Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT E. CARUSO and SANDRA L. FERGUSON,

Plaintiffs,

v.

WASHINGTON STATE BAR ASSOCIATION 1933, a legislatively created Washington association, State Bar Act (WSBA 1933); WASHINGTON STATE BAR ASSOCIATION after September 30, 2016 (WSBBA 2017): PAULA LITTLEWOOD, Executive Director, WSBA 1933 and WSBA 2017, in her official capacity; ROBIN LYNN HAYNES is the President of the WSBA 1933 and WSBA 2017, in her official capacity; DOUGLAS J. ENDE, Director of the WSBA 1933 and WSBA 2017 Office of Disciplinary Counsel, in his official capacity; WSBA 1933/WSBA 2017 BOARD OF GOVERNORS, namely: BRADFORD E. FURLONG-President-elect (2016-2017), *et al*.,

Defendants.

No. 2:17-cv-00003

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

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I. INTRODUCTION

Plaintiffs' claims against Defendant the Washington State Bar Association ("WSBA") and its officials have been rejected in prior lawsuits and likewise should be rejected here. As explained in the WSBA's Motion to Dismiss ("Motion"), Plaintiffs' counsel Stephen K. Eugster ("Eugster") has brought the same challenges to bar requirements and to the lawyer discipline system in prior suits, without success. In the effort to seek yet another round of judicial review, Eugster now brings his claims on behalf of the named Plaintiffs and asserts that the Court should decide the claims because the WSBA is a new organization due to recent bylaws amendments. But Plaintiffs' claims fail as a matter of law. Regardless of the bylaws amendments, mandatory bar membership and fees remain constitutional, the WSBA still has disciplinary authority, and Washington's lawyer discipline system continues to satisfy due process. Additionally, this Court should abstain from deciding Plaintiffs' claims due to ongoing discipline proceedings against the named Plaintiffs, who also should have raised their discipline-related claims in prior proceedings. Plaintiffs' due process claim also should be dismissed because it is overly abstract and unripe. Finally, the WSBA should be dismissed from this case because it is immune from suit.

Rather than address these numerous deficiencies, Plaintiffs devote the bulk of their Response to the Motion rehashing Eugster's history of bar discipline and litigation and questioning the accuracy of certain characterizations made about that history and this suit. In doing so, Plaintiffs ignore the relevance of Eugster's prior cases as persuasive authority. Regardless, although the WSBA's statements in the Motion are accurate, the Court need not resolve that quarrel to adjudicate Plaintiffs' claims. Plaintiffs' claims fail as a matter of law and this Court should dismiss them with prejudice.

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II. ARGUMENT

A. The Recent WSBA Bylaws Amendments Are Irrelevant to the Continuing Legality of Mandatory Bar Membership and License Fees.

As explained in the WSBA's Motion, numerous courts have confirmed that bar membership and license fees are constitutional requirements to practice law. *See* Dkt. # 16 at 10-11. In fact, Judge Robart of the United States District Court for the Western District of Washington dismissed similar claims brought by Eugster in September 2015 based on these precedents. *See Eugster v. Wash. State Bar Ass'n*, No. C15-0375JLR, 2015 WL 5175722 (W.D. Wash. Sept. 3, 2015) ("*Eugster* III"). Plaintiffs insist that these precedents do not apply to the "new" WSBA, which now includes limited-license practitioners as members. Dkt. # 18 at 13. But Plaintiffs do not explain why including limited-license practitioners would make a difference to the constitutionality of mandatory bar membership and license fees. In fact, Plaintiffs' Complaint does not allege that the bylaws amendments affect the constitutionality of mandatory membership or license fees in any way. *See* Dkt. # 4 at 32-34 (alleging that "Plaintiff [sic] cannot be compelled to be a [sic] members of WSBA 1933 or WSBA 2017").

As a matter of law, the WSBA's inclusion of limited-license practitioners does not affect the constitutionality of bar membership and fees. Membership and fee requirements further the same purposes and impose the same minimal burdens regardless of whether limited-licensed practitioners are included within the mandatory association in addition to full-fledged lawyers. *See, e.g., Keller v. State Bar of Cal.*, 496 U.S. 1, 7-9, 15-16 (1990) (acknowledging "'limit[ed]'" burden of bar requirements and "'legitimate'" state interests in regulating and improving the legal profession (quoting *Lathrop v. Donohue*, 367 U.S. 820, 842-43 (1961)). Moreover, courts have emphasized that bar associations may use mandatory fees to improve the quality of legal services in the state, and administering limited-practice licenses furthers that very purpose. *See,*

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e.g., *Eugster* III, 2015 WL 5175722, at *7 (noting that Washington's limited license boards appeared properly "geared toward regulating the profession and improving the quality of legal services").

