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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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BARBARA J. WEBER, Ph.D.,

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Plaintiff,

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v.

NO: 2:15-CV-225-RMP

ORDER GRANTING MOTION TO
DISMISS AS TO DAVID E. EASH

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DAVID E. EASH, Attorney at Law;
JOHN MUNDING, Trustee of the
Court; PAUL ZAMBON; and
GENERAL SERVICES
ADMINISTRATION,

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Defendants.

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BEFORE THE COURT is Defendant David Eash's Motion to Dismiss, **ECF**

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No. 32. Plaintiff is proceeding *pro se* in prosecuting this action. The Court has

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reviewed the filings, the response memorandum (ECF No. 36), the amended

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response memorandum (ECF No. 38), the reply memorandum (ECF No. 45), and

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the surreply memorandum (ECF No. 50), and is fully informed.

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BACKGROUND

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On January 28, 2015, Plaintiff Dr. Barbara Weber alleges that she had an

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allergic reaction in the Thomas S. Foley United States Courthouse in Spokane,

1 WA. ECF No. 21 at 2. Dr. Weber alleges that she was attending a bankruptcy
2 hearing on the fifth floor when she reacted to something in the environment and
3 was forced to leave the floor. *Id.* Defendant David E. Eash was representing
4 Dr. Weber in the chapter 7 bankruptcy hearing. *Id.* at 4. Dr. Weber alleges that
5 Mr. Eash asked Dr. Weber’s husband about Dr. Weber’s location and was
6 informed that Dr. Weber was downstairs as she had suffered an allergic reaction.
7 *Id.* at 6. Dr. Weber alleges that, upon learning she was on another floor and had
8 had an allergic reaction, Mr. Eash refused to make any accommodation for her
9 disability and made her return to the fifth floor to sign paperwork. *Id.* at 7.

10 The instant lawsuit alleges that Mr. Eash failed to make reasonable
11 accommodations for Dr. Weber’s disability as required by a variety of federal and
12 state statutes. *See id.* at 11. Dr. Weber alleges that Mr. Eash violated (1) Title II of
13 the Americans with Disabilities Act (“ADA”); (2) the Rehabilitation Act; (3) Title
14 III of the ADA; (4) the Architectural Barriers Act (“ABA”)¹; (5) the Washington

16 ¹ Dr. Weber alleges that Mr. Eash violated a statute called the “ABA.” *See* ECF
17 No. 21 at 3. Throughout her second amended complaint, Dr. Weber refers to the
18 American Bar Association Commission on Mental and Physical Disability Law.
19 *See id.* at 3. However, given that the Architectural Barriers Act is a relevant statute
20 that utilizes the acronym “ABA,” the Court will analyze Dr. Weber’s allegations
21 under both theories of liability.

1 Law Against Discrimination (