DISTRICT COURT, CITY AND COUNTY OF DENVER,
STATE OF COLORADO
1437 Bannock Street
Denver, Colorado 80202

Plaintiff:

WARD CHURCHILL, an individual

Defendants:

UNIVERSITY OF COLORADO;
THE REGENTS OF THE UNIVERSITY OF COLORADO, a body corporate;
PAUL SCHAUER, in his individual and official capacities;
TOM LUCERO, in his individual and official capacities;
PAT HAYES, in her individual and official capacities;
STEVE BOSLEY, in his individual and official capacities;
CINDY CARLISLE, in her individual and official capacities;
MICHAEL CARRIGAN, in his individual and official capacities;
STEVE LUDWIG, in his individual and official capacities;
KYLE HYBL, in his individual and official capacities; and
TILMAN BISHOP, in his individual and official capacities.

Case Number:

2006 CV 11473

Division 6

Patrick T. O'Rourke, #26195
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Denver, Colorado 80203
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JOINT STIPULATION FOR DISMISSAL OF CLAIMS AND WITHDRAWAL OF MOTIONS TO DISMISS

EXHIBIT A

The Plaintiff, WARD CHURCHILL, and the Defendants, the UNIVERSITY OF COLORADO, THE REGENTS OF THE UNIVERSITY OF COLORADO, PAUL SCHAUER, in his official and individual capacity; TOM LUCERO, in his official and individual capacity; PAT HAYES, in her official and individual capacity; STEVE BOSLEY, in his official and individual capacity; CINDY CARLISLE, in her official and individual capacity; MICHAEL CARRIGAN, in his official and individual capacity; STEVE LUDWIG, in his official and individual capacity; KYLE HYBL, in his official and individual capacity; and TILMAN BISHOP, hereby stipulate and agree as follows:

1. The Defendants to the case currently are :(1) the University of Colorado; (2) the Regents of the University of Colorado; and (3) the individual Regents of the University of Colorado in both their official and individual capacity claims.

2. The parties wish to simplify the pleadings to the extent possible, prevent litigation against potentially unnecessary parties, and to allow the case to proceed in the most expeditious manner.

3. Accordingly, Professor Churchill stipulates and agrees:

   (a) Professor Churchill dismisses all official capacity and individual capacity claims currently pled against individual Regents of the University of Colorado with prejudice.

   (b) Professor Churchill dismisses the following claims for relief presented in his Second Amended Complaint in their entirety

   Third Claim for Relief – Breach of Contract

   Third [Sic] Claim for Relief – Breach of Contract/Good Faith and Fair Dealing

   Alternative Claim for Relief – Breach of Contract

   Alternative Claim for Relief – Breach of Implied Contract

Alternative Claim for Relief – Promissory Estoppel

Fifth Claim for Relief – Substantive Due Process

4. The University stipulates and agrees:

   (a) The University withdraws its Motion to Dismiss applicable to the following Claims for Relief asserted in the Second Amended Complaint

   First Claim for Relief – First Amendment Retaliation in Launching the Investigation

   Second Claim for Relief – First Amendment Retaliation in Terminating Professor Churchill's Employment

   Fourth Claim for Relief – Denial of Procedural Due Process

5. The University and Professor Churchill agree that the University shall file its responsive pleading to the First Claim for Relief, Second Claim for Relief, and Fourth Claim for Relief as pled against the University of Colorado and the Regents of the University of Colorado, a body corporate, by no later than January 4, 2008 and that the case shall be "at issue" as of that date.

6. The University and Professor Churchill request that the Court amend the caption in this case to reflect that only the University of Colorado and the Regents of the University of Colorado, a body corporate, shall remain as defendants.

Dated this 20 day of December, 2007:

OFFICE OF UNIVERSITY COUNSEL

_/s/Patrick T. O'Rourke
Patrick T. O'Rourke

KILLMER LANE & NEWMAN, LLP

_s/ David A. Lane
David A. Lane

Effective:[See Text Amendments] to October 18, 1996

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21. Civil Rights
Subchapter I. Generally
➡ **§ 1983. Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CREDIT(S)

(R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

END OF DOCUMENT

EXHIBIT B

Effective: October 19, 1996

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 21. Civil Rights (Refs & Annos)
Subchapter I. Generally
§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CREDIT(S)

(R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub.L. 104-317, Title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)

Current through P.L. 111-21 approved 5-20-09

END OF DOCUMENT

EXHIBIT C

Slip Copy
Slip Copy, 2008 WL 5062162 (D.R.I.)
(Cite as: 2008 WL 5062162 (D.R.I.))

