IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BRIAN STUBBS,

Plaintiff,

Civil No. 04-6029-AA
OPINION AND ORDER

v.

NEIL GOLDSCHMIDT, in his individual capacity; GERI RICHMOND, in her individual capacity; DONALD BLAIR, in his individual capacity; KIRBY DYESS, in his individual capacity; TIMOTHY NESBITT, in his individual capacity; GRETCHEN SCHUETTE, in her individual capacity; HOWARD SOHN, in his individual capacity; JOHN VON SCHLEGELL, in his individual capacity; BRIDGET BURNS, in her individual capacity; HENRY LORENZEN, in his individual capacity; RACHEL PILLIOD, in her individual capacity; RICHARD JARVIS, in his individual capacity; and DAVID FROHNMAYER, in his individual capacity,

Defendants.

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AIKEN, Judge:

Plaintiff brings this action against the defendants seeking declaratory and injunctive relief for violation of state statutes, Or. Rev. Stat. § 166.170 and Or. Rev. Stat. § 166.370, both regulating firearm possession; and violation of substantive due process rights pursuant to 42 U.S.C. § 1983. Pursuant to Fed. R. Civ. P. 12(b)(6), defendants move for dismissal of plaintiff's claims. On June 14, 2004, the court heard oral argument on this motion. Defendants' motion is granted and this case is dismissed.

Defendants argued that plaintiff lacks standing, and that this court lacks federal jurisdiction over plaintiff's claims. I agree and find that this court lacks jurisdiction under either Article III of the United States Constitution or the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.

Facts

Plaintiff is a graduate student at the University of Oregon, where he is also employed as a Graduate Teaching Fellow. He possesses a valid Concealed Handgun License ("CHL") pursuant to Oregon law that allows him to carry a concealed firearm. Defendants are state officials sued in their individual capacities, and members of the State Board of Higher Education who establish policies which are then enforced by the Oregon University System ("OUS"). Defendants Jarvis, Chancellor of the OUS, and Frohnmayer, President of the University of Oregon, implement those OUS policies. One of the policies, OAR 580-022-0045(3), prohibits the possession of firearms by all persons on any OUS facility. Plaintiff alleges that pursuant to state law defendants may not regulate firearms on Oregon university campuses. Or. Rev. Stat. § 166.170 bars local cities, counties, and districts from regulating firearms except as expressly authorized by state statute. Or. Rev. Stat. § 166.370 exempts holders of valid CHL's from ordinances or rules that regulate, or prohibit possession of firearms in public buildings. Plaintiff contends that defendants' regulation prohibiting concealed weapons amounts to a violation of these state statutes, and that as a CHL holder, he is entitled to carry a concealed weapon on the University of Oregon campus.

Specifically, plaintiff's complaint alleges that "Defendants have stated that [the OUS] prohibition applies to any firearm carried by Plaintiff... and have indicated that they intend to enforce OAR 580-022-0045(3) against Plaintiff, should he attempt to carry his firearm on the University of Oregon campus or in OUS buildings." Plaintiff explains that he requested clarification from the defendants as to whether they would enforce OAR 580-022-0045(3) against him if he were to carry his weapon on campus. Defendants replied by letter, and informed plaintiff that they would indeed enforce the policy, which includes academic sanctions. Defendants stated that their firearm prohibition applies to any firearm carried by plaintiff, and indicated that they intend to enforce the policy if he attempts to carry his firearm on the University of Oregon campus. Plaintiff has since complied with defendants' policy.

Plaintiff's first claim for relief alleges that defendants' policy prohibiting guns on campus amounts to a violation of Or. Rev. Stat. § 166.170 and Or. Rev. Stat. § 166.370. Plaintiff's claim seeks an injunction barring defendants from imposing sanctions on CHL holders who possess their firearms on OUS property, and a declaration stating that CHL holders have the right to carry firearms on OUS property.

