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Honorable Thomas O. Rice

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STEPHEN KERR EUGSTER,

Plaintiff,

v.

PAULA LITTLEWOOD, Executive Director, Washington State Bar Association (WSBA), in her official capacity; DOUGLAS J. ENDE, Director of the WSBA Office of Disciplinary Counsel, in his official capacity; FRANCESCA D'ANGELO, Disciplinary Counsel, WSBA Office of Disciplinary Counsel, in her official capacity,

Defendants.

No. 2:15-cv-00352-TOR

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

6/28/2016
Without Oral Argument

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I. INTRODUCTION

In his Response to Defendants' Motion to Dismiss, Plaintiff Stephen Kerr Eugster ("Eugster") fails to address in any substantive way the numerous independent grounds for dismissal of this lawsuit. Eugster has failed to identify a single deprivation of due process that he has suffered or is likely to suffer imminently. Rather, he contends that he is likely to be subjected to the WSBA's lawyer discipline system in the immediate future and asserts that the system as a whole violates due process. Eugster's argument fails to satisfy ripeness requirements and fails to state a claim as a matter of law. Moreover, Eugster should have raised his claims in one of his previous similar challenges to Washington's lawyer discipline system or in his prior disciplinary proceedings. Finally, this Court should abstain to avoid interfering with the ongoing state disciplinary proceedings against Eugster. For these reasons, Eugster's claims should be dismissed with prejudice.

II. ARGUMENT

A. Eugster's Due Process Claim Is Not Ripe.

Eugster's due process claim is abstract and speculative and, thus, is not ripe for adjudication. *See* ECF No. 16 at 7-10. Eugster responds by repeatedly insisting, without explanation or support, that his allegations are "obviously not abstract." ECF No. 17 at 10. But insistence is not argument. Eugster ignores

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the Ninth Circuit's opinion in *Pence v. Andrus*, 586 F.2d 733 (9th Cir. 1978), which establishes that procedural due process claims require concrete factual development to become ripe. Eugster cannot point to any such development here.

Instead of identifying a deprivation of due process he has suffered, Eugster challenges the Washington lawyer discipline system as a whole. In particular, Eugster complains that he will not receive an impartial decision maker. ECF No. 17 at 11. But Eugster's disciplinary proceeding has not yet been assigned to a hearing officer and Eugster does not and cannot identify a decision made in that proceeding that has deprived him of due process. *See* ECF No. 16 at 9. Eugster asserts that his forthcoming disciplinary hearing "will likely result in sanctions" against him, but this assertion is entirely speculative and fails to identify any basis for finding a due process violation. *See* ECF No. 17 at 12. In sum, Eugster's due process claim fails to identify any violation of his due process rights and, thus, is not ripe for adjudication by this court.

B. Eugster Has Failed to State a Due Process Claim.

Beyond asserting a claim that is unripe, Eugster also has failed to allege the required elements of a due process claim. *See* ECF No. 16 at 10-14. Eugster's only response is to insist that he "has identified several violations" and that "an impartial decision maker is essential." ECF No. 17 at 13. Again,

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insistence is no substitute for argument or explanation, and cannot save a claim from dismissal. *See, e.g.*, *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 995, 999 (9th Cir. 2014) (noting plaintiff must identify "specific facts" to establish valid claim).

Eugster ignores the numerous procedural protections within Washington's lawyer discipline system to ensure due process. These include protections against biased decision-making in particular, such as the ability to challenge any given hearing officer, and ultimate review by the Washington Supreme Court. *See* ECF No. 16 at 9-11 (citing ELC 10.2(b) and ELC Title 12). Eugster also ignores the numerous Ninth Circuit decisions rejecting challenges to systems identical to the WSBA's lawyer discipline system in all relevant respects. *See* ECF No. 16 at 11-13 (citing cases). Accordingly, Eugster's claim that the WSBA's lawyer discipline system violates due process fails as a matter of law and should be dismissed.