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Only the Westlaw citation is currently available.

United States District Court,
D. Rhode Island.
Douglas PELLETIER, Plaintiff
v.
State of RHODE ISLAND, et al., Defendant.
C.A. No. 07-186S.

Nov. 26, 2008.

West KeySummary
Civil Rights 78 ⇐1376(7)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith and Probable Cause
78k1376 Government Agencies and Officers
78k1376(7) k. Prisons, Jails, and Their Officers; Parole and Probation Officers. Most Cited Cases

Civil Rights 78 ⇐1376(8)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith and Probable Cause
78k1376 Government Agencies and Officers
78k1376(8) k. Judges, Courts, and Judicial Officers. Most Cited Cases

Parole board members were entitled to quasi-judicial immunity for a civil rights claim brought against them by an inmate. The inmate sought damages from the board members for their actions in denying his parole. He specifically alleged that they did not consider the appropriate parole factors and failed to provide him with frequent parole hearings. Because the determination of how to weigh factors and when an inmate would be ready for a parole hearing were adjudicatory functions at the heart of the members' official duties, absolute immunity applied. 28 U.S.C.A. § 636(b)(1); 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

Douglas J. Pelletier, Cranston, RI, pro se.

Richard B. Woolley, Attorney General's Office, Providence, RI, for Defendants.

ORDER

WILLIAM E. SMITH, District Judge.

***1** The Report and Recommendation of United States Senior Magistrate Judge Jacob Hagopian dated November 12, 2008 in the above-captioned matter is accepted pursuant to Title 28 United States Code § 636(b)(1). Plaintiff's objection to the Senior Magistrate Judge's Report and Recommendation is DENIED. The defendant's motion to dismiss plaintiff's claims for lack of jurisdiction and venue is DENIED. The defendant's motion to dismiss plaintiff's 1983 claim for failure to state a claim for which relief may be granted is GRANTED and such claims against defendant's are DISMISSED with prejudice. Plaintiff's pendant state law claims are DISMISSED without prejudice.

REPORT AND RECOMMENDATION

HAGOPIAN, Senior Magistrate J.

Pro se plaintiff, Douglas Pelletier, an inmate confined at the Adult Correctional Institutions in Cranston, Rhode Island, filed an action pursuant to 42 U.S.C. § 1983 alleging violations to his Constitutional rights. Plaintiff names as defendants: the State of Rhode Island; the Rhode Island Parole Board (the "Parole Board" or "Board"); and Lisa Holley, Esquire and Chairwoman of the Parole Board; Frederic Reamer, member of the Parole Board; Charles Denby, member of the Parole

EXHIBIT D

Board; and Authur [sic] Jones, member of the Parole Board (together, the "Parole Board Members").

This matter is currently before the Court on defendants' motions to dismiss pursuant to Rules 12(b)(1), 12(b)(3) and 12(b)(6) of the Federal Rules of Civil Procedure (the "Federal Rules"), or, in the alternative, to stay proceedings until such time as the Rhode Island Supreme Court disposes of allegedly identical issues in a case now pending before that court (Docket # 38). Plaintiff has filed an objection thereto. This matter has been referred to me pursuant to 28 U.S.C. § 636(b)(1)(B) for a report and recommendation. As discussed below, I recommend the motions to dismiss for lack of jurisdiction and improper venue be denied, but the motion to dismiss for failure to state a claim be granted. I further recommend that plaintiff's federal claims be dismissed with prejudice and his supplemental state law claims be dismissed without prejudice for lack of jurisdiction.

BACKGROUND

The factual allegations, taken as true from the Amended Complaint, are as follows. In January 1990, plaintiff pled *nolo contendere* in Rhode Island Superior Court on charges including first degree sexual assault and assault with intent to murder. He was sentenced to 75 years with 60 to serve, retroactive to his arrest in January 1989.

In 2003, plaintiff filed an application for post-conviction relief in the Rhode Island Superior Court. That court granted plaintiff's petition and ordered plaintiff to be re-sentenced. In connection with this decision, the Superior Court had a psychiatric evaluation of plaintiff prepared by a board certified psychiatrist. Plaintiff alleges the psychiatric evaluation was extensive and indicates that he is a "prime candidate for parole according to the criteria [set] forth in R.I. Gen. Laws § 13-8-14 and § 13-8-14.1."Docket # 20. However, the Rhode Island Supreme Court reversed the Superior Court decision to re-sentence plaintiff. *Pelletier v. State of Rhode Island,* 882 A.2d 567 (R.I.2005).

