

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

Kenneth Alvarez, an Individual Provider in
Washington,

Plaintiff,

v.

GOVERNOR JAY INSLEE, in His Official
Capacity as Governor of the State of Washington;
KEVIN W. QUIGLEY in His Official Capacity as
Director of the Washington Department of Social
and Health Services (“DSHS”), SERVICE
EMPLOYEES INTERNATIONAL UNION
HEALTHCARE 775NW (“SEIU 775”), a labor
organization; SEIU Healthcare NW Training
Partnership (“Partnership”),

Defendants.

NO. 3:16-cv-05111-RJB

PLAINTIFF’S SURREPLY

INTRODUCTION

Pursuant to Local Rules W.D. Wash. LCR 7(g), Plaintiff respectfully requests that the Court strike the Partnership's argument that *Eldredge v. Carpenters 46 N. Cal. Ctys. Joint Apprenticeship & Training Comm.*, 440 F. Supp. 506 (N.D. Cal. 1977) ("1977 *Eldredge*") is not good law, or that Plaintiff misled the court. Plaintiff also respectfully requests that this Court strike the Partnership's claim that no evidence exists that it would circumvent this court's possible ruling.

ARGUMENT

A party may file a surreply to request that the court strike material contained in or attached to the moving party's reply. CR 7(g); *Sheet Metal Workers Intern. Assn', Local 66 v. Northshore Sheet Metal, Inc.*, No. CV12-01903-RSL 2013 WL 1412931 at * 1 (W.D. Wash. Apr. 8, 2014). A court may strike matter that is an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. FRCP 12(f). "Immaterial matter is 'that which has no essential or important relationship to the claim for relief or the defenses being pleaded.'" *Ramirez v. Ghillotti Bros. Inc.*, 941 F. Supp.2d 1197, 1204-05 (N.D. Cal. 2013) (quoting *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir.1993), *rev'd on other grounds*, 510 U.S. 517 (1994)). An impertinent matter does not pertain, and is not necessary, to the issues in question. *Id.*

The Court should strike as impertinent and immaterial the Partnership's contention that the 1977 *Eldredge* is bad law, or that Plaintiff failed to properly cite its subsequent history. *See* Dkt. # 22 at p. 5, ln. 14-17. The Partnership misstates the current status of the 1977 *Eldredge* case and Plaintiff's citation.¹ The Ninth Circuit has subsequently affirmed the rule and principles of the

¹ The Partnership also misstates the holding of *Eldredge v. Carpenters 46 N. Cal. Ctys. Joint Apprenticeship & Training Comm.*, 662 F.2d 534 (9th Cir. 1981). In the Ninth Circuit *Eldredge*, the court reversed the district court on narrow, factual grounds because the training entity had sufficient control to effectuate complete relief. *See Eldredge*, 662 F.2d at 537-38 ("we conclude that relief on plaintiffs' claims against JATC as an entity could be afforded by an injunction against JATC alone. ***Both sides agree that JATC has the power under the trust fund agreement to structure its apprenticeship program in any way it sees fit.*** It is quite possible that a court-ordered restructuring of the program could effectively increase the participation of women in the apprenticeship programs.") (emphasis added).

1 1977 *Eldredge*. In 2005, the Ninth Circuit in *E.E.O.C. v. Peabody Western Coal Co.*, 400 F.3d
2 774, 783 (9th Cir. 2005)—cited extensively and briefed by Plaintiff, *see* Dkt. # 21-1 at pgs. 3-6,
3 8-11—explicitly relied on the reasoning and holding of the 1977 *Eldredge*:

4 Our interpretation of Rule 19 is also consistent with both the purpose and text of
5 the rule. The *Northern District of California* provided a succinct statement of this
6 purpose when it explained that “[b]y definition, parties to be joined under Rule
7 19 are those against whom no relief has formally been sought but who are so
8 situated as a practical matter as to impair either the effectiveness of relief or their
9 own or present parties’ ability to protect their interests.” *Eldredge v. Carpenters
46 Northern California Counties Joint Apprenticeship and Training Committee*,
440 F. Supp. 506, 518 (N.D. Cal.1977). The Nation fits this definition—it is a party
against which relief has not formally been sought but is so situated that
effectiveness of relief for the present parties will be impaired if it is not joined. We
hold that its joinder is feasible. *See* Fed.R.Civ.P. 19(a).