Plaintiffs' only other argument regarding these claims is that the WSBA's Board, rather than the Washington Legislature or Supreme Court, adopted the recent bylaws amendments. *See* Dkt. # 18 at 13. But again, Plaintiffs never explain how this relates to the constitutionality of bar membership and fees. Instead, Plaintiffs merely assert that necessary authority for the bylaws amendments "has not be[en] passed on to the WSBA . . . ." *Id.* In addition to being irrelevant, this assertion is false. As the WSBA detailed in its Motion, the State Bar Act expressly authorizes the WSBA Board to adopt rules regarding any matter affecting "the organization and functioning of the state bar," including "admission to the practice of law" and "membership" in particular. RCW 2.48.050, .060; *see* Dkt. # 16 at 13. The Washington Supreme Court's rules governing the WSBA are consistent with this underlying authority. *See* GR 12.1(a), (c). Accordingly, the WSBA's recent bylaws amendments were authorized. Plaintiffs' challenges to mandatory bar membership and fees remains meritless and their second and third claims for relief should be dismissed with prejudice.

B. The WSBA Still Has Disciplinary Authority Over the Practice of Law in Washington.

Plaintiffs' challenge to the WSBA's disciplinary authority also fails as a matter of law. As explained in the WSBA's Motion, the WSBA retains its authority over the lawyer discipline system notwithstanding the recent bylaws amendments. *See* Dkt. # 16 at 12-15. In response, Plaintiffs simply restate their belief that the "New WSBA 2017 has no authority," Dkt. # 18 at 13, without addressing the WSBA's detailed explanation of its continuing existence, authority to

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amend its bylaws, and the long history of limited-license practice in Washington, *see* Dkt. # 16 at 12-15. Plaintiffs have failed to offer any defense to the deficiencies of this claim.

Plaintiffs' only other argument is that "[i]ntegrated bar associations . . . have specific characteristics." Dkt. # 18 at 14. Plaintiffs fail to explain the meaning or significance of this statement. In addition to being irrelevant to the WSBA's disciplinary authority, the suggestion that the WSBA is no longer an integrated bar association is false. The reason that the WSBA is "an 'integrated' bar association" is because "membership and payment of dues are mandatory in order to practice law in the State of Washington." *Eugster* III, 2015 WL 5175722, at *1. This remains true after the bylaws amendments, given that limited-licensed practitioners are engaged in the practice of law. *See, e.g., State v. Hunt*, 75 Wn. App. 795, 802 (1994) (noting "preparing legal forms is practicing law"). And anyone practicing law in this state must pay license fees to the WSBA, which continues to exercise disciplinary authority over any such practice on behalf of the Washington Supreme Court. *See* Dkt. # 16 at 14. In sum, the WSBA's disciplinary authority remains intact and Plaintiffs' fourth claim for relief should be dismissed with prejudice.

C. Washington's Lawyer Discipline System Satisfies Due Process Requirements.

Plaintiffs' challenges to the constitutionality of the lawyer discipline system also fail as a matter of law. As detailed in the WSBA's Motion, Washington's lawyer discipline system includes more than adequate procedural protections. *See* Dkt. # 16 at 15-17. Plaintiffs' only response is to restate their view that "the entire system is biased," without further explanation. Dkt. # 18 at 14. Plaintiffs ignore the authorities cited in the Motion demonstrating that the roles of the WSBA, its officials, and the Washington Supreme Court are proper, and that any claim of bias requires actual bias specific to a given adjudicator, which Plaintiffs have not alleged here. *See* Dkt. # 16 at 16-17. Thus, Plaintiffs' fifth and sixth claims for relief fail to state a cognizable

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legal claim and should be dismissed with prejudice. Finally, because Plaintiffs' first claim for declaratory relief is entirely dependent on Plaintiffs' other claims for relief, that claim also fails as a matter of law and should be dismissed.