Plaintiff first went before the Parole Board in January 1999, however, the Board denied parole due to the seriousness of the crime and the fact that plaintiff had just begun work in the sex offender treatment program ("SOTP"). Five years later, in November 2004 he went before the Board again, and again parole was denied. The Board stated that plaintiff was no longer in the SOTP and noted they would review his case again in four years.

***2** In May 2007, plaintiff filed this action seeking damages and injunctive relief requiring (i) the Parole Board be constituted in compliance with Rhode Island law; (ii) a new parole hearing at which he be granted parole or, in the alternative, a new parole hearing employing constitutional policies; and (iii) guidelines mandating parole hearings at more frequent intervals.[FN1]Plaintiff claims such relief is warranted because, in denying his parole, defendants violated his Constitutional rights to equal protection and due process as well as his rights under Rhode Island state law. He claims defendants (1) constituted the Parole Board in violation of Rhode Island law, thereby denying him a parole hearing before a legal parole board; (2) treated him unfairly compared to similarly situated inmates; (3) failed to consider the parole criteria set forth in R.I. Gen. Laws § 13-8-14 and § 13-8-14.1; and (4) imposed extraordinarily long intervals between parole hearings.

FN1. Plaintiff states claims for relief in the body of his amended complaint (in the preliminary statement and under claims for relief) and in the legal memorandum that is appended thereto. Plaintiff also seeks immediate release on bail pending the outcome of this case. However, as detailed in the Report and Recommendation dated July 18, 2008 (Docket # 61), bail is not available in this § 1983 action. *See Wilkinson v. Dotson,* 544 U.S. 74, 82, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005).

Defendants have moved to dismiss the case for lack of jurisdiction, improper venue and failure to state a claim upon which relief may be granted pursuant to Federal Rules 12(b)(1), 12(b)(3) and 12(b)(6), respectively, or, in the alternative, for a stay. Defendants urge that they are immune from this lawsuit. Additionally, they state that plaintiff filed an application for post-conviction relief in the Rhode Island Superior Court raising claims virtually identical to those in the instant action. They state that the Superior Court dismissed the action in October 2007, but plaintiff appealed the denial to the Rhode Island Supreme Court. They urge this Court to dismiss the instant matter because plaintiff's appeal to the Rhode Island Supreme Court is presently pending. In the alternative, defendants urge this Court to stay the instant action until the Rhode Island Supreme Court rules on plaintiff's appeal pending before it. Plaintiff objects to defendants' motion and denies that his appeal before the Rhode Island Supreme Court involves § 1983 issues.

DISCUSSION

I. Rule 12(b)(1) Motion

Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for the dismissal of actions in which the court lacks subject matter jurisdiction. Plaintiff here filed this action pursuant to 42 U.S.C. § 1983. It is well established that a federal court's subject matter jurisdiction for a claim under 42 U.S.C. § 1983 derives from the general federal question jurisdiction pursuant to 28 U.S.C. § 1331. *See*28 U.S.C. § 1331 (providing that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States").

Pointing to plaintiff's action pending before the Rhode Island Supreme Court, defendants urge this Court to decline to exercise its jurisdiction pursuant to the doctrine of abstention set forth by the United States Supreme Court in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). However, defendants do not present a case of "exceptional circumstances" as required by *Colorado River* to support such a surrender of jurisdiction. *Id.* at 817-820.[FN2]Additionally, defendants provide no evidence that plaintiff's case pending before the Rhode Island Supreme Court involves § 1983 claims, and plaintiff denies that it does. Docket # 41. Accordingly, I recommend that defendants' motion to dismiss for lack of jurisdiction be DENIED.

FN2. While the state court obtained jurisdiction first, (i) there is no problem regarding a res, (ii) the federal forum is not inconvenient, (iii) piecemeal litigation will not occur and (iv) there is a question of federal law. *See Colorado River*, 424 U.S. at 817-820 (listing factors to consider in determining if "exceptional circumstances" exist).

II. Rule 12(b)(3) Motion

***3** Defendants also state, without any explanation, that the action should be dismissed pursuant to Federal Rule 12(b)(3) for lack of proper venue. However, 28 U.S.C. § 1391(b) provides that in a civil action in which jurisdiction is based on a question of federal law, as here, venue is proper in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred."28 U.S.C. § 1391(b). In this action there is no dispute that the events giving rise to the claim here arose in Rhode Island, and thus this Court is the proper venue for this action. Accordingly, I recommend that defendants' motion to dismiss for improper venue be DENIED.

