

Honorable John C. Coughenour

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

PERRY MILLS,

Plaintiff,

v.

ANDREW BODMAN,

Defendant.

NO. CV05-1315

DEFENDANT’S REPLY IN SUPPORT  
OF MOTION TO DISMISS

**NOTE FOR MOTION CALENDAR:  
September 9, 2005**

**I. INTRODUCTION**

Plaintiff’s Opposition to Defendant’s Motion to Dismiss fails to address the defendant’s motion to dismiss all § 1983 damage claims against Dr. Bodman as Provost for lack of subject matter jurisdiction. Likewise, it fails to address the lack of subject matter jurisdiction over Prof. Mills’ two state law causes of action alleging Western Washington University ("WWU") breached its employment contract with Prof. Mills. Finally, the Amended Complaint, like the Complaint, fails to allege any facts that would support a contract claim by Prof. Mills against Dr. Bodman personally.<sup>1</sup>

<sup>1</sup> Plaintiff's Amended Complaint (Docket No. 17) and service of the complaint on the Attorney General (Docket No. 16) addressed the indefinite statement (Fed. R. Civ. P. 12(e)) and insufficient personal service (Fed. R. Civ. P. 12(b)(2)(5)) issues of defendant's motion. The request to dismiss the § 1983 injunctive against WWU and personal liability claims is withdrawn.

1 Defendant asks the Court to dismiss these three sets of claims: (1) all plaintiff's  
2 § 1983 damage claims based upon the state's Eleventh Amendment immunity from suit in federal  
3 court,<sup>2</sup> (2) the two state law contract claims against Dr. Bodman as Provost because of the Court's  
4 lack of subject matter jurisdiction due to the Eleventh Amendment, and (3) the state law contract  
5 claims, if any, asserted against Dr. Bodman individually for failure to state a claim in either the  
6 Complaint or Amended Complaint. Plaintiff's Opposition fails to address these three sets of claims,  
7 and instead focuses almost entirely upon issues not raised by Defendant's Motion.

## 8 **II. ARGUMENT**

### 9 **A. All Plaintiff's Claims for Monetary Damages Against Dr. Bodman in His Official** 10 **Capacity as Provost Should be Dismissed for Lack of Subject Matter Jurisdiction.**

11 In response to defendant's Motion to Dismiss, plaintiff amended the prayer for relief  
12 in his Amended Complaint so that there is no specific request for monetary damages against  
13 Dr. Bodman in his official capacity. See Amended Complaint at pp. 10-11. However, the Amended  
14 Complaint did not change the factual allegations that allege that Dr. Bodman was acting in his  
15 capacity as Provost, nor did it delete the general request for relief that is not restricted to  
16 Dr. Bodman's personal assets. *Amended Complaint* at 11.

#### 17 **1. The § 1983 Monetary Claims Against the Provost Cannot be Asserted in Federal** 18 **Court.**

19 Because the Eleventh Amendment prohibits suits for damages against states or  
20 individual state actors in their official capacities in federal court, this Court lacks jurisdiction to the  
21 extent plaintiff seeks monetary damages from Dr. Bodman in his capacity as Provost. Goodisman v.  
22 Lytle, 724 F.2d 818, 820 (9<sup>th</sup> Cir. 1984) (court holding it did not have jurisdiction to consider  
23 42 U.S.C. § 1983 action seeking money damages against the University of Washington or its  
24 officials acting in their official capacities); Smith v. The University of Washington Law Sch.,

25 <sup>2</sup> Plaintiff's factual allegations in the Amended Complaint allege that Dr. Bodman was acting in his official  
26 capacity and paragraph 5 of the Prayer for Relief appears designed to place the defendant on notice that there  
is no limitation on the source of damages plaintiff seeks, despite the language in the first four paragraphs of  
the prayer.

1 2 F. Supp. 2d 1324, 1331 (W.D. Wa. 1998). Plaintiff's argument about the holding in Goodisman  
2 actually concedes this point quite clearly.<sup>3</sup>

3 Defendant is therefore entitled to an order dismissing all § 1983 claims for monetary  
4 damages against Dr. Bodman as Provost. See attached proposed Order.

5 2. Plaintiff's State Law Breach of Contract Claims Against WWU Should Also Be  
6 Dismissed for Lack of Subject Matter Jurisdiction.