C. Eugster's Due Process Claim Is Barred by the Res Judicata Doctrine.

Although Eugster's due process claim is invalid in substance, Eugster could have raised the same claim in prior proceedings, and thus, it is also barred by the doctrine of res judicata. *See* ECF No. 16 at 14-15. Eugster could and should have raised his due process claim in his previous lawsuit last year in the Western District of Washington, *Eugster* III. *See id.* That prior challenge to

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mandatory bar membership, which was based in part on Eugster's objections to the discipline system, was dismissed with prejudice for failure to state a claim. *See id.* Eugster objects that he "could not have included" his due process claim then because "there was no imminent threat" of discipline, further insisting that this is the "first time" he is facing such a threat. ECF No. 17 at 2, 4. But a formal investigation of Eugster's conduct was already underway when he filed his complaint in *Eugster* III, and Eugster was aware of that investigation. *See* ECF No. 16 at 3-4; ECF No. 8 at 23-24. Thus, to whatever extent Eugster's abstract due process claim is viable, it should have been asserted in *Eugster* III.

Moreover, Eugster should have raised the claim even earlier, in his prior disciplinary proceedings. *See* ECF No. 16 at 15. Eugster's only response is to downplay as "superfluous" the Spokane County Superior Court's recent decision that Eugster could have raised his due process claim in his prior disciplinary proceeding. ECF No. 17 at 14. Regardless of whether the Spokane County Superior Court's basis for decision binds this court, that decision was correct: due process claims are regularly adjudicated within disciplinary proceedings and Eugster could and should have raised his due process claim within his prior disciplinary proceedings. *See, e.g.*, ECF No. 16 at 15 (citing *In re Blanchard*, 158 Wn.2d 317, 330-31 (2006)). Eugster does not suggest otherwise. His claim is thus barred under the res judicata doctrine.

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D. Eugster's First Amendment Claim Is Barred by the Res Judicata Doctrine.

Defendants also moved to dismiss Eugster's First Amendment claim on the basis that it is barred by the doctrine of res judicata. *See* ECF No. 16 at 16. Eugster responds by reciting the standards governing the "doctrine of collateral estoppel." ECF No. 17 at 15-16. Thus, Eugster has "confused" res judicata "with the related but distinct doctrine of collateral estoppel," which has different and independent elements. *Constantini v. Trans World Airlines*, 681 F.2d 1199, 1201 n.2 (9th Cir. 1982). Under the doctrine of res judicata, there need only be an "identity of claims," meaning that the claims in the two suits must "arise out of the same transactional nucleus of facts." *See Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001). Here, Eugster does not credibly dispute that his First Amendment challenge to Washington's mandatory bar system in *Eugster* III and his First Amendment challenge to that same system in this case arise out of the same nucleus of facts. *See* ECF No. 16 at 16.

Instead, Eugster now attempts to deny that his claim in this case "is about mandatory bar membership" as in his prior suit. *See* ECF No. 17 at 16. Eugster's amended complaint states, however, that this action is brought in part under "the First" Amendment and then specifies that "[c]ompelled participation of a lawyer in an integrated bar disciplinary system fails to meet the test of strict

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scrutiny – exacting scrutiny." ECF No. 8 at 3, 28. Likewise, Eugster's assertion that his claim merely concerns "strict or exacting scrutiny" is without merit. ECF No. 17 at 16. "Strict scrutiny" refers to the level of judicial scrutiny Eugster seeks to apply to his First Amendment claim and is not a standalone claim for relief. *See* ECF No. 8 at 27-28.

Regardless of the specific legal grounds he asserts for his claims, Eugster's claims in both cases challenge Washington's bar system and thus arise from the same nucleus of facts. *See* ECF No. 16 at 14-16. Accordingly, Eugster's First Amendment claim is barred by res judicata.