III. Rule 12(b)(6) Motion

Rule 12(b)(6) of the Federal Rules provides for the dismissal of an action which fails to state a claim upon which relief can be granted. In ruling on a

motion filed under Rule 12(b)(6), the Court must accept all well-pleaded allegations in the complaint as true, and construe these facts in the light most favorable to the pleader. *Chongris v. Board of Appeals,* 811 F.2d 36, 37 (1st Cir.1987). Further, a *pro se* complaint is held to a less stringent standard than formal pleadings drafted by counsel. *See Estelle v. Gamble,* 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). A Rule 12(b)(6) motion will only be granted when, viewed in this manner, the factual allegations raise plaintiff's right to relief above the speculative level. *Bell Atl. Corp. v. Twombly,*-U.S.-, 550 U.S. 544, 127 S.Ct. 1955, 1964-65, 167 L.Ed.2d 929 (2007).

In order to maintain a § 1983 action, the conduct complained of must (i) be committed by a "person" acting under color of state law and (ii) have deprived the plaintiff of a constitutional right or a federal statutory right. *Gomez v. Toledo,* 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980). Here, defendants contend that they have immunity against suit under § 1983. As discussed below, I agree that the defendants are not amenable to suit in this action.

A. State of Rhode Island and Parole Board Not "Persons" under § 1983

It is well established that neither states nor state agencies are considered "persons" against whom a § 1983 action may be maintained. *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); *Johnson v. Rodriguez,* 943 F.2d 104, 108 (1st Cir.1991). Therefore, the State of Rhode Island and the Parole Board, an agency of the state, are not "persons" for purposes of § 1983. I recommend that the motion to dismiss by the State of Rhode Island and the Parole Board pursuant to Rule 12(b)(6) be GRANTED and plaintiff's § 1983 claims against them be dismissed.

B. Money Damages from Parole Board Members

1. Parole Board Members in their Official Capacities Not "Persons" under § 1983 in Suit for Dam- ages

A suit for money damages under § 1983 against state officials in their official capacity is equivalent to a suit against the state. *Monell v. New York City Dep't of Social Services,* 436 U.S. 658, 690, n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). In such a suit, the real party in interest is the state for which the officials are agents, and the state treasury would be responsible for paying any damages awarded. *Kentucky v. Graham,* 473 U.S. 159, 165, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). Consequently, as a state is not a "person" amenable to suit for money damages, neither are state officials acting in their official capacities. *Will,* 491 U.S. at 71 (1989). Therefore, I recommend that the motion to dismiss claims for damages by the Parole Board Members in their official capacities be GRANTED and plaintiff's claims against them for damages be dismissed.

2. Quasi-Judicial Immunity Shields Parole Board Members in their Individual Capacities from § 1983 Action for Damages

***4** To the extent they are sued in their individual capacities, the Parole Board Members urge that quasi-judicial immunity shields them from plaintiff's § 1983 claims against them for damages. Judicial immunity protects judges from liability for their judicial acts to allow them to act freely upon their own convictions. *Bradley v. Fisher,* 13 Wall. 335, 80 U.S. 335, 347-351, 20 L.Ed. 646 (1872). Quasi-judicial immunity similarly protects persons performing tasks functionally equivalent to judges to allow them to perform their duties properly. *See, e.g., Butz v. Economou,* 438 U.S. 478, 511-517, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978)(persons performing adjudicatory functions within federal agencies are entitled to absolute immunity from damages liability for their judicial acts). Judicial immunity is overcome in two situations: (i) if the challenged act is administrative or otherwise nonjudicial in nature, *Forrester v. White,* 484 U.S. 219,

229, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988), and (ii) if the action was taken in the "clear absence of all jurisdiction," *Stump v. Sparkman*, 435 U.S. 349, 356-357, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978).

The First Circuit has determined that "[p]arole board members are entitled to absolute immunity from liability for damages in a § 1983 action for actions taken within the proper scope of their official duties." *Johnson v. R.I. Parole Bd. Members*, 815 F.2d 5, 8 (1st Cir.1987). This quasi-judicial immunity arises because "parole board officials perform functionally comparable tasks to judges," and " 'render impartial decisions in cases and controversies that excite strong feelings because the litigant's liberty is at stake." ' *Id.* at 6 (citation omitted).

Here, plaintiff seeks damages from defendants for their actions in denying his parole, including allegedly (i) considering only his absence from the SOTP rather than the parole factors enumerated in R.I. Gen. Laws § 13-8-14 & § 13-8-14.1 and (ii) not providing him parole hearings frequently enough. However, determining how to weigh factors and when an inmate is ready for a parole hearing are adjudicatory functions at the heart of the Parole Board Members' official duties in deciding whether to grant or deny parole; thus, the Parole Board Members have immunity for such actions. *See, e.g., McLaurin v. Paterson*, No. 07-3482, 2008 WL 3402304, at *13 (S.D.N.Y.2008).

