

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 08-cv-00251-MSK-KMT

KENNETH L. SMITH,

Plaintiff,

v.

HON. DAVID M. EBEL, in his official capacity as Judge of the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, THE UNITED STATE DISTRICT COURT FOR THE DISTRICT OF COLORADO, THE TENTH CIRCUIT COURT OF APPEALS, THE COLORADO COURT OF APPEALS, THE SUPREME COURT OF COLORADO, and JOHN DOES 1-99,

Defendants.

**COLORADO SUPREME COURT AND COLORADO COURT OF APPEALS'
MOTION TO HOLD MATTER IN ABEYANCE
PENDING DISPOSITION OF MOTION TO DISMISS**

Defendants the Colorado Supreme Court and Colorado Court of Appeals (“the state courts”), by and through undersigned counsel and the Office of the Colorado Attorney General, hereby respectfully file this motion requesting that this matter be held in abeyance pending disposition of their motion to dismiss, and as grounds therefor, state as follows.

1. Undersigned counsel contacted Plaintiff Smith (“Smith”) via email regarding this motion. He opposes it.

2. In addition to their response to the complaint, due May 27, 2008, the defendant state courts are currently obliged to:

- a. Respond to Smith's 57-page motion for preliminary injunction¹ ("the motion") (*Doc. 9*) as directed by this court (*Doc. 11*);
- b. Attend a Rule 16(b) Scheduling Conference and Rule 26(f) Planning Meeting and other requirements as specified in Magistrate Judge Tafoya's order of March 3, 2008 (*Doc. 7*); and
- c. Attend a June 27, 2008 Rule 16 hearing as specified in this court's order of April 9, 2008 (*Doc. 13*).

The instant motion is aimed at holding all of these obligations, and any of the other incidents of litigation, in abeyance pending disposition of their motion to dismiss.

IMMUNITY DEFENSE

3. The state courts aver that their motion to dismiss will assert, *inter alia*, Eleventh Amendment or sovereign immunity from suit in this matter. Counsel is mindful of this court's dedication to speedy resolution of all litigation. However, in this case, the state courts should be put to the expense and burdens of litigation only if and when their immunity defense is unsuccessful.

4. In *Workman v. Jordan*, 958 F.2d 332 (10th Cir. 1992), the court concluded that a federal district court's decision on a motion to dismiss on grounds of qualified immunity should not be postponed pending trial. The court found that such a decision met the tests for application of the *Cohen* collateral order doctrine for immediate appealability; and it concluded that the district court's order postponing a decision on immunity was impermissible. Citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the *Workman* court stated:

¹ The motion is accompanied by an equally voluminous appendix (*Doc. 10*).

The defense by a public official based on a claim of qualified immunity, if successful, protects the official both from liability as well as from the ordinary burdens of litigation, including far-ranging discovery.

958 F.2d at 335. *Workman* quoted *Mitchell v. Forsyth*, 472 U.S. 511 (1985), for the proposition that “qualified immunity is an *immunity from suit* rather than a mere defense to liability that is effectively lost if a case is erroneously permitted to go to trial.” (emphasis in original; internal quotation marks and ellipsis omitted) 958 F.2d at 335.² Citing *Siegert v. Gilley*, 500 U.S. 226 (1991), the court stated that “qualified immunity is not only a defense to liability but also entitlement to immunity from suit and other demands of litigation.” 958 F.2d at 336. It referred to an assertion of immunity as a “threshold question,” which may be a “purely legal” one, that a court should not avoid answering “by framing it as factual.” *Id.* While *Workman* related specifically to qualified immunity, the rationale for such a holding is equally applicable to sovereign immunity. For these purposes, case law draws no distinction between qualified immunity and Eleventh Amendment immunity. *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (Eleventh Amendment does not relate solely to claims for damages; “The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties,” quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). *See also*

² The only exception to this principle is if discovery or other pretrial proceedings are necessary in order to rule on the immunity claim. 958 F.2d at 336. Even in that instance, such proceedings must be “narrowly tailored to uncover only those facts needed to rule on the claim.” *Id.* In the instant case, the issue is purely one of law, as Smith acknowledges with respect to his claims for declaratory and injunctive relief. *Motion (Doc. 9) at 2, 3rd ¶.*

Crumpacker v. Kansas Dep't of Human Resources, 338 F.3d 1163 (10th Cir. 2003), *cert. denied*, 540 U.S. 1180 (2004). Failure of the district court to address Eleventh Amendment immunity will be construed as a rejection of the claim, allowing for immediate circuit court review. *Stewart v. Oklahoma*, 292 F.3d 1257, 1260 (10th Cir. 2002), *cert. denied*, 537 U.S. 1104 (2003).

5. In the instant case, the state courts' immunity should protect them not only from liability but also from "the ordinary burdens of litigation." They are entitled to be free "from the demands of litigation" until this threshold legal question is decided.