Plaintiff's second claim for relief, under 42 U.S.C. § 1983, alleges that defendants deprived him of a substantive due process right protected by the Due Process Clause of the Fourteenth Amendment. Plaintiff argues that he has a substantive due process right to lawful possession of his concealed weapon under a "state-created, federally-protected liberty interest," under traditionally recognized due process rights, and under an "admittedly more novel" right to self-defense. The second claim seeks injunctive relief and attorney fees under 42 U.S.C. § 1988.

Defendants argue that plaintiff lacks standing to bring the complaint, that the Eleventh Amendment bars plaintiff's first claim for relief, and that plaintiff's second claim for relief fails to state a substantive due process claim.

Standard

A motion to dismiss under Rule 12(b)(6) tests whether the plaintiff has properly stated a claim, not whether the plaintiff will prevail on the merits. Fed. R. Civ. P. 12(b)(6); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), *overruled on other grounds*, Davis v. Scherer, 468 U.S. 183

(1984). The motion will be granted if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 248 (9th Cir. 1997) (*quoting*, Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

Review is normally limited to the contents of the complaint. Gilligan, 108 F.3d at 248 (*citing*, Allarcom Pay Television Ltd. v. General Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995)). However, under Fed. R. Civ. P. 8(a)(2), the Federal Rules only require that a complaint include a short and plain statement of the claim showing that the pleader is entitled to relief. The complaint must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley, 355 U.S. at 47. Under Fed. R. Civ. P. 8(f), all pleadings should be construed so as to do substantial justice. Id. at 48. All allegations of material fact are taken as true and viewed in the light most favorable to the non-moving party. Gilligan, 108 F.3d at 248 (*citing*, Smith v. Jackson, 84 F.3d 1213, 1217 (9th Cir. 1996)). However, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss. Pareto v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998) (citation omitted).

Discussion

As a preliminary matter, defendants argue that plaintiff lacks standing on his federal claim under 42 U.S.C. § 1983.[1] I agree. To state a claim for relief under 42 U.S.C. § 1983, a plaintiff must establish that he was deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of law. American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49-50 (1999). Section 1983 does not create any substantive rights, but merely provides relief against those who, acting under color of state law, violate federal rights created elsewhere. Barry v. Fowler, 902 F.2d 770, 773 (9th Cir. 1990) (*citing*, Baker v. McCollan, 443 U.S. 137, 140 (1979)). The Article III standing requirement of an actual case or controversy remains under § 1983. O'Shea v. Littleton, 414 U.S. 488, 495 n. 2 (1974), *vacated*, Spomer v. Littleton, 414 U.S. 514 (1974). Before the court can reach the merits of plaintiff's claims, it must first address the "threshold jurisdictional question" of whether

[1] Plaintiff's state law claim depends upon pendent jurisdiction arising under the federal claim.

plaintiff has standing to sue. Steel Co. v. Citizen for a Better Env't, 523 U.S. 83, 102 (1998).

The Article III standing requirement gives federal courts jurisdiction over actual "cases and controversies." See Steel Co., 523 U.S. at 102. Requiring standing ensures that the domain of the courts is limited to justiciable cases, and effectuates the Constitution's separation of powers function by preventing the courts from engaging in activities more appropriately performed by legislatures or executives. Id. "This court can have no right to pronounce an abstract opinion upon the constitutionality of a State law. Such law must be brought into actual or threatened operation upon rights properly falling under judicial cognizance, or a remedy is not had here." Southern Pacific Transporation Co. v. Redden, 458 F. Supp. 593, 602 (D.Or. 1978), *aff'd*, Southern Pacific Transporation Co. v. Brown, 651 F.2d 613 (9th Cir. 1980) (internal quotation omitted). This case presents a challenge to an administrative OUS rule, not a state law; however, administrative rule challenges are subject to the same standing requirements as any other case. See Sierra Club v. Morton, 405 U.S. 727, 733 (1972).