A liberal reading of plaintiff's complaint suggests the argument that the Parole Board Members should be denied quasi-judicial immunity because they were acting in the clear absence of all jurisdiction. Plaintiff claims that certain members of the Parole Board were not technically eligible to be appointed under Rhode Island law because their term had expired or they are attorneys, and, therefore, did not have authority to deny his parole.[FN3]

> FN3. Specifically, plaintiff points out that (i) R.I. Gen. Law § 13-8-1 states that Parole Board members be appointed for terms of three years, but that certain of the Parole Board Members have been on the Board for more than one term; (ii) R.I. Gen. Law § 13-8-12 states that, of the seven Board Members, one member shall be an attorney, but more than one of the Parole Board Members are lawyers; and (iii) R.I. Gen. Law § 13-8-3 provides that a chairperson be appointed for a term of two years, but Lisa Holley, the current chairperson, has been the chairperson since at least 1998. Docket # 20.

First, plaintiff misinterprets the statutes. Neither R.I. Gen. Law § 13-8-1 nor § 13-8-3 prevent the reappointment of a Parole Board member as a member or a chairperson, respectively, after the completion his or her term.R.I.Gen.Laws § 13-8-1 & § 13-8-3. Further, even if they should not have been reappointed, they would still be valid holdovers under Rhode Island law.*Id.; see, e.g., Central Falls City Council v. Cross*, No. 76-2675, 1976 WL 177154 (R.I.Super.1976). Additionally, the R.I. Gen. Law § 13-8-2 requirements that, of the seven Parole Board members, one be an attorney, one be a physician, one be a social worker and one be a law enforcement officer are more sensibly interpreted as minimum requirements, not limitations, in order to ensure representation of various relevant fields of expertise. *See Such v. State*, 950 A.2d 1150, 1156 (R.I.2008)(statutory construction requires court to attribute the meaning most consistent with the legislature's purposes).

***5** Further, even if the members were appointed to the Parole Board due to a misinterpretation of the statute, their adjudicatory decisions as members of the Parole Board were still not in the "clear absence of all jurisdiction." *See, e.g., Miller v. Davis*, 521 F.3d 1142, 1148 (9th Cir.2008)(governor had absolute quasi-judicial immunity and did not act in "clear absence of all jurisdiction" when reversing plaintiff's parole based on erroneous interpretation that statute granted him authority to do so), *cert. denied*, No. 08-176, 2008 WL 3538462 (U.S. Oct.6, 2008); *Schucker v. Rockwood*, 846 F.2d 1202, 1204

(9th Cir.1988)(judge who erroneously exercised jurisdiction based on a misinterpretation of a statute did not act in "clear absence of all jurisdiction").

Since the Parole Board Members were acting within the scope of their official duties and not in "clear absence of all jurisdiction," absolute immunity applies. I therefore recommend that the Parole Board Members' motion to dismiss plaintiff's § 1983 claims for damages against them in their individual capacities be GRANTED and such claims be dismissed.[FN4]

> FN4. Additionally, although not raised by defendants, the *Heck* doctrine bars plaintiff from recovering damages under § 1983 for allegedly unlawful Parole Board determinations that have not been invalidated. *Heck v. Humphrey,* 512 U.S. 477, 486-487, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994); *see also White v. Gittens,* 121 F.3d 803, 807 (1st Cir.1997)(*Heck* bars challenges to parole revocation); *Butterfield v. Bail,* 120 F.3d 1023, 1024 (9th Cir.1997)(*Heck* bars challenges to denial of parole).

C. § 1983 Bars Actions for Injunctive Relief Against Parole Board Members as Judicial Officers

Second, the Parole Board Members urge that quasi-judicial immunity shields them with respect to plaintiff's claim for injunctive relief. Although, as discussed above, caselaw provides that quasi-judicial immunity protects Parole Board Members from § 1983 actions for damages, the law is not as clear with respect to actions for injunctive relief. In fact, public officials' rights to immunity generally do not protect them from actions for prospective injunctive relief. *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). In 1984, the Supreme Court held that judicial immunity did not extend to claims for injunctive relief. *Pulliam v. Allen,* 466 U.S. 522, 537, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984). However, in October 1996, Congress passed the Federal Courts Improvement Act (the "FCIA"), amending § 1983 to bar injunctive relief "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity ... unless a declaratory decree was violated or declaratory relief was unavailable."42 U.S.C. § 1983; *see* Section 309 of the FCIA of 1996, Pub.L.No. 104-317, Title III, § 309(c), Oct. 19, 1996, 110 Stat. 3847, 3853.

