

Stoll Berne

MEMORANDUM

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TO: Oregon Senate Committee on Conduct

FROM: Steven Berman

DATE: February 23, 2023

RE: Analysis of December 5, 2022 Complaint Filed by Senator Boquist

Senator Brian Boquist has filed a complaint alleging that Senator Floyd Prozanski violated Senate Rule 3.33(1) by failing to disclose a conflict of interest before voting at a Senate Committee on Conduct meeting. As explained below, because there was no actual or potential “conflict of interest,” the allegations that Senator Prozanski violated Senate Rule 3.33(1) cannot be sustained. The complaint does not warrant further action.

BACKGROUND

On July 8, 2019, the Senate Special Committee on Conduct voted to implement safety measures regarding Senator Boquist’s presence at the Capitol. On July 26, 2019, Senator Boquist filed a lawsuit in federal court against Senators Courtney, Manning and Prozanski, and others, alleging that the safety measures violate his state and federal constitutional rights. *Boquist v. Courtney, et al.*, Case No. 6:19-cv-01163-MC. The District Court dismissed the case for failure to allege any viable legal theory. Senator Boquist appealed. The Ninth Circuit Court of Appeals affirmed the trial court’s dismissal of all of Senator Boquist’s legal theories, except one. *Boquist v. Courtney, et al.*, 2022 WL 1184730 (April 21, 2022). The Ninth Circuit held that Senator Boquist could pursue his First Amendment theory against Senators Courtney, Manning and Prozanski. *Boquist v. Courtney, et al.*, 32 F4th 764 (2022). Senator Boquist then filed an amended complaint in the District Court, alleging that the safety measures violate his First Amendment rights. He seeks relief under 42 USC § 1983 and attorneys’ fees under 42 USC § 1988.

On November 28, 2022, the Committee on Conduct voted to rescind the safety measures implemented on July 8, 2019. Senator Prozanski is on the Committee, made the motion to rescind the safety measures and voted aye. He did not announce an actual or potential conflict of interest before voting.

In his complaint before this Committee, Senator Boquist alleges that the pending federal litigation creates an actual or potential conflict of interest for Senator Prozanski. Senator Boquist asserts that if he prevails in his federal litigation, Senator Prozanski could “become personally liable” for “legal expenses” and “damages [that] could exceed several hundred thousand dollars.” Complaint, p. 1. Senator Boquist asserts that Senator Prozanski’s vote to rescind the safety measures could “moot the lawsuit in federal district court.” Senator Boquist asserts this would be a “purely personal gain or loss prevention attempt” by Senator Prozanski, “illegally using his

official position.” Complaint, p. 3. In other words, Senator Boquist alleges that by voting to rescind the safety measures, Senator Prozanski had a conflict of interest, because the vote could benefit Senator Prozanski’s private financial interests in the federal litigation Senator Boquist is pursuing against Senator Prozanski.

THE APPLIABLE RULES AND LAW

Senate Rule 3.33 and ORS 244.020

Senate Rule 3.33(1) requires a Senator “involved in an actual or potential conflict of interest as defined by ORS 244.020” to announce the conflict before voting on the issue giving rise to the conflict. An “actual conflict of interest” means, as relevant here, “any action or any decision or recommendation by a person acting in a capacity as a public official, **the effect of which would be to the private pecuniary benefit or detriment of the person . . .**” ORS 244.020(1) (emphasis added). A “potential conflict of interest” means, as relevant here, “any action or decision or recommendation by a person acting as a public official, **the effect of which could be to the private pecuniary benefit or detriment of the person . . .**” ORS 244.020(13) (emphasis added). In other words, for a conflict situation to arise, the action, decision or recommendation actually or potentially must be “to the private pecuniary benefit or detriment” of the public official. If a public official’s personal financial interests are not implicated, then there is no actual or potential conflict.

Federal Claims Against Public Officials

The Eleventh Amendment to the United States Constitution shields state officers from liability in federal court for their official acts. In *Ex Parte Young*, 209 US 123 (1908), the United States Supreme Court recognized an exception to that rule – state officers (such as legislators) can be enjoined from engaging in official acts that violate the United States Constitution. However, state officials cannot be held personally liable in federal court for monetary damages, including attorneys’ fees, for their official acts. *See, e.g., Buffin v. California*, 23 F4th 951, 956-957 (9th Cir 2022) (discussing applicable law and reaffirming that state actors cannot be personally held financially liable for actions taken in their official capacity). In a lawsuit brought pursuant to 42 USC § 1981, where the plaintiff is seeking injunctive and declaratory relief against a state actor to vindicate the plaintiff’s constitutional rights, if the plaintiff wins, the plaintiff may be able to recover attorneys’ fees under 42 USC § 1988. However, those attorneys’ fees cannot be recovered from the individual state actor. Rather, as the United States Supreme Court has explained, the attorneys’ fees must be paid by the state or the governmental agency under whose authority the individual acts. *Hutto v. Finney*, 437 US 678, 693-694 (1978). In other words, even if a plaintiff (such as Senator Boquist) prevails in their federal court case against a state actor (such as Senator Prozanski), financial liability cannot be imposed on the state actor – whether as damages, attorneys’ fees or costs.

ANALYSIS AND CONCLUSION

Senator Boquist's federal lawsuit against Senator Prozanski and others is brought pursuant to 42 USC § 1983. Senator Boquist seeks to have the safety measures revoked. The lawsuit alleges that Senator Prozanski and others adopted the safety measures in the course of their official duties as state actors, during Committee meetings. Senator Boquist seeks to recover attorneys' fees under 42 USC § 1988.

Based on the established law discussed above, in Senator Boquist's federal lawsuit, Senator Prozanski cannot be held personally liable for damages, costs or attorneys' fees, even if Senator Boquist ultimately wins his case. The outcome of that case does not impact Senator Prozanski's personal financial interests. That means that even if Senator Prozanski's vote at the November 28, 2022 Senate Conduct Committee affects the litigation, there will be no personal financial impact on Senator Prozanski. The vote neither could nor would "be to the private pecuniary benefit or detriment" of Senator Prozanski. Because the vote does not impact Senator Prozanski's personal financial interests, there is no actual or potential conflict of interest. Because there is no actual or potential conflict of interest, there was nothing for Senator Prozanski to announce at the November 28, 2022 Senate Committee on Conduct meeting prior to the vote to rescind the safety measures.