D. This Court Should Abstain Under *Younger* Because of Ongoing Disciplinary Proceedings Involving Plaintiffs Caruso and Ferguson.

In addition to being facially invalid, Plaintiffs' claims also require abstention under the *Younger* doctrine to avoid interference with ongoing state discipline proceedings against each Plaintiff. *See* Dkt. # 16 at 17-19. To address this issue, Plaintiffs copy and paste argument from briefing in one of Eugster's prior cases, regarding ongoing proceedings against Eugster. *See* Dkt. # 18 at 15-16. The discussion is outdated and does not discuss whether there are ongoing proceedings against *Plaintiffs*. Each of the underlying arguments is also contrary to law.

First, Plaintiffs suggest that "the date for determining whether *Younger* applies 'is the date the federal action is filed.'" Dkt. # 18 at 15 (quoting *Gilbertson v. Albright*, 381 F.3d 965, 969 n.4 (9th Cir. 2004)). But as the Ninth Circuit has clarified, "*Younger* abstention applies . . . as long as [the state action is initiated] before proceedings of substance on the merits occur in federal court." *M&A Gabaee v. Cmty. Redev. Agency*, 419 F.3d 1036, 1040 (9th Cir. 2005). No proceedings of substance have taken place in this case. *See Polykoff v. Collins*, 816 F.2d 1326, 1332 (9th Cir. 1987) (noting "extensive hearings" or a preliminary injunction qualify as proceedings of substance). Accordingly, now is the proper time for this Court to dismiss Plaintiffs' claims under the *Younger* doctrine.

Second, Plaintiffs argue that "an investigation is not a proceeding," citing *Mulholland v. Marion Cnty. Election Bd.*, 746 F.3d 811 (7th Cir. 2014). This argument does not apply to Caruso, against whom a formal hearing has been ordered. *See* Dkt. # 16, Ex. C. It also ignores the nature of a formal WSBA investigation, relevant Washington law, and the underlying

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purpose of *Younger* abstention, which is to avoid undue interference in state proceedings. *See* Dkt. # 16 at 18. The *Mulholland* case is distinguishable from the Ferguson proceedings on numerous grounds. In *Mulholland*, a potential "Election Board" meeting was insufficient to trigger *Younger* abstention, largely because that body's "authority to sanction" was "extremely limited" and the "purpose" of the planned meeting was "vague" and speculative. 746 F.3d at 816-17. The court contrasted this to situations in which investigations could qualify as ongoing proceedings, such as when a formal investigation has commenced with a direct potential for sanctions. *See id.* at 817 (citing cases). That is the case with the ongoing investigation of Ferguson, which is governed by detailed Washington rules and constitutes a substantive part of the disciplinary process. *See* Dkt. # 16 at 18.

Finally, Plaintiffs suggest that they might not be able to raise their discipline-related objections in the ongoing state proceedings. *See* Dkt. # 18 at 16. The only argument they offer in support of this contention is a conclusory statement by Eugster that he "has been thwarted" in his efforts. *See id.*; Dkt. #19 at 10. Without question, however, the rules governing disciplinary proceedings allow individuals to raise discipline-related objections in those proceedings. *See, e.g.*, Wash. Rules for Enf't of Lawyer Conduct ("ELC") 10.1(a), 10.5(b)(2), 10.8. Further, public bar records from Eugster's prior proceeding, attached to this reply for the Court's convenience, reveal that he was in fact allowed to raise his objections, albeit as defenses rather than counterclaims. *See* Ex. A.

In sum, Plaintiffs' arguments against *Younger* abstention are meritless. There are ongoing state proceedings against each of the Plaintiffs and to avoid undue interference, this Court should abstain from adjudicating Plaintiffs' claims.

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E. Plaintiffs' Discipline-Related Claims Should Have Been Raised Already and Are Barred Under the Res Judicata Doctrine.