Although neither the Supreme Court nor the First Circuit have addressed whether the statute protects quasi-judicial actors, such as parole board members, performing tasks functionally equivalent to judges from actions for injunctive relief, circuit and district courts in the Second, Sixth, Seventh, Ninth and District of Columbia Circuits have answered in the affirmative. In *Montero v. Travis,* the Second Circuit found that, as a result of the 1996 amendment to § 1983, "[a]bsolute immunity bars not only [the plaintiff's] § 1983 claim for damages but also his claim for injunctive relief" against parole officials "when they serve a quasi-adjudicative function in deciding whether to grant, deny or revoke parole." 171 F.3d 757, 761 (2nd Cir.1999); *see also Roth v. King,* 449 F.3d 1272, 1286-87 (D.C.Cir.2006)(stating that there is no reason to believe that the FCIA immunization of judicial officers from injunctive relief "is restricted to 'judges,' " court applies immunity to quasi-judicial officers); *Gilbert v. Ferry,* 401 F.3d 411, 414 n. 1 (6th Cir.2005)(state court administrator entitled to absolute quasi-judicial immunity against injunctive relief), *rev'd in part on other grounds,* 413 F.3d 578 (6th Cir.2005); *Cannon v. South Carolina Dept. of Corrections,* No. 07-3984, 2008 WL 269519, at *4 (D.S.C.2008)(court clerk protected by quasi-judicial immunity against injunctive relief based on FCIA); *Von Staich v. Schwarzenegger,* No. 04-2167, 2006 WL 2715276 (E.D.Cal.2006)(board of prison terms commissioners immune from claims for injunctive relief).

***6** I found only one case specifically concluding that the FCIA ban on injunctive relief against "judicial officers" did not apply to quasi-judicial

actors. *Simmons v. Fabian,* 743 N.W.2d 281 (Minn.App.2007). In *Simmons,* the Minnesota Court of Appeals determined that § 1983 immunity is granted sparingly and found that nothing in the language or legislative history of the FCIA suggested that the immunity granted to "judicial officers" included immunity for quasi-judicial actors. *Id.* at 290-294.However, importantly, the *Simmons* court failed to consider the legislative intent revealed by a reference in the Senate Judiciary Committee Report on the FCIA to *Butz,* a case in which the Supreme Court analyzed why judicial immunity protects quasi-judicial officials performing functions analogous to judges. *See*S. Rep. 104-366 at 37 (citing *Butz,* 438 U.S. at 478). The *Simmons* Court also acknowledged that the scant caselaw on the issue was in opposition to its conclusion. *Id.* at 289.

Plaintiff cites *Wilkinson v. Dotson,* a case in which the Supreme Court allowed two inmates who had been denied parole to bring § 1983 actions against the parole board members seeking new parole hearings, as evidence that parole board members are not immune from suit under § 1983. 544 U.S. 74, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005). However, the sole focus of the Supreme Court in *Wilkinson* was which type of action, § 1983 or habeas corpus, was the proper vehicle for claims challenging a state parole board's policies and procedures and seeking declaratory or injunctive relief not involving an immediate release from custody. *Id.* 82.As the *Wilkinson* Court did not address the immunity issue, the case does not support a conclusion that the FCIA does not protect parole board members from suits for injunctive relief.*Id.; see also Torres v. Costa,* 249 Fed.Appx. 516 (9th Cir.2007) (rejecting notion that *Wilkinson* eliminated absolute quasi-judicial immunity for parole board members).[FN5]

> FN5. Further, as the FCIA ban against actions for injunctive relief applies only to actions taken in a judicial officer's judicial capacity and not in the clear absence of jurisdiction, *see*S. Rep. 104-366 at 37 ("Immunity is not granted for any conduct "clearly in excess" of a judge's jurisdiction, even if the act is taken in a judicial capacity"), the § 1983 avenue for injunctive relief against parole board members carved out by the *Wilkinson* Court is not rendered meaningless. Thus, for example, the FCIA does not ban claims regarding parole board members' actions creating policies regulating the parole board, as opposed to their adjudicatory actions in determining whether to grant or deny parole based on the facts in a particular case. *See, e.g., Schwartz v. Dennison,* 518 F.Supp.2d 560, 570 (S.D.N.Y.2007).