10 *Id.* at 783-84 (emphasis added). Other courts have repeatedly affirmed the proposition for which
11 the 1977 *Eldredge* stood for—i.e., the judicial preference for avoiding ineffective relief and paper
12 decrees by failing to join necessary parties. *See Royal Travel, Inc. v. Shell Management Hawaii,*
13 *Inc.*, No. 08-00314-JMS/LEK 2009 WL 2448495, at *fn. 8 (D. Haw. Aug. 11, 2009); *Quechan*
14 *Indian Tribe of Fort Yuma Indian Reservation v. U.S. Department of Interior*, No. CV07-0677-
15 PHX-JAT 2007 WL 2023487 at *7-8 (D. Ariz. July 7, 2007) (citing *E.E.O.C.*’s discussion of the
16 1977 *Eldredge*).²

17 This Court should also strike the Partnership’s contention that no evidence exists that the
18 Partnership will force meetings with SEIU for all IPs attending state-mandated, state-funded
19 meetings. *See* Dkt. # 22 at pg. 7, ln. 13-18. Such a contention is beyond disingenuous. The
20 Partnership has indicated that it will continue its preferred practices regardless of what the CBA

21 _____
22 Here, the State and the Union do not have the power to structure the IP trainings in a way they see fit, and thus *do not*
23 *have the power to effectuate the complete, practical relief that Mr. Alvarez seeks.* Instead, it is the Partnership that
24 schedules, plans, prepares, operates facilitates and runs the trainings where the contested union meetings occur. *See*
Dkt. # 21-1 at pgs. 2, 3, 15.

² Additionally, Plaintiff was not aware of any overruling in any sense of the 1977 *Eldredge* at the time of filing its
Response. At Plaintiff’s request, Westlaw has reviewed and corrected the KeyCite and case history information for
the 1977 *Eldridge*. *See* Decl. of Stephanie Olson, Ex. A.

requires, or how its provisions are construed. *See* Decl. of Stephanie Olson, Ex. B. For example, the Partnership has stated that “If union access is eliminated as a bargained-for benefit, the Trustees of the Training Partnership will make an independent determination at that time as to whether, and if so, how any such presentations may continue to occur.” Decl. of Stephanie Olson, Ex. B.³ The Partnership has also stated that the terms of the CBA do not impose binding obligations on the Partnership. Dkt. # 22 at pg. 7, fn. 3. Based on its prior assertions, it is disingenuous that the Partnership would claim a lack of evidence.⁴

CONCLUSION

For the foregoing reasons, Plaintiff requests that this Court grant Plaintiff’s requests to strike the aforementioned material in the Partnership’s reply.

Dated: May 4, 2016

By: /s/ Stephanie Olson
Stephanie Olson WSBA #50100
James G. Abernathy WSBA #48801
David M.S. Dewhirst WSBA # 48229
c/o Freedom Foundation
P.O. Box 552
Olympia, WA 98507
Telephone: (360) 956-3482
Fax: (360) 352-1874
Email: solson@myfreedomfoundation.com
JAbernathy@myfreedomfoundation.com
DDewhirst@myfreedomfoundation.com
Attorneys for Plaintiff Alvarez

³ Plaintiff submits the Partnership’s email to show that the Partnership may continue to force IPs to meet with SEIU during state-mandated, state-funded training regardless of the Court’s order, and not for liability purposes, pursuant to ER 408’s “other purpose” exception. *See* ER 408, *Brothers v. Public School Employees of Washington*, 88 Wn. App. 398, 406-07 (1997).

⁴ Plaintiff also respectfully requests that the Court reject the arguments that the Partnership raised for the first time in its Reply. *See* Dkt. # 22 at pgs. 4, 8. “Courts decline to consider arguments that are raised for the first time in reply.” *FT-Travel—New York, LLC v. Your Travel Center, Inc.*, 112 F. Supp.3d 1063, 1079 (C.D. Cal. 2015). For example, for the first time in its Reply, the Partnership argues that it receives certain privileges and is entitled to certain enforcement mechanisms because of its ERISA status. *See* Dkt. # 22 at pgs. 7-9. The Partnership omitted any argument as to how it, as a training entity, qualified as either a welfare or pension plan subject to ERISA, *see* 29 U.S.C. § 1002(1)-(3); how it was not subject to the government plan exemption, *see* 29 U.S.C. § 1002(32), or that it was subject to an entirely separate enforcement mechanism. Further evidence through discovery will be needed to prove its ERISA status. The Partnership’s arguments that it raised for the first time in its Reply should be rejected.