7 As stated above, plaintiff did not respond to defendant's motion to dismiss plaintiff's  
8 two separate state law breach of contract causes of action for lack of subject matter jurisdiction. See  
9 Amended Complaint at 7-8, 9. The Court lacks subject matter jurisdiction over both of these contract  
10 claims against Western Washington University ("WWU"), because the Eleventh Amendment  
11 deprives this Court of all subject matter jurisdiction over all state law causes of action against a state  
12 entity.

13 As was discussed in Defendant's Motion to Dismiss and supra, the Eleventh  
14 Amendment bars citizens from bringing suit against a state or one of its agencies in federal court.  
15 See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99-100, 104 S. Ct. 900, 79 L. Ed. 2d  
16 67 (1984). As a public university, the University is a state entity. Goodisman v. Lytle, 724 F.2d  
17 818, 820, (9<sup>th</sup> Cir. 1984). See also Doe v. Lawrence Livermore Nat'l Lab., 131 F.3d 836, 838-839  
18 (9<sup>th</sup> Cir. 1997) (finding University of California an arm of the state); Spaulding v. University of  
19 Washington, 740 F.2d 686, 694 (9<sup>th</sup> Cir. 1984), cert. denied, 469 U.S. 1036, 105 S. Ct. 511,  
20 83 L. Ed. 2d 401 (1984). Suits against state officials in their official state capacities are not actually  
21 suits against the individual, but suits against the individual's office. Smith v. The University of  
22 Washington Law Sch., 2 F. Supp. 2d 1324, 1331 (W.D. Wa. 1998). Therefore, this type of suit is  
23 indistinguishable from a suit against the state itself. Will v. Michigan Dept. of State Police, 491 U.S.

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25 <sup>3</sup> "[T]he Court recognized that 'Goodisman is barred from seeking money damages from the state treasury  
26 through liability of University officials in their official capacities.'" Opposition at 7, quoting Goodisman, 720  
F.2d at 820. Plaintiff's further discussion of Goodisman is completely irrelevant to the argument made in  
Defendant's Motion to Dismiss.

1 58, 71, (1989); Smith 2 F. Supp. 2d at 1331. Thus, pursuant to Pennhurst, all plaintiff's state law  
 2 breach of contract claims against Dr. Bodman in his official capacity are barred by the Eleventh  
 3 Amendment. Plaintiff cites no exception to this rule, but instead focuses on irrelevant issues relating  
 4 to his § 1983 injunctive claims and totally ignores his contract causes of action.

5 Furthermore, even if the Court had subject matter jurisdiction over plaintiff's state  
 6 law claims against Dr. Bodman in his official capacity, plaintiff has wholly failed to allow the  
 7 administrative remedies afforded to him run their course.<sup>4</sup> Because Prof. Mills has failed to exhaust  
 8 his administrative remedies, the Court lacks jurisdiction to decide his contract claim for this separate,  
 9 independent reason. See Kraeger v. Washington State University, 76 Wn. App. 661, 664-65, 886 P.2d  
 10 1136 (1994) (court did not have jurisdiction to hear plaintiff's claim because plaintiff had not  
 11 exhausted his administrative appeal rights); see also Munsey v. Walla Walla College, 80 Wn. App. 92,  
 12 95, 906 P.2d 988 (1995) (contractual dispute resolution methods must be "pursued before either party  
 13 can resort to the courts for relief"), quoting Tombs v. Northwest Airlines, Inc., 83 Wn.2d 157, 162,  
 14 516 P.2d 1028 (1973) (trial court lacked jurisdiction to hear case because plaintiff failed to exhaust his  
 15 contractual remedies). "Where the agreement provides for a method of resolving disputes that may  
 16 arise between the parties, that method must be pursued before either party can resort to the courts for  
 17 relief." Tombs, 83 Wn.2d at 162 (citing Jackson v. Walla Walla, 130 Wash. 96, 226 P. 487 (1924)).  
 18 Prof. Mills has clearly not exhausted his administrative remedies with regard to any of his state law  
 19 breach of contract claims.

20 The Court, therefore, lacks jurisdiction to hear the § 1983 claim for monetary relief  
 21 against Dr. Bodman as Provost, and the contract claim against WWU.<sup>5</sup>

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 23 <sup>4</sup> At this point, the next step includes the October hearing on the charges against him before hearing examiner  
 24 Michael Reiss and panel of five faculty members. See Bohlke Decl. Ex. A; see also Mueller Decl. Exs. A-G.