E. Eugster Has Failed to State a First Amendment Claim.

In addition to being barred by the doctrine of res judicata, Eugster's First Amendment claim also fails as a matter of law. *See* ECF No. 16 at 16-17. The Supreme Court and the Ninth Circuit repeatedly have determined that mandatory bar membership does not infringe on First Amendment rights. *See id.* Eugster fails to respond to this additional basis for dismissal, other than to deny that his claim concerns mandatory bar membership. *See* ECF No. 17 at 16. But as explained above, that is contrary to the language in Eugster's amended complaint. *See* ECF No. 8 at 3, 28. Further, regardless of whether or not Eugster's First Amendment claim is based on mandatory bar membership, the claim lacks any meaningful explanation or support and remains legally deficient

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for that reason alone. *See* ECF 16 at 7 (claim lacking cognizable legal theory must be dismissed).

F. This Court Should Abstain Under the *Younger* Doctrine.

This Court also should dismiss this case under the *Younger* abstention doctrine. *See* ECF No. 16 at 17-20. Eugster's only response is to insist there is "not an ongoing discipline action" against him. ECF No. 17 at 17. But Eugster ignores that a formal investigation can qualify as an ongoing state proceeding warranting abstention. *See* ECF No. 16 at 18. Moreover, Eugster acknowledges that his pending bar matter has actually been ordered "to hearing" under ELC 5.7(d). ECF No. 17 at 19. The rules provide that a formal complaint and hearing are the next steps as a matter of course. *See* ELC 10.3(a)(1). To whatever extent Eugster wishes to challenge the time being taken to prepare the formal complaint against him (which is an important document that may take substantial time to prepare), he can make a motion to the Chief Hearing Officer under ELC 10.8(g) or seek a writ of mandamus. In the meantime, the complaint is being prepared and a hearing is forthcoming. In these circumstances, federal adjudication would likely interfere with important state proceedings that are ongoing. The very purpose of the *Younger* doctrine is to avoid such interference. *See* ECF No. 16 at 17-18.

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In the attempt to avoid application of the *Younger* doctrine, Eugster mistakenly relies on ELCs 5.3(a) and 5.7 for the proposition that a bar investigation does not necessarily result in a hearing. *See* ECF No. 17 at 18. But a formal investigation is still subject to the sort of undue interference that may warrant abstention. *See* ECF No. 16 at 17-18. Regardless, Eugster's case is past the investigation stage and has been ordered to a hearing. Eugster also cites to ELC 10.3(b), which provides that a "disciplinary proceeding commences when the formal complaint is filed." But this rule merely sets an internal benchmark, it does not establish when bar proceedings become subject to interference for purposes of *Younger* abstention. Indeed, the Washington Supreme Court has confirmed that bar disciplinary matters can be considered "pending ELC proceedings" even before a formal complaint has been filed. *See In re Scannell*, 169 Wn.2d 723, 740 (2010). Because Eugster's proceedings are pending, this Court should abstain from interfering in those proceedings.

G. This Court Should Dismiss with Prejudice.

Eugster's complaint should not only be dismissed, it should be dismissed with prejudice. *See* ECF No. 16 at 20. Eugster already has amended his complaint once, but it remains deficient. Eugster has failed to identify any further amendment that would help save his complaint from dismissal. Thus, to avoid undue cost or delay, this Court should dismiss this case with prejudice.

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III. CONCLUSION

Eugster has failed to overcome the numerous, independent grounds for dismissing this lawsuit. Eugster's claims are unripe, legally inadequate, and barred by the doctrine of res judicata. Further, this Court should abstain to avoid interfering with the ongoing bar proceedings against Eugster. For these reasons, this Court should dismiss Eugster's complaint with prejudice.

DATED this 14th day of June, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 2016, I electronically filed the foregoing document with the United States District Court ECF system, which will send notification of such filing to the following:

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Signed at Seattle, Washington this 14th day of June, 2016.

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