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DECLARATION OF SERVICE

I hereby certify that on May 4, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

- . Eleanor Hamburger ehamburger@sylaw.com, matt@sylaw.com, theresa@sylaw.com
- . Scott A Kronland skronland@altber.com, jperley@altber.com
- . Susan Sackett-Danpullo susand1@atg.wa.gov, loris2@atg.wa.gov, lpdarbitration@atg.wa.gov
- . Richard E Spoonemore rspoonemore@sylaw.com, matt@sylaw.com,
rspoonemore@hotmail.com, theresa@sylaw.com
- . Michael C Subit msubit@frankfreed.com, jfrancisco@frankfreed.com
- . Alicia O Young AliciaO@atg.wa.gov, alib@atg.wa.gov, nicolew@atg.wa.gov,
DianeP1@ATG.wa.gov, stacyo@atg.wa.gov, TorOlyEF@atg.wa.gov

and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants:

- (no manual recipients)

DATED: May 4, 2016, at Olympia, Washington.

/s/ Stephanie Olson
Stephanie Olson

HON. ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

Kenneth Alvarez, an Individual Provider in
Washington,

Plaintiff,

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GOVERNOR JAY INSLEE, in His Official
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KEVIN W. QUIGLEY in His Official Capacity as
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and Health Services ("DSHS"), SERVICE
EMPLOYEES INTERNATIONAL UNION
HEALTHCARE 775NW ("SEIU 775"), a labor
organization; SEIU Healthcare NW Training
Partnership ("Partnership"),

Defendants.

NO. 3:16-cv-05111-RJB

**DECLARATION OF STEPHANIE
OLSON IN SUPPORT OF
PLAINTIFF'S SURREPLY**

I, Stephanie Olson, pursuant to Section 1746 of the Judicial Code, 28 U.S.C. § 1746, certify
and declare as follows:

1. I am over the age of 18 and am competent to testify regarding the following facts of
which I have personal knowledge.
2. I work as Litigation Counsel to the Freedom Foundation, counsel for Plaintiff Alvarez.

DECLARATION OF STEPHANIE OLSON
NO. 3:16-CV-05111-RJB

3. Attached as **Exhibit A** is true and accurate copy of a letter dated May 4, 2016 from Westlaw recognizing and apologizing for their error in failing to provide accurate history and KeyCite information for *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*, 440 F. Supp. 506 (C.D. Cal. 1977).
4. Attached as **Exhibit B** is true and accurate copy of an e-mail communication from the Partnership indicating their intention to make “an independent determination at that time as to whether, and if so, how any such presentations may continue to occur” if union access is eliminated during training. This is submitted for the purposes of showing the SEIU Partnership’s intent to independently decide whether SEIU presentations may continue to occur, and not for any liability purposes.
5. I declare under penalty of perjury that the foregoing is true and correct.

Dated this 4th day of May, 2016 at Olympia, Washington.

By: /s/ Stephanie Olson

Stephanie Olson WSBA #50100

DECLARATION OF SERVICE

I hereby certify that on May 4, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

- . Eleanor Hamburger ehamburger@sylaw.com, matt@sylaw.com, theresa@sylaw.com
- . Scott A Kronland skronland@altber.com, jperley@altber.com
- . Susan Sackett-Danpullo susand1@atg.wa.gov, loris2@atg.wa.gov, lpdarbitration@atg.wa.gov
- . Richard E Spoonemore rspoonemore@sylaw.com, matt@sylaw.com, rspoonemore@hotmail.com, theresa@sylaw.com
- . Michael C Subit msubit@frankfreed.com, jfrancisco@frankfreed.com
- . Alicia O Young AliciaO@atg.wa.gov, alib@atg.wa.gov, nicolew@atg.wa.gov, DianeP1@ATG.wa.gov, stacyo@atg.wa.gov, TorOlyEF@atg.wa.gov

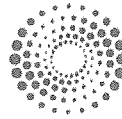
and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants:

- (no manual recipients)

DATED: May 4, 2016, at Olympia, Washington.