25 <sup>5</sup> Dr. Bodman is entitled to qualified immunity for his actions as Provost of WWU because his actions were  
 26 taken in good faith pursuant to the duties that he is required to perform as a public official. Harlow v. Fitzgerald, 457 U.S. 800, 815-16 (1982). Qualified immunity, according to the Supreme Court, is more than a  
 "mere defense to liability," it is "an entitlement not to stand trial or face the other burdens of litigation," and  
 "it is effectively lost if a case is erroneously permitted to go to trial." Jeffers v. Gomez, 267 F.3d 895, 909 (9<sup>th</sup>  
 Cir. 2001) quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) and Hunter v. Bryant, 502 U.S. 224, 227

1 **B. The Amended Complaint Has a More Definite Statement of His § 1983 Claims Against**  
2 **Dr. Bodman, But Still Fails to Allege a Contract Claim Against Dr. Bodman Personally.**

3 While plaintiff has made a more definite statement of his § 1983 claims in his  
4 Amended Complaint, neither the Amended Complaint nor Prof. Mills' Opposition addresses the  
5 issue of any contract claim against Dr. Bodman personally.

6 To the extent plaintiff's breach of contract claims are asserted against Dr. Bodman in  
7 his individual capacity, the Amended Complaint fails to state such a claim. Fed. R. Civ. P. 12(b)(6).  
8 Dr. Bodman cannot possibly be individually liable on a contract claim under the facts asserted by  
9 plaintiff in the Amended Complaint. Dr. Bodman, in his individual capacity, had no business  
10 contacts with Prof. Mills that could possibly provide the factual basis for a contractual relationship  
11 between the two individuals.

12 Defendant is entitled to, and respectfully requests, an order granting defendant's  
13 motion to dismiss all plaintiff's state law breach of contract claims, whether asserted against WWU  
14 or Dr. Bodman personally.

15 **C. The Court Now Has Personal Jurisdiction Over WWU Provost Andrew Bodman.**

16 Plaintiff properly served Provost Bodman and WWU by serving the Attorney General  
17 on August 25, 2005, with a complaint and summons. Docket No. 16. Provost Bodman entered his  
18 Notice of Appearance on behalf of WWU on August 26. Docket No. 15. There is no indication that  
19 the plaintiff's motion for preliminary injunction was ever served on the Attorney General with the  
20 complaint or on Dr. Bodman's counsel after the court obtained personal jurisdiction over the Provost  
21 and WWU, the state entity, on August 25. Although the court now has personal jurisdiction over  
22 WWU, the motion for a preliminary injunction has never been properly served on WWU or properly

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(1991) (per curiam). These issues, however, can only be addressed following discovery. Plaintiff, however, is making meritless claims that Dr. Bodman is personally liable to Prof. Mills, at the same time that he has asked the Court to enjoin Dr. Bodman from conducting discovery on those allegations. See Proposed Order on Motion for Preliminary Injunction at 2.

1 noted pursuant to the Federal Rules of Civil Procedure and local rules. See Fed. R. Civ. P. 7,  
2 65(a)(1) and Local Rule 7.<sup>6</sup>

3 **III. CONCLUSION**

4 For the foregoing reasons, defendant respectfully requests that the Court dismiss all of  
5 plaintiff’s state law claims, as well as any claim plaintiff may be asserting for monetary damages  
6 against Dr. Bodman in his official capacity. The motion to dismiss the injunction claim for lack of  
7 personal jurisdiction and the § 1983 personal claim for damages against Dr. Bodman for a more  
8 definite statement under Fed. R. Civ. P. 12(b)(2), (5)(e) are withdrawn. A proposed order to that  
9 effect is attached for the Court’s convenience.

10 DATED this 9th day of September, 2005.

11 MILLER NASH LLP

12  
13 /s/  
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25 <sup>6</sup> In the absence of appropriate service of the preliminary injunction motion on the defendant Provost and  
26 WWU, defendant will file a motion to strike the injunction motion for failure to comply with CR 65(a)(1) and  
Local Rule 7. (Because a hearing is scheduled on Dr. Mills’ suspension in early October, the entire  
preliminary injunction motion may shortly become moot.)

**CERTIFICATE OF SERVICE**

I hereby certify that on this 9th day of September, 2005, I caused to be electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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CERTIFICATE OF SERVICE

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