it is unclear how there was any inappropriate behavior. Indeed there are indications that the actions of the CJC are based more on the politics of the situation rather than the strength of the evidence or the seriousness of the violation (if there is any violation at all).

investigations against member attorneys irrespective of private individuals' wishes. However, this does not apply to the case at hand. In particular, the CJC is a government agency with all salaries paid by tax payers who have a greater interest in their performance of their duties which in this case are constitutionally mandated. Further the members of the CJC are all bound by oaths of office which clearly mandate the investigation of such complaints (there is no discretion in the stage of investigation where the CJC took no action). In addition, the targeted defendants are not private attorneys but themselves government employees paid by the taxpayers and subject to their own oath of office. While citizens can choose to not deal with private attorneys, they do not have the same discretion with government employees. In this case, the defendants have precluded the citizens of Clark County of any forum with jurisdiction to hear domestic violence matters.

None of the cases cited by the defendants are on point as they do not address the case of judges and judicial misconduct. However, *Dunham v. Wadley, 195 F.3d 1007*, 1010 (8th Cir. 1999) relies on *Board of Regents v. Roth*, 408 U.S. 564, (1972) which states:

> While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. 390, 399. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed. See, e. g., Bolling v. Sharpe, 347 U.S. 497, 499-500; Stanley v. Illinois, 405 U.S. 645.

(insertions and deletions by the court citing previous cases). Certainly every individual has a life, liberty and property interest in having a forum where domestic violence matters can be heard and all residents of Clark County are being deprived of this right by the actions of the defendants.

The defendant argue that '*The Commission and staff* [CJC] *have unlimited discretion to pursue or dismiss citizen complaints against judges*.' [[M3 pg11 ln9], but this is mostly wishful thinking on the part of the defendant. The state constitution mandates each step of the investigation with the only exits based on a determination of a lack of probable cause of a violation until the entire

proceedings and their decision is publicized. In face of four orders supported by a sworn statement [D2 ¶6,pg5-26, D3 ¶3] and a constitutional limit of '*not exceeding three in number*' there was no lack of probable cause.

Further, in *U.S. v. Lee 106 U.S. 196*, 220 1 S. Ct. 240, 261, 27 L. Ed 171 (1882) states

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.
>
> It is the only supreme power in our system of government, and every man who, by accepting office participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes on the exercise of the authority which it gives.

The CJC does not have the right to ignore their constitutionally mandated actions or the violations the constitutions, statutes, and the oaths of office of the other defendants.

Argument 4

Eleventh Amendment Does Not Apply to This Action

The defendant again misapplies the Eleventh Amendment protections of the state. Defendant Briggs is sued solely in her official capacity and no damages are sought. The only relief sought is injunctive relief concerning a constitutional question of due process [AC ¶95-96, R19]. The Eleventh Amendment exception for injunctive relief was refined in *Ex parte Young*, 209 U.S. 123 (1908) with '*the circuit court had jurisdiction in the case before it, because it involved the decision of Federal questions arising under the Constitution of the United States.*' This was stated more clearly in *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984) with '*The Court in Ex parte Young, supra, recognized an important exception to this general rule: a suit challenging the federal constitutionality of a state official's action is not one against the State.*'

Conclusion

The defendant raised numerous arguments against the Amended Complaint, but none of them can withstand careful review, they are all defective. Ignoring the rule of law, violating the constitution, statutes, and their oath of office is simply not acceptable for the Clark County

courts, Washington Court of Appeals, Washington Supreme Court, or Washington CJC. Turning a blind eye of violations of the constitution and statutes strikes at the foundation of the rule of law and can not be accepted. For the reasons set forth above, plaintiff respectfully requests that the defendants' Motion for Summary Judgment and Motions to Dismiss be denied.

Respectfully submitted, October 15, 2007 (Vancouver, WA).

s/ Brian P Carr
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CERTIFICATION

I hereby certify that on October 15, 2007, a true and accurate copy of the foregoing Plaintiff's Combined Reply Brie to Defendants' Motions for Summary Judgement and Motions to Dismiss was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system as all parties have elected electronic filing as indicated on the Notice of electronic Filing. Parties access this filing through the court's CM/ECF System.

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