/s/ Stephanie Olson
Stephanie Olson

Exhibit A



THOMSON REUTERS

May 4, 2016

Stephanie Olson
Freedom Foundation
2403 Pacific Avenue SE
P.O. Box 552
Olympia, WA 98507-0552

Dear Ms. Olson,

Thank you for contacting Thomson Reuters regarding the KeyCite history for the decision of *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*, 440 F.Supp. 506 (N.D. Cal. 1977) and for the detailed comments that were passed to our editors for review.

Upon reviewing the subsequent 9th Circuit Court of Appeals decision, *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*, 662 F.2d 534 (9th Cir. 1981), our senior editors agreed with the assessment that history should be changed and that a red flag was warranted on the Northern District of California decision. The changed history (reversed and remanded) and red flag displayed on Westlaw on Monday, May 2, at approximately 9:45 a.m. Central time.

We employ stringent quality measures and strive for 100 percent accuracy in analyzing history. With the tens of thousands of decisions reviewed by Thomson Reuters editors each year, mistakes in editorial analysis do occur on extremely rare occasions.

We are sorry for the error.

If you have concerns or comments about any of our KeyCite references, we would appreciate hearing from you. You or any member of your organization should feel free to call me at 651-687-4546.

Sincerely yours,

Robert J. Smits
Manager, Judicial Editorial
Thomson Reuters
robert.smits@thomsonreuters.com

Exhibit B

Wednesday, May 4, 2016 at 3:54:53 PM Pacific Daylight Time

Subject: Alvarez v. State of Washington et al., CONFIDENTIAL PURSUANT TO ER 408

Date: Thursday, April 21, 2016 at 10:02:19 AM Pacific Daylight Time

From: Ele Hamburger

To: Stephanie Olson, James Abernathy

CC: Richard Leigh, Rick Spoonemore

CONFIDENTIAL PURSUANT TO ER 408

Dear Stephanie and James,

Thank you for your call yesterday regarding a potential settlement that would result in voluntary dismissal of the Training Partnership from this litigation. It is my understanding that the Freedom Foundation is willing to voluntarily dismiss the Training Partnership from this case if the Training Partnership would stipulate to (1) be "bound by the decision in the case" and (2) that it is not a "necessary party" pursuant to FRCP 12 (b)(7) (and presumably FRCP 19).

I appreciate the call and our discussion. As I mentioned to you, the Training Partnership is not a necessary party to the adjudication of the constitutionality of various terms under the CBA between the State and SEIU 775. The Training Partnership can easily stipulate to the second provision.

With regard to the first request, it is unclear what the Freedom Foundation intends when it states it would expect the Training Partnership to be "bound by the decision in the case."

As the Complaint is presently drafted, the Training Partnership can stipulate that if the terms of the CBA related to union access are determined to be unconstitutional and are removed by a final judgment by the Court or via settlement, the Training Partnership will no longer administer union access as a "bargained for benefit."

But what I heard from you yesterday is that the Freedom Foundation hopes to obtain relief broader than is currently indicated in the Complaint. I understand from our conversation that the Freedom Foundation seeks a stipulation from the Training Partnership that, should union access be eliminated from the CBA, the Training Partnership would agree to never allow SEIU 775 to make presentations before or after any of its scheduled classes. The Training Partnership will not agree to such a stipulation. If union access is eliminated as a bargained-for benefit, the Trustees of the Training Partnership will make an independent determination at that time as to whether, and if so, how any such presentations may continue to occur.

In short, if the Freedom Foundation seeks a stipulation that if union access is eliminated from the CBA, that the Training Partnership will not administer union access as a CBA benefit, I believe we can reach a stipulated agreement regarding voluntary dismissal. If not, we look forward to seeing your responsive briefing on Monday.

Please let me know if you have any further questions,

Sincerely yours,

Ele

Ele Hamburger
Sirianni Youtz Spoonemore Hamburger
999 Third Avenue, Suite 3650