Two components, constitutional and prudential, comprise the broader standing inquiry. The constitutional component is a jurisdictional requirement rooted in Article III, whereas the prudential component focuses on whether the record is adequate to ensure effective review.[2] City of Auburn v. Qwest Corp. 260 F.3d 1160, 1171 (9th Cir. 2001).

I. Constitutional Component

The "irreducible constitutional minimum" for standing under Article III of the United States Constitution requires three elements:

> (1) that the plaintiff have suffered an "injury in fact" – an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of – the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the

[2] The standing issue in this case could also be a ripeness problem, another justiciability element within the Article III case or controversy requirement. Because defendants' motion to dismiss only mentions the ripeness problem in a footnote, and emphasizes that the "doctrine that requires a litigant to have 'standing' to invoke the power of a federal court is perhaps the most important," Allen v. Wright, 468 U.S. 737, 750 (1984), the court merges the ripeness problem into the standing inquiry. See Thomas v. Anchorage Equal Rights Commission, 220 F.3d 1134, 1138-39 (9th Cir. 2000) (merging standing and ripeness inquiries).

injury will be redressed by a favorable decision.

Bennett v. Spear, 520 U.S. 154, 167 (1997) (*citing*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992)). Plaintiff bears the burden of establishing each of the three elements of standing. Bras v. California Public Utilities Comm'n, 59 F.3d 869, 872 (9th Cir. 1995). "[The standing elements] are not mere pleading requirements but rather an indispensable part of the plaintiff's case." Lujan, 504 U.S. at 561. When seeking injunctive relief, plaintiff bears a heightened burden. See O'Shea, 414 U.S. at 502 n.5 ("in suits brought under 42 U.S.C. § 1983 we have withheld relief in equity even when recognizing that comparable facts would create a cause of action for damages") (internal quotation marks omitted). In these circumstances, the issuance of equitable relief requires the plaintiff to plead: the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law. Id. at 502.

A. Injury in fact

The first standing element, "injury in fact," requires plaintiff to show not only that the statute is unconstitutionally invalid, but that "he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement." Poe v. Ullman, 367 U.S. 497, 505 (1961) (internal quotation omitted). "This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." Allen v. Wright, 468 U.S. 737, 754 (1984). The Supreme Court defines "injury in fact" to be an invasion of a legally protected interest which is a) concrete and particularized, and b) actual or imminent, not conjectural or hypothetical. Lujan, 504 U.S. at 560 (quotations and citations omitted). By "particularized," the direct injury must "affect the plaintiff in a personal and individual way." Id. at 561 n.1. If plaintiff has yet to sustain an actual injury, he must allege "a genuine threat of imminent prosecution." See Table Bluff Reservation v. Philip Morris, Inc., 256 F.3d 879, 882 (9th Cir. 2001).

1. Actual Enforcement

"[T]he mere existence of a statute, which may or may not ever be applied to plaintiffs, is

not sufficient to create a case or controversy within the meaning of Article III."[3] San Diego County Gun Rights Committee v. Reno, 98 F.3d 1124, 1126 (9th Cir. 1996) (internal quotation omitted). The court may not entertain a claim by any citizen who does no more than assert that certain law enforcement practices are unconstitutional. See Lyons, 461 U.S. at 111. For example, in Thomas the plaintiffs argued that they were injured because in order to remain true to their religious beliefs they had to violate the challenged regulation. 220 F.3d at 1138-39. The court described this "somewhat circular argument" as essentially another way of saying that the mere existence of a statute can create a constitutionally sufficient direct injury, "a position that we have rejected before and decline to adopt now." Id. at 1139.