As discussed above with respect to plaintiff's claims for damages against the Parole Board Members, plaintiff's allegations that the Parole Board Members violated his constitutional rights by placing too much weight on his absence from the sex offender treatment program and failing to provide him more frequent parole hearings impugn determinations they made in their adjudicatory capacity and not in the absence of all jurisdiction.[FN6]Thus, as plaintiff did not claim that a declaratory decree was violated or declaratory relief was unavailable, plaintiff's claims fit squarely within the FCIA prohibition on granting injunctive relief against judicial officers for actions in their judicial capacity.[FN7]42 U.S.C. § 1983. Accordingly, given the FCIA ban on granting injunctive relief against them as judicial officers, I recommend that the defendant Parole Board Members' motion to dismiss the § 1983 claims against them for injunctive relief be GRANTED and such claims be dismissed.

> FN6. Although he complains about the Parole Board's policy to deny parole based on an inmate's failure to be enrolled in the SOTP, even a liberal reading of his amended complaint does not allow an inference that he has sued the Parole Board Members for their role in creating such a policy. He does not state a claim against them for such action and alleges no facts

relating to their responsibility for such policy. *See Schwartz,* 518 F.Supp.2d at 570 (although plaintiff alleges he is suing certain parole board commissioners for their roles in creating policy rather than for their conduct at the parole hearing, he alleges no facts supporting such contention).

FN7. Additionally, although not raised by defendants, to the extent plaintiff seeks an injunction requiring the Parole Board Members grant him immediate parole, such relief is not available in this § 1983 action. *See Wilkinson v. Dotson,* 544 U.S. 74, 82, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005)(court may not order a prisoner's "immediate or speedier release into the community" in a § 1983 action). A state prisoner's sole remedy to challenge the very fact or duration of his physical imprisonment lies in a writ of habeas corpus. *Preiser v. Rodriguez,* 411 U.S. 475, 500, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973).

IV. Supplemental State Claims

*7 Having recommended that the federal claims be dismissed, I further recommend that the Court decline to exercise jurisdiction over plaintiff's remaining supplemental state law claims, and that such state law claims be dismissed without prejudice for want of jurisdiction. *See*28 U.S.C. § 1367(c) (district court may decline to exercise supplemental jurisdiction if it has dismissed all claims over which it has original jurisdiction); *see also Menebhi v. Mattos,* 183 F.Supp.2d 490, 505-506 (D.R.I.2002) (quoting *United Mine Workers v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)) ("when all federal claims are eliminated from the case before trial, in the usual case the balance of factors to be considered should lead the court to conclude that the 'state claims should be dismissed as well' ").

CONCLUSION

As discussed above, I recommend that defendants' motions to dismiss plaintiff's claims for lack of jurisdiction and venue pursuant to Federal Rules 12(b)(1) and 12(b)(3), respectively, be DENIED. However, I have found that (i) the State and the Parole Board are not "persons" amenable to suit under § 1983, (ii) the Parole Board Members in their official capacities are not "persons" who can be sued under § 1983 for damages, (iii) the Parole Board Members in their individual capacities have absolute immunity from suit for damages under § 1983 with respect to the actions about which plaintiff complains and (iv) the FCIA bars plaintiff's suit against the Parole Board Members for injunctive relief. I thus further recommend that defendants' motion to dismiss plaintiff's § 1983 claims for failure to state a claim for which relief may be granted pursuant to Federal Rule 12(b)(6) be GRANTED and such claims against defendants be DISMISSED with prejudice. Finally, I recommend that plaintiff's pendant state law claims be DISMISSED without prejudice.

Any objection to this Report and Recommendation must be specific and filed with the Clerk of Court within ten days of its receipt. Fed R. Civ. P. 72(b); LR Cv 72(d). Failure to file timely, specific objections to this report constitutes a waiver of both the right to review by the district court and the right to appeal the district court's decision. *United States v. Valencia-Copete,* 792 F.2d 4 (1st Cir.1986) (per curiam); *Park Motor Mart, Inc. v. Ford Motor Co.,* 616 F.2d 603 (1st Cir.1980).

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further questions. Mr. O'Rourke, who you met before, will be questioning now.

CROSS-EXAMINATION

BY MR. O'ROURKE:

Q Good afternoon, Professor Hutcheson.

A Good afternoon, Mr. O'Rourke.

Q I want to talk to you for a couple seconds about where Mr. Bruce left off.

A Fine.

Q You were talking about the privilege & tenure report.

A Talking about all the reports, but I did -- yes, address the privilege & tenure report. There were two, as I recall, a Level 3 and a Level 2.