ADDITIONAL CONSIDERATIONS

6. Smith's 57-page motion contains approximately 27 pages of invective and impertinent comment on the judiciary as a whole and on individual judicial officers. This scurrilous matter should be stricken from the record, and should the case continue, Smith should be required to follow the dictates of D.C.COLO.LCivR 7.1 H. with regard to the verbose and redundant, let alone immaterial and scandalous, verbiage in his filings.

7. Three of the complaint's four specific requests for relief are aimed at the United States, rather than the state courts. *Complaint (Doc. 1) at 21-22, ¶¶A.-D.* Upon information and belief, the U.S. government defendants have not been served in this matter, and it would contribute to efficiency and expediency if all the defendants were on a similar time track.

8. With regard to the issue of recusal (*Doc. 8, 12, and 13*), Smith raises the possibility that "every federal judge in the country [has] a disqualifying personal interest in

the outcome of” the instant case. *Doc. 12 at 3, 4th ¶*. He states that the purpose of the instant lawsuit is “to establish the rights of litigants in federal courts,” and that the case “impacts every case in every court in the land, and in a practical sense, affects every judge in America.” *Doc. 12 at 3, 3rd ¶*. He also suggests that the instant case and *Smith v. Bender*, No. 07-cv-1924, be “removed” from the District of Colorado and the 10th Circuit. *Doc. 12 at 5, 1st ¶*. See also *Complaint (Doc. 1) at 21-22, ¶¶B-C* (requesting relief against all “agents, employees, and/or representatives of the United States District Court for the District of Colorado” and of the Tenth Circuit). Thus disposition of the issue of recusal is controlled by *Switzer v. Berry*, 198 F.3d 1255 (10th Cir. 2000), which provides that disqualification herein is not only not required, but should be eschewed. Like Smith, Switzer was unhappy with the performance of article III judges vis-à-vis *pro se* litigants. The court analyzed the provisions of 28 USC. § 455(b)(5) in light of a judge’s strong duty to sit on assigned cases, as well as the rule of necessity. 198 F.3d at 1257. The court concluded that the statutory provisions are not to be construed so broadly as to be “presumptive,” i.e., litigants do not have veto power over a judge and are not entitled to manipulate the system, citing with approval the maxim that “where all are disqualified, none are disqualified.” 198 F.3d at 1258. The court also noted the applicability of the rule of necessity to federal district courts, citing with approval *In re City of Houston*, 745 F.2d 925 (5th Cir. 1984) (even if there are judges in other districts available, an otherwise-disqualified district judge can invoke the rule of necessity and hear the case). The court also cited *Andersen v. Roszkowski*, 681 F.Supp. 1284 (N.D. Ill. 1998), *aff’d*, 894 F.2d 1338 (7th Cir. 1990) (Table) (plaintiffs should not be allowed to impede the

administration of justice by suing every district judge until the case is transferred out of the circuit). 198 F.3d at 1258. The *Switzer* court concluded that the enunciated principles were applicable whether the individual judges were named or not named as defendants. *Id.*

9. Smith has filed at least six other lawsuits in state and federal court, all stemming from the 1995 denial of his application for admission to the Colorado bar and subsequent related litigation. None has been successful, and the instant case suffers from many of the same defects, e.g., lack of standing, preclusion principles, etc. He should not be permitted to burden the judicial system, state or federal, with such repetitive and meritless litigation. As one of our federal circuit judges has said: “A court is not like a pin-ball machine, in which a player dissatisfied with his result can try his hand over and over again.” The fact that Smith appears *pro se* does not insulate him from sanctions and/or filing restrictions, and this matter will be explored should this litigation continue. *Haworth v. Royal*, 347 F.3d 1189, 1192, (10th Cir. 2003), citing *Stafford v. United States*, 208 F.3d 1177 (10th Cir. 2000).

WHEREFORE, based on the above authority and argument, the state courts respectfully request that this matter be held in abeyance pending disposition of their motion to dismiss.

Dated: May 13, 2008

Respectfully submitted,

JOHN W. SUTHERS
Attorney General

s/ Dianne E. Eret

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CERTIFICATE OF SERVICE

This is to certify that on May 13, 2008, I electronically filed this **COLORADO SUPREME COURT AND COLORADO COURT OF APPEALS' MOTION TO HOLD MATTER IN ABEYANCE PENDING DISPOSITION OF MOTION TO DISMISS**

with the Clerk of court using the CM/ECF system, and I hereby certify that I have mailed this document to the following individuals by U.S. mail as indicated below:

Kenneth L. Smith
23636 Genesee Village Rd.
Golden, CO 80401

and that a courtesy copy was sent to:

Hon. Kathleen M. Tafoya
United States Magistrate Judge
Alfred A. Arraj United States Courthouse
A641
901 19th Street
Denver, CO 80294-3589

s/ Pamela Ponder
PAMELA PONDER