Similarly, the plaintiff here contends that he has standing based upon injury from the mere existence of defendants' policy. Plaintiff argues that defendants' enforcement of the OUS gun policy has already occurred by prohibiting him from utilizing his CHL on their campus. His alleged harm is the deprivation of his right to a "liberty interest in carrying a weapon pursuant to state law." Plaintiff inquired to defendants whether the OUS gun policy applies to him, and defendants responded that they intended to enforce the policy *if* he violates it.[4] From this, plaintiff alleges that, "***These*** Defendants told ***this*** Plaintiff by direct letter that he was not allowed to carry his weapon even if he had a valid CHL (emphasis original)." Even if defendants' particularized their policy as applying to plaintiff in the letter, the alleged injury, prohibition of plaintiff's weapon, is merely what the OUS gun policy itself requires and has not actually been

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[3] An exception exists, where the very promulgation of a law may itself affect a party enough to confer standing, when a substantive regulation requires the plaintiff to adjust his conduct immediately as a practical matter. Lujan v. National Wildlife Federation, 497 U.S. 871, 891 (1990). The Ninth Circuit, however, has indicated that under this exception the requirement that an immediate credible threat of enforcement still remains. See City of Auburn v. Qwest Corp., 260 F.3d at 1172.

[4] The defendants' letter is not properly before the court. The liberal reading accorded complaints on 12(b)(6) motions is usually subject to the requirement that the facts demonstrating standing must be clearly alleged in the complaint. Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). However, "while a court must generally refrain from considering extrinsic evidence in deciding a 12(b)(6) motion, it may consider documents on which the complaint necessarily relies and whose authenticity... is not contested." Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1141 n.5 (9th Cir. 2003). Here, defendants do not contest the authenticity of the letter, and consideration of the extrinsic evidence is necessary to decide whether plaintiff has alleged injury in fact sufficient to confer standing. See id. Therefore, this court considers the defendants' letter for the purpose of this 12(b)(6) motion.

enforced by defendants. No threat to plaintiff's rights appear beyond that implied by the existence of the regulation itself. See Rincon Band of Mission Indians v. County of San Diego, 495 F.2d 1, 5 (9th Cir. 1974). Plaintiff's argument that enforcement has already occurred is essentially another way of saying that the mere existence of the OUS policy creates a constitutionally sufficient direct injury, the injury being the prohibition against carrying a firearm; a position that this court rejects.

As in Thomas, plaintiff's alleged injury of a deprived right is actually caused by his voluntary compliance with the challenged regulation. Plaintiff chooses not to carry a weapon on campus due to his fear of enforcement of the OUS policy. Plaintiff would assert "his intention to exercise his CHL rights ***but for*** the actions of Defendants" in notifying him by letter that the OUS policy applies to him (emphasis original). Through this statement, plaintiff reveals that his own apprehension of the academic sanctions that the OUS gun policy could impose prevents him from carrying a weapon; not that any actual enforcement has already occurred. As is, plaintiff's voluntary compliance with the OUS gun policy causes his own alleged injury. Just as the Ninth Circuit found in Thomas, plaintiff's argument of actual enforcement amounts to a complaint about the mere existence of the challenged regulation.

Moreover, plaintiff belies his argument that enforcement has already occurred at various points in his complaint and response. Such contradictions occur when plaintiff claims: he "fears that the Defendants *will enforce* their policy;" defendants "have indicated that they *intend to enforce* OAR 580-022-0045(3);" and that "Defendants *have threatened* to enforce" the OUS policy against plaintiff (emphasis added). These statements indicate future contingent enforcement, and that enforcement has not occurred thus far. Plaintiff's claims amount to a pre-enforcement, not post-enforcement, challenge.

Equally telling, plaintiff argues that he has no duty to subject himself to academic sanctions in order to assert standing, without citing any authority to support this position. Plaintiff contends that defendants can not make him "risk his entire academic and professional future on a game of "chicken" to determine whether the Defendants were in fact serious about enforcing their unlawful rule against ***this*** Plaintiff (emphasis original)." First, plaintiff again

indicates that enforcement has not already occurred by questioning the seriousness of defendants' intent to enforce the OUS rule against him. Second, under Article III's fundamental case or controversy requirement, in a game of "chicken," plaintiff would most decidedly lose. When plaintiff argues that he should not be required to undergo prosecution as the sole means of seeking relief, he must show a "genuine threat of imminent prosecution" to assert standing on this basis. San Diego County Gun Rights Committee, 98 F.3d at 1126.