Q There was the dismissal for cause report. Do you remember that one, about an 80-page report?

A Right.

Q When we talked before, you told me that you had no evidence whatsoever that the faculty, who were members of that Privilege & Tenure Committee, had been leaned on, pressured, influenced in any way to reach a preordained result against Professor Churchill?

A That's right.

Q And that remains your opinion still. You have no evidence to support that they decided this case

on anything other than the facts that were presented at that?

A There is the "but for" that's in their report.

Q Right.

EXHIBIT E

A That says, "But for the utterances, this would not have occurred." But in terms of pressure from anyplace, no.

Q And, in fact, you remember -- if we pull up page 21f82. CHECK 21F82

A Do you want me to try to look for it?

Q No. We'll pop it up.

A Okay.

Q And if we go down to the summary of the conclusion --

A I'm sorry, Mr. O'Rourke. I'm old enough, I can't really read that.

Q How that?

A That's better.

Q Okay. And so this privilege & tenure panel that you said you got no evidence to show that anybody leaned on them, pressured them, made them come out against Professor Churchill in any way, found by a preponderance of the evidence that one element was proven but for, but that Professor Churchill hadn't

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carried his burden of proving the second element, which was that anybody in the university was motivated in a bad way to get Professor Churchill. Do you remember that?

A Yes.

Q And you're not coming in here saying that you've reviewed all the evidence that they did and you are reaching some kind of different conclusion, true?

A There is the report -- I think it's the Privilege & Tenure Committee's Level 3 and Level 2.

And as I recall there, they suggested that there are questions about motivation, but there is no evidence.

Q Right. And they also said, "That should be determined by another panel." And you understand this was the panel that looked at that question and found Professor Churchill hasn't carried his burden and can't show that people were motivated against him in a bad way, right?

A That's correct.

Q They also looked at it and they said on the very next page that they looked at all the evidence and they looked at the e-mail from Professor Wesson and they looked at Professor Churchill's allegations who were on the committee and they came through and they said that "While some specific mistakes were made, we

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find that Professor Churchill hasn't met his burden of showing that due process was so fundamentally flawed as to deprive him of his constitutional right to due process, noting in particular it has now had subsequent opportunity to provide additional information and clarification to this panel." CHECK 21F82

Now, I want to ask you some questions about the process because we talked about them earlier. You thought it was appropriate that faculty of an institution take the lead on academic matters and that they set the standards of academic ethics for their institutions, true?

A Correct.

Q And you think it's appropriate that if anybody is going to come through and try to take an employment action against Professor Churchill, that he

have a full right to have a hearing in front of a jury of his peers of the faculty, true?

A Correct.

Q And you think it's appropriate that the university has to prove the misconduct by clear and convincing evidence rather than just some preponderance of the evidence standard, true?

A Correct.

Q And you think it's appropriate that

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Professor Churchill got to bring in whatever witnesses he wanted to in the United States to say, "I didn't engage in research misconduct," right?

A Correct.

Q And you think it's appropriate that he got to bring in whatever documents he wanted to to be able to support his claims, right?

A Correct.

Q And you think it's appropriate that he got to submit several hundred pages of written arguments to try to dispel the academic conduct against him, correct?

A Correct.

Q You think it is appropriate that you saw, when they looked at the case, the P&T panel weighed all the evidence in the case and said, "The university hasn't proven some of its allegations, but it has proven others." And that would show you that they are not just rubber stamping, right?

A Correct.

Q And you think it's appropriate that

Professor Churchill got an opportunity to get up before this panel and explain anything he wanted to about the whole case, right?

A Correct.

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Q Okay. Now, you did see, didn't you, that ultimately, if we go down to the bottom of the page -- no, I'm going to approach you. Do you mind?

A That's fine.

MR. O'ROURKE: Judge?

THE COURT: That's fine.

Q (BY MR. O'ROURKE) What I'm looking at is page 83 of the P&T report. And you saw that the faculty -- it's 83 in our exhibits, page 71 of the P&T report -- that the faculty came through and found eight different instances where Professor Churchill had fallen below the minimum standards of professional integrity, right?

A Correct.

Q Now, that's serious for an institution, isn't it? If you have a professor who has shown on eight different occasions to have violated what the faculty have determined to be the minimum standards of professional integrity?

A Yes. But not within the context of the amount of work.

Q Okay. Well, actually, you talked about that and talked about being four or five footnotes. You understand, don't you, that there was an allegation that he completely appropriated someone else's piece of

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work as plagiarized?