

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

CHAMBERS OF  
**PHILIP K. SWEIGERT**  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES COURTHOUSE  
1010 FIFTH AVE.  
SEATTLE, WA 98104  
(206) 553-1396

November 6, 1997

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CLERK OF COURT

TO: Sean G. Duffy  
Leonard J. Feldman  
David C. Fathi  
Daniel J. Judge  
Douglas Wayne Carr  
Thomas J. Young  
Penelope S. Nerup

FROM: Philip K. Sweigert  
U.S. Magistrate Judge

RE: Duffy v. Riveland, et al.  
Case No. C92-1596R

Attached are copies of my Report and Recommendation, proposed order, and proposed judgment in the above-captioned case. The originals are being filed with the Clerk. This Report and Recommendation is not an appealable order. Any notice of appeal should not be filed until the District Judge enters judgment in this case.

Objections to the recommendation should be filed and served within fifteen days of the date of this letter with copies to the Clerk for forwarding to the District Judge and to my office. Failure to file objections within the specified time waives the right to appeal any order by the District Court adopting this Report and Recommendation. In accordance with our local rules, you should note your objections for consideration on the Judge's motion calendar for the third Friday after they are filed. If no timely objections are filed, the matter will be ready for consideration by the District Judge on November 28, 1997.

Thank you for your cooperation.

Attachments  
PKS/vlr

cc: Hon. Barbara J. Rothstein  
C92-1596R

Duffy v. Riveland



PC-WA-0003-0001

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6 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 SEAN G. DUFFY, et al.,  
9 Plaintiff,

CASE NO. C92-1596R

10 v.

REPORT AND RECOMMENDATION

11 CHASE RIVELAND, et al.,  
12 Defendant.

13  
14 INTRODUCTION AND SUMMARY CONCLUSION

15 Plaintiff Sean Duffy is a hearing-impaired inmate currently incarcerated at the Washington State  
16 Reformatory (WSR) at Monroe, Washington. He originally filed this action pro se, to challenge the  
17 institution's repeated denial of his request for a certified interpreter at disciplinary hearings. He invoked  
18 the jurisdiction of this court under the Rehabilitation Act, 29 U.S.C. § 794, and the Americans with  
19 Disabilities Act, 42 U.S.C. § 12132. This case and a parallel one were both dismissed for failure to state  
20 a claim. On appeal, and subsequent to the reversal of both dismissals by the Ninth Circuit Court of  
21 Appeals, plaintiff has been represented by counsel. The cases have now been consolidated, and plaintiff  
22 has moved for partial summary judgment on the state law claims in his amended complaint. Defendants  
23 have opposed the motion, and the matter has been fully briefed. After careful consideration of the  
24 complete record, the opinion of the Ninth Circuit Court of Appeals, and the memoranda of the parties, I  
25 conclude that plaintiff's motion should be denied, and the state law claims should be dismissed pursuant to  
26 28 U.S.C. § 1367(c)(1).

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DISCUSSION

2 For purposes of clarification, the two cases which have been consolidated shall be referred to as  
3 Duffy I (C92-1596R), which originally concerned a specific 1992 disciplinary hearing; and Duffy II (C93-  
4 637R), which concerned 1992 and 1993 classification hearings. Plaintiff has moved for partial summary  
5 judgment on the state law claims brought under RCW 2.42.120, which requires that a qualified  
6 interpreter be appointed for a hearing-impaired person in all judicial or quasi-judicial proceedings. The  
7 Ninth Circuit Court of Appeals, addressing Duffy II, ruled that the classification hearings are neither  
8 judicial nor quasi-judicial, and thus did not trigger the requirements set forth in the state statute. Duffy v.  
9 Riveland, 98 F. 3d 447, 458 (9th Cir. 1996). As to the disciplinary hearing which was the subject of  
10 Duffy I, however, the appeals court ruled that the hearing was a quasi-judicial proceedings, such that the  
11 provisions of the state statute were applicable. Id. It is plaintiff's position that the Ninth Circuit's ruling  
12 has made it the law of the case that plaintiff's state law rights were violated.

13 Following remand, plaintiff filed an amended complaint adding allegations of additional violations  
14 of his right to a qualified interpreter at more recent hearings. In response to the motion for partial  
15 summary judgment, defendants argue that the amended complaint raises issues with respect to numerous  
16 unspecified additional hearings, such that the factual bases cannot be addressed. Dkt. # 106, p. 2-3. In  
17 reply, plaintiff has narrowed his motion to a single hearing, the 1992 disciplinary hearing originally  
18 addressed in Duffy I. Dkt. # 111. This limitation moots a second argument raised by defendants in  
19 opposition to the motion, namely that it is premature because it was filed less than 20 days after filing of  
20 the amended complaint. Rule 56 states that a motion for summary judgment on a claim may be made "at  
21 any time after the expiration of 20 days from the commencement of the action. . . ." F.R.Civ.P. 56(a).  
22 Since the original action regarding the 1992 disciplinary hearing was commenced five years ago,  
23 defendants' Rule 56(a) argument is not viable.

24 Far more persuasive, however, is defendants' argument that the court should decline to take  
25 supplemental jurisdiction over this state law claim, pursuant to 28 U.S.C. § 1367(c)(1). That section  
26 permits a district court to decline supplemental jurisdiction over a state law claim when it raises a novel  
27 or complex issue of state law. The state law at issue here states, in relevant part,  
28

1 If a hearing impaired person is a party or witness at any stage of a judicial or quasi-  
2 judicial proceeding in the state or in a political subdivision, . . . the appointing authority  
shall appoint and pay for a qualified interpreter to interpret the proceedings.