2. Threat of prosecution

In the pre-enforcement facial challenge or declaratory judgment context, under a credible threat of prosecution, a plaintiff must demonstrate that the allegedly unconstitutional law is about to be enforced against him. Stoianoff v. Montana, 695 F.2d 1214, 1223 (9th Cir. 1983) (citations omitted). In evaluating the genuineness of a claimed threat of prosecution, courts consider: 1) whether the plaintiff articulated a 'concrete plan' to violate the law in question, 2) whether the prosecuting authorities communicated a specific warning or threat to initiate proceedings, and 3) the history of past prosecution or enforcement under the challenged statute. Thomas, 220 F.3d at 1139 (*citing*, Stoianoff, 695 F.2d at 1126-27). The court applies this three-factor test when the gravamen of the suit is injury from threatened prosecution. National Audubon Society, Inc. v. Davis, 307 F.3d 835, 854 (9th Cir. 2002).

At times plaintiff argues that his claim is not a pre-enforcement challenge. Plaintiff contradicts this argument at other times, when he argues that there was imminent enforcement of the OUS policy. He also uses threat of prosecution language by asserting that defendants "have threatened to enforce" the OUS policy against plaintiff. Plaintiff claims injury from threatened prosecution when he alleges that he "stands in fear of the impacts on his employment and academic career of Defendants' threatened enforcement of the rule." By alleging potential injury from deprivation of rights to employment and education, plaintiff alleges that the gravamen of the suit, in part, is injury from threatened prosecution. Thus, I will apply the three-factor threat of prosecution test from Thomas.

2. i. Concrete Plan

A general intent to violate a statute at some unknown date in the future is not an articulated concrete plan. Thomas, 220 F.3d at 1139. In Thomas, the court dismissed so-called "some day" intentions as insufficient when the plaintiffs pledged their intent to violate the law in the future, but did not "specify when, to whom, where, or under what circumstances." Id. at 1139-40. In the present case, plaintiff alleges that his "intent" in the complaint refers not to a "some day" desire to violate the OUS policy, "but rather his intention to exercise his CHL rights ***but for*** the actions of Defendants (emphasis original)." Here, plaintiff all but abandons any intent to violate the OUS policy in the future, in apprehension of defendants' actual enforcement of the policy. But even if plaintiff were to allege future intent, the complaint does not specify any particular time or date on which plaintiff intends to violate the OUS policy. Plaintiff argues that the federal notice pleading standard does not require him to state in the complaint that he will violate the OUS policy on a specific date. However, to establish standing under a threat of prosecution, a concrete intent is required. "Such 'some day' intentions – without any description of concrete plans, or indeed even any specification of *when* the some day will be – do not support a finding of the 'actual or imminent' injury" that caselaw requires. Lujan, 504 U.S. at 564 (emphasis in original). Thus, plaintiff lacks a sufficiently concrete plan to violate the OUS policy to support a claimed threat of prosecution.

2. ii. Specific warning

The threat of prosecution must be real and immediate to confer standing. Southern Pacific Transporation Co., 458 F. Supp. at 599. A specific warning of an intent to prosecute under a criminal statute may suffice to show imminent injury and confer standing, whereas a general threat of prosecution is not enough. San Diego County Gun Rights Committee, 98 F.3d at 1127.

For example, a letter clarifying the scope of a regulation's applicability was held to be a general threat insufficient to confer standing. In Rincon Band of Mission Indians v. County of San Diego, after the Sheriff's Department informed members of the Rincon Band that a county

gambling prohibition would be enforced against them, the Band requested a written statement of the gambling ordinance's applicability on the Reservation. 495 F.2d at 4. In response, the Sheriff replied that the county ordinance will be enforced within their jurisdiction. Id. The court dismissed the complaint based partly upon the lack of immediacy and reality of the general threat of enforcement from the Sheriff.[5] Id. at 6. "The lack of immediacy of the threat described by these allegations might alone raise serious questions of non-justiciability of appellants' claims." Id. at 5 (*quoting*, Poe, 367 U.S. at 501). The court considered the threats in the case to be closer to a "general threat by officials to enforce those laws which they are charged to administer," then to a specific threat of punishment against a named organization for a completed act that made other specific warning cases justiciable. Id. (*quoting*, United Public Workers v. Mitchell, 330 U.S. at 88).