As the WSBA explained in its Motion, Plaintiffs' discipline-related claims are also barred under the res judicata doctrine, because they should have been raised in Plaintiffs' prior disciplinary proceedings. *See* Dkt. # 16 at 19-20. Plaintiffs' only response is that they "would not have known there was anything wrong with the system without first learning from experience." Dkt. # 18 at 17. Plaintiffs do not explain, however, why they could not have raised their objections at some point during the prior proceedings when the alleged violations of their rights occurred. Moreover, as demonstrated by Plaintiffs' Complaint, the overall structure of Washington's lawyer discipline system, including the roles of the Washington Supreme Court, the WSBA, and its officials, is publicly known information memorialized in court rules and case law. *See* Dkt. # 4 at 15-31. Plaintiffs could have, but did not, raise their challenges to the lawyer discipline system within their discipline proceedings. Accordingly, their claims that the discipline system violates their constitutional rights are barred by the doctrine of res judicata.

F. Plaintiffs' Due Process Claim Is Abstract and Not Ripe.

As the WSBA has explained, Plaintiffs' due process claim is invalid for the additional reason that it is unripe. *See* Dkt. # 16 at 21-23. Plaintiffs' response is to call this argument "absurd," Dkt. # 18 at 17, without addressing the need for factual allegations, the burden of alleging bias with particularity, or the vague and generic nature of Plaintiffs' procedural objections, *see* Dkt. # 16 at 21-23 (citing cases). Plaintiffs' Complaint wholly fails to allege how they have been deprived of due process or how their constitutional rights have been violated.

Plaintiffs also dispute whether a similar claim was found unripe in one of Eugster's prior lawsuits, *Eugster v. Wash. State Bar Ass'n*, No. CV 09-357-SMM, 2010 WL 2926237 (E.D. Wash. July 23, 2010) ("*Eugster* II"). *See* Dkt. # 18 at 17. There can be no genuine dispute. In

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Eugster II, the district court expressly held that Eugster's due process challenge was "unripe as Plaintiff [did] not present concrete legal issues to [the] Court, but rather, abstractions." 2010 WL 2926237, at *8 (internal quotations omitted). On appeal, the Ninth Circuit similarly held that Eugster's challenge rested on "contingent future events that may not occur" and thus was "not ripe." 474 Fed. Appx. 624, 625 (9th Cir. 2012) (unpublished). In other words, there was no indication any particular deprivation of due process would actually occur. The same is true here and Plaintiffs' constitutional challenges to the lawyer discipline system should be dismissed as a result.

G. The WSBA Is Immune from Suit.

As numerous courts already have determined in Eugster's prior lawsuits, the WSBA is immune from suit. *See* Dkt. # 16 at 23. Plaintiffs argue that immunity does not "bar claims seeking prospective injunctive relief against *state officials*," Dkt. # 18 at 17 (emphasis added), without explaining how that justifies naming the WSBA itself as a defendant in this case. The WSBA is immune and should never have been named as a defendant in this case.

H. Plaintiffs' Various Assertions of Professional Misconduct Are Equally Meritless.

Rather than address the multiple grounds the WSBA has presented for dismissing this case with prejudice, Plaintiffs spend the bulk of their Response arguing about Eugster's prior disciplinary history and lawsuits against the WSBA. Plaintiffs question the relevance of Eugster's prior suits, dispute certain characterizations made in the WSBA's Motion, and go so far as to accuse the WSBA's counsel of ethics violations. *See* Dkt. # 18 at 2-3, 6-13. These assertions are not merely distractions from the extent to which Plaintiffs' claims lack merit, they are also incorrect in substance.

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First, Plaintiffs urge that Eugster's prior lawsuits are "irrelevant" to this one. Dkt. # 18 at 9. But in addition to providing context for the claims being made here, Eugster's prior suits serve as persuasive authority on the issues of mandatory bar membership and fees, res judicata, ripeness, and immunity. For example, Eugster's original discipline case is discussed not to show that Eugster is a "bad man" as Plaintiffs suggest, Dkt. # 18 at 10, but to give background to the subsequent finding made in state court that Eugster "already had been afforded an opportunity to raise his constitutional concerns . . . in his prior disciplinary proceedings," *Eugster v. Littlewood*, No. 2:15-CV-0352-TOR, 2016 WL 3632711, at *2 (E.D. Wash. June 29, 2016) (discussing prior state court lawsuit), which informs the res judicata issue in this case. As another district court in this circuit recently stated in similar circumstances, it is appropriate for a party to reference such prior, related lawsuits as persuasive authority:

> Plaintiff objects to Defendants' . . . references to a similar action filed by Plaintiff . . . as irrelevant and improper. . . . The Court finds Plaintiff's objections frivolous and overrules them as such. The [other] case is not irrelevant as Plaintiff contends; rather, it is persuasive authority because it is an opinion issued by a district court in this district analyzing issues similar to those at play in this action.