3 RCW 2.42.120(1). Plaintiff's invocation of this statute raises a novel issue of state law because the  
4 statute is silent as to a remedy, and no Washington state case has either created a private cause of action  
5 from this statute, or fashioned a remedy for its violation. If such a right and remedy are to be implied, it  
6 is for the state court, not this one, to do so.

7 Plaintiff contends that defendants have waived their right to challenge supplemental jurisdiction  
8 over the state law claim by failing to assert their objections sooner. Moreover, plaintiff argues, the Ninth  
9 Circuit's reversal of this court's dismissal of the state law claim has become the law of the case,  
10 preventing reconsideration of the jurisdictional issue. However, a thorough review of the original  
11 complaint filed by plaintiff in Duffy I, the parties' memoranda on the earlier summary judgment motion  
12 which resulted in dismissal, the Report and Recommendation of the undersigned, and the court's Order of  
13 dismissal, shows that neither the parties nor this court construed plaintiff's references to state law as  
14 raising a separate claim; his citations to RCW 2.42.120 were treated as establishing a liberty interest to  
15 support his due process claim. Dkt. # 2, 31, 41, 43, 49, 52.

16 The original complaint clearly invoked the jurisdiction of the court pursuant to 29 U.S.C. § 794  
17 (the Rehabilitation Act) and 42 U.S.C § 12132 (the Americans with Disabilities Act). Dkt. # 2. Because  
18 of plaintiff's repeated reference to constitutional and due process violations, the court construed the  
19 complaint as also raising a claim under 42 U.S.C. § 1983; thus it was only in support of the due process  
20 claim that plaintiff's state law references were considered. Dkt. # 4. For example, in his ninth cause of  
21 action, plaintiff alleged that certain defendants denied him his constitutional rights of due process as a  
22 qualified individual with a disability, and also that plaintiff "do [sic] have a liberty interest under the state  
23 law for the services of 'qualified interpreters' --- R.C.W. 2.42.110." Dkt. # 2, p. 42. Similarly, he cited  
24 the state law in his third, fourth, and tenth causes of action, all of which were constitutional due process  
25 claims. Dkt. # 2, pp. 29, 44. Nowhere in the eleven stated causes of action is a separate one based on  
26 state law. The statute is only mentioned in cursory fashion in plaintiff's memorandum opposing summary

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1 judgment. Dkt. # 43, p. 17. Defendants, in their motion for summary judgment, did not address any state  
2 law claim or ask for dismissal thereof. Dkt. # 41. Nor did the Report and Recommendation recognize or  
3 reach the merits of a state law claim. Dkt. # 49.

4 Thus, notwithstanding the Ninth Circuit's language that the district court "erred in dismissing" the  
5 state law claim, a review of the record shows that this court neither recognized nor took jurisdiction of  
6 any independent state law claim. Accordingly, defendants' § 1367(c)(1) challenge to supplemental  
7 jurisdiction is not untimely.

8 As the state law claims now properly raised in the amended complaint raise novel issues of state  
9 law which should be addressed first by the state court, this court should decline to exercise supplemental  
10 jurisdiction over them. Accordingly, plaintiff's motion for partial summary judgment on the state law  
11 claims should be denied, and the claims should be dismissed pursuant to § 1367(c)(1). A proposed form  
12 of Order is attached.

13 DATED 6<sup>th</sup> day of November, 1997.

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16 PHILIP K. SWEIGER  
17 United States Magistrate Judge  
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6 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 SEAN G. DUFFY, et al.,

9 Plaintiff,

10 v.

11 CHASE RIVELAND, et al.,

12 Defendant.

CASE NO. C92-1596R

ORDER DENYING PLAINTIFF'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT

13  
14 The Court, having reviewed the Plaintiff's motion for partial summary judgment on the state law  
15 claims, the Report and Recommendation of Judge Philip K. Sweigert, United States Magistrate Judge,  
16 and the remaining record, does hereby find and Order:

17 (1) The Court adopts the Report and Recommendation.

18 (2) Plaintiff's motion for partial summary judgment on the state law claims should be denied,  
19 and the claims should be dismissed pursuant to § 1367(c)(1).

20 (3) The Clerk is directed to send copies of this Order to petitioner, to counsel for respondent,  
21 and to Judge Sweigert.

22 DATED \_\_\_\_\_ day of \_\_\_\_\_, 1997.

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24 \_\_\_\_\_  
25 BARBARA J. ROTHSTEIN  
26 United States District Judge  
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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 SEAN G. DUFFY, et al.,  
9 Plaintiff,

CASE NO. C92-1596R

10 v.

**JUDGMENT IN A CIVIL CASE**

11 CHASE RIVELAND, et al.,  
12 Defendant.

- 13
- 14  Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried  
15 and the jury has rendered its verdict.
- 16  Decision by the Court. This action came under consideration before the Court. The issues have  
17 been considered and a decision has been rendered.

18 IT IS ORDERED AND ADJUDGED Plaintiff's motion for partial summary judgment on the  
19 state law claims should be denied, and the claims should be dismissed pursuant to § 1367(c)(1).

20 Date: \_\_\_\_\_

Bruce Rifkin  
Clerk of Court

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23 (by) Deputy Clerk \_\_\_\_\_  
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