The present case is distinguishable from cases where courts found specific threats of intent to prosecute in that defendants' did not threaten to prosecute plaintiff for a completed act. Plaintiff never alleges that he attempted to, or in fact did, violate the OUS gun prohibition. He merely alleges that the defendants' letter, stating that the OUS policy applies to him, prevented him from choosing to violate the policy. Like the plaintiffs in Rincon, plaintiff here requested clarification by letter from the defendants as to whether they would enforce their regulation against him. Even though the clarification letter is particular to the plaintiff in this case, just as the Rincon court found the letter to be a general threat of the gambling ordinance's applicability, this court so too finds defendants' clarification letter to be a general threat insufficient to establish an imminent threat of prosecution. Defendants' letter informing plaintiff that they intend to enforce the OUS policy *if* plaintiff violates it, exhibits a lack of requisite immediacy raising serious questions of non-justiciability. Analogous to Rincon, defendants' letter is closer to a

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[5] The Rincon court also based their dismissal upon the absence of any arrests for violating the ordinance, or a lack of history of past enforcement, and distinguishes other inapposite cases by noting that the plaintiffs did not allege interference with fundamental rights. 495 F.2d at 6. This court addresses the significance of the history of past enforcement below. While, unlike the Rincon case, the present plaintiff does allege interference with his constitutional rights. However, this distinction is insignificant because cases since have all emphasized that the threat of prosecution must be real and immediate. See Southern Pacific Transportation Co. v. Redden, 458 F. Supp. at 599.

general threat by officials to enforce the OUS policies which they are charged to administer, than to a specific threat of punishment directed towards plaintiff for a completed act.

2. iii. History of past enforcement

A plaintiff's inability to point to any history of prosecutions under a challenged statute undercuts their argument that they face a genuine threat of prosecution. San Diego County Gun Rights Committee, 98 F.3d at 1128. If a challenged statute has been enforced against persons in circumstances similar to those of plaintiff, this fact lends credibility to the plaintiff's fear of prosecution. Southern Pacific Transportation Co., 458 F. Supp. at 599. Here, where the record of past enforcement is absent, and would involve civil not criminal prosecution, the past prosecution factor is neutral at most. See Thomas, 220 F.3d at 1141. The "Supreme Court and Ninth Circuit have repeatedly found a lack of standing where the litigant's claim relies upon a chain of speculative contingencies, particularly a chain that includes the violation of an unchallenged law." Eggar v. Livingston, 40 F.3d 312, 316 (9th Cir. 1994), *cert. denied*, 515 U.S. 1136 (1995) (internal quotation marks omitted).

3. Speculation and conjecture

When the threat of enforcement is based on a future violation which may never occur, it is speculative, and therefore lacks imminence. Thomas, 220 F.3d at 1140. The imminence requirement demands an injury that is "*certainly* impending" to ensure that the alleged injury is not too speculative for Article III purposes. Lujan, 504 U.S. at 564 n.2 (citation omitted, emphasis in original). "[The imminence requirement] has been stretched beyond the breaking point, when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control." Id. Here, plaintiff's alleged injury is based upon a speculative future violation of the OUS policy, an act entirely within his own control, and is therefore *not* impending.

Moreover, plaintiff cites no case law nor provides the court with any affirmative support to defend his claim of injury, despite the Supreme Court's requirement that the person seeking to invoke federal court jurisdiction must establish standing to sue. Whitmore v. Arkansas, 495 U.S.