Alaei v. Rockstar, Inc., No. 15-cv-2959-JAH, 2016 WL 7210378, at *1 n.2 (S.D. Cal. Dec. 13, 2016) (citations omitted). The WSBA should not be required to relitigate these issues anew in each and every one of Eugster's lawsuits without reference to prior decisions.[1]

Second, Plaintiffs object to various characterizations made in the WSBA's Motion. But each characterization is justified under the circumstances. Plaintiffs insist that Eugster is neither "disgruntled" nor on a "meritless crusade against Washington's bar system." Dkt. # 18 at 6. Yet at the same time, Plaintiffs relay Eugster's beliefs that the discipline system treated him unfairly

[1] The history of litigation between Eugster and the WSBA also demonstrates that this lawsuit is part of a pattern of harassment. As Eugster is aware, the WSBA intends to file a motion for sanctions against him for the first time, as counsel in this lawsuit. In the meantime, the Court could order sanctions on its own motion. *See* Fed. R. Civ. Pro. 11(c)(3). Eugster's litigation history is relevant for this additional reason.

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and that false claims were made against him. *See id.* at 10, 11. These beliefs, along with the unending string of failed lawsuits Eugster has brought against the WSBA, show Eugster is dissatisfied with Washington's bar system and relentlessly attacking that system in court.

Plaintiffs further object that Eugster "has not 'enlisted' the Plaintiffs" in this lawsuit. *Id.* at 7. Yet Eugster named the Plaintiffs in this suit, which he filed against the WSBA, repeating claims and arguments that he previously pursued on his own behalf without success, many nearly verbatim. Under these circumstances, and given Eugster's history of litigation against the WSBA, it is clear that Eugster is continuing his campaign against the WSBA in this lawsuit, even if he is doing so on behalf of the named Plaintiffs.

Plaintiffs also question whether Eugster has been "disciplined on multiple occasions for professional misconduct." Dkt # 18 at 6. But Eugster was formally sanctioned in 2009 with an 18-month suspension. *In re Disciplinary Proceeding Against Eugster*, 166 Wn.2d 293, 327-28 (2009) ("*Eugster* I"). And this year, Eugster stipulated to a 60-day suspension to resolve the most recent disciplinary proceeding against him. *See* Ex. B (copy of public record attached for Court's convenience). The Disciplinary Board approved the stipulation on March 10, 2017. *Id.* That decision now awaits the Washington Supreme Court's approval. Moreover, although not rising to the level of "disciplinary action" as defined in the ELCs, in 2009, Eugster was given an informal warning to take greater care in filing lawsuits as a result of the WSBA's investigation of a separate grievance against him. *Eugster* II, 2010 WL 2926237, at *1.

In any case, Plaintiffs' quarrel regarding the appropriate characterizations for Eugster's disciplinary history and litigation history need not be resolved in order to adjudicate Plaintiffs' claims in this lawsuit. Plaintiffs' arguments do not alter the underlying facts, the decisions made

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in Eugster's prior lawsuits, or the lack of merit in each of Plaintiffs' claims. This Court should dismiss Plaintiffs' case with prejudice. *See* Dkt. # 16 at 23-24.

III. CONCLUSION

Plaintiffs' claims against the WSBA fail as a matter of law. Mandatory bar membership and fees are constitutional, the WSBA has disciplinary authority over the practice of law, and Washington's lawyer discipline system includes adequate procedural protections to satisfy due process. Further, Plaintiffs must raise any objections within their ongoing disciplinary proceedings, and in fact should have already raised their claims in prior proceedings. Their due process claim is also unripe and the WSBA should be dismissed because it is immune from suit. In response, Plaintiffs fail to address any of these deficiencies in substance. Accordingly, their claims should be dismissed with prejudice.

DATED this 18th day of April, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April, 2017, 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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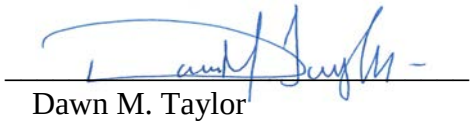
Signed at Seattle, Washington this 18th day of April, 2017.



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