149, 154 (1990). Plaintiff also fails to plead a "likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law," as required when requesting injunctive relief. See O'Shea, 414 U.S. at 502. Plaintiff merely claims that he is "not complaining about the 'mere existence' of OAR 580-022-0045(3), or the 'generalized threat of prosecution' under the rule, but the enforcement of the rule toward him by Defendants," without citing authority for his assertions. As discussed above, plaintiff's argument that defendants' rule has already been enforced against him amounts only to a complaint about the mere existence of the rule. Plaintiff fails to establish actual injury in fact. Meanwhile, plaintiff fails to meet standards for an imminent threat of prosecution because: 1) he lacks a concrete plan to violate the OUS policy; 2) defendants' letter amounted to a general threat; and 3) plaintiff fails to allege a history of past enforcement in the pleadings. Therefore, plaintiff fails to meet the injury in fact test because his intent is not concrete, nor is his injury actual or imminent.

B. Redressability

The third prong of the "irreducible constitutional minimum" for standing requires plaintiff to establish the likelihood that his injury will be redressed by a favorable decision. Lujan, 504 U.S. at 560-61. The prospect of obtaining relief from the injury as a result of a favorable ruling cannot be too speculative. Bras, 59 F.3d at 872 (*citing*, Lujan, 504 U.S. at 559). Plaintiff fails to demonstrate the required redressability.

Defendants contend that because plaintiff is suing defendants in their individual capacities, any judgment would bind only those individuals as individuals. This is problematic when the court can not bind the respective offices of the defendants, who are not parties in this action, nor prevent action by any other officials or the institutions they represent. The Supreme Court found a similar problem in Lujan, by finding that "[t]he most obvious problem in the present case is redressability." Lujan. 504 U.S. at 568. There, the agencies responsible for the challenged policy were not parties to the case when it was filed, and the District court could only bind a decision against an individual official in a different agency. Id. The Court reasoned that the District court's resolution would not bind the agencies, and there was no reason the agencies

should be obliged to honor an incidental legal determination that a lawsuit would produce. Id. at 569.

Here, plaintiff responds that any decision against defendants will serve to collaterally estop their "successors in interest" from enacting a similar rule. Collateral estoppel, however, prevents relitigation of issues, and does not guarantee certain promulgation or interpretation of agency rules by those found to be in "privity" in the absence of a future suit. Moreover, as defendants persuasively argue, in the preclusion doctrine context, "privity" does not necessarily exist among officials when the defendants sued in the first action were sued in their individual capacities. See Beard v. O'Neal, 728 F.2d 894, 897 (7th Cir. 1984), *cert. denied*, 469 U.S. 825 (1984) (no basis for holding that government agents are in privity with each other when sued in their individual capacities). Further, "[p]rivity does not exist... between the government and an officer sued solely in his individual capacity." Sterling v. United States., 85 F.3d 1225, 1230 n.1 (7th Cir. 1996); See also Headley v. Bacon, 828 F.2d 1272, 1280 (8th Cir. 1987) (defendants in their individual capacity were not in privity with the defendant city in a prior case). Therefore, because the agencies responsible for the challenged OUS policy and its future employees may not be in privity with the present defendants sued in their individual capacities, defendants' replacements would not be bound by collateral estoppel.

Plaintiff cites no support for his theory that collateral estoppel will serve to redress his alleged injury other than two cases; one contradictory and the other unrelated. In the absence of affirmative support from plaintiff, defendants sued in their individual capacities cannot bind their replacements or the OUS institution to prevent a particular action. Even if the court granted plaintiff's prayer for injunctive relief, a future third party not before the court could reverse the court's action. Therefore, redressability would be speculative and a favorable result to plaintiff from this court would not necessarily correct his alleged injury.

II. Prudential Standing Component

In addition to the requirements of Article III, the court also adheres to a set of prudential principles that bear on the question of standing. Bennett, 520 U.S. at 162 (internal quotation

omitted). These principles are "judicially self-imposed limits on the exercise of federal jurisdiction." Id. (*quoting*, Allen, 468 U.S. at 751). The two-pronged prudential inquiry requires consideration of the fitness of the issues for judicial decision, and the hardship to the parties in withholding court consideration. Thomas, 220 F.3d at 1141 (internal quotation omitted). Both of these factors justify withholding adjudication of the constitutional issue raised by plaintiff. See Poe, 367 U.S. at 509.

Regarding the fitness of plaintiff's claims for judicial review, this prudential consideration supports dismissal. The court should not be called upon "to decide abstract questions of wide public significance" when other government institutions may be more competent to address the question and judicial intervention may be unnecessary to protect the individual's rights. Warth v. Seldin, 422 U.S. 490, 500 (1975). First, plaintiff's claims are abstract in that he establishes no personal injury in fact and his claims amount to a general complaint about the mere existence of the OUS policy. Second, gun control at schools is an issue of wide public significance and interest. Third, both the legislative and executive branches of the government may afford plaintiff more definite redressability that would actually serve to bind defendants' successors. Moreover, the state government may be decidedly more suitable to address plaintiff's claims, specifically since his first claim involves state law exclusively and his second claim relies upon a supposed "*state*-created federally-protected liberty interest in possessing a concealed weapon pursuant to *Oregon* statutes (emphasis added)." Fourth, plaintiff's claims may be unfit for judicial review because he has not actually violated OUS' gun policy, and has never explored other administrative remedies. Plaintiff can appeal the OUS policy under the Oregon Administrative Procedures Act, or bring his claims to state court. There are state administrative remedies. Thus, federal judicial intervention may be unnecessary to protect the plaintiff's asserted rights.

Another prudential consideration supporting dismissal of plaintiff's claims is the lack of hardship to plaintiff if the court withholds judicial scrutiny. To favor plaintiff, postponing review must impose an "immediate" hardship on the complaining party. City of Auburn v.

Qwest Corp., 260 F.3d at 1173 (citation omitted). As in Thomas, this plaintiff has not persuaded the court that any hardship will result from deferring resolution of his issue until a time when a real case or controversy arises. 220 F.3d at 1142. "The absence of any real or imminent threat of enforcement, particularly criminal enforcement, seriously undermines any claim of hardship." Id. As discussed above, plaintiff has not established any credible threat of enforcement, which if he did, would merely impose academic sanctions and not criminal punishment. Moreover, any claim of hardship on plaintiff's behalf would be undermined by the fact that he subjects himself to this hardship by his voluntary compliance with the OUS gun policy. Plaintiff will have the opportunity to raise his objection to the OUS policy if and when the agency initiates an enforcement action against him. See San Diego County Gun Rights Committee, 98 F.3d at 1133.

In sum, plaintiff fails to establish prudential standing considerations, in addition to failing to meet the constitutional minimum of Article III standing requirements. Plaintiff's claims are dismissed for failure to present a justiciable "case or controversy," therefore the court need not discuss defendants' remaining grounds for dismissal. Defendants concede that interpretation of the state's firearm preemption statute is "inevitable." However, because there is no federal case or controversy, this question must be addressed in a different forum.

Conclusion

For the reasons set forth above, defendants' Motion to Dismiss (doc. 9) is granted, and plaintiff's Complaint is dismissed,[6] with prejudice.[7]

IT IS SO ORDERED.

Dated this 29 day of June 2004.

/s/ Ann Aiken
Ann Aiken
United States District Judge

[6] Because plaintiff is not the "prevailing" party under this motion, the court denies his request for attorney's fees under 42 U.S.C. § 1988 for his second claim of relief, and denies attorney's fees for his first claim of relief dependent upon the second claim.

[7] The court dismisses the complaint with prejudice because amendment is futile. Plaintiff previously amended his complaint from the only measure that could cure the redressability problem of the current complaint; naming the state agencies as defendants. See Schmier v. U.S. Court of Appeals, 279 F.3d 817, 824 (9th Cir. 2002) (outlines five factors used to assess the propriety of a dismissal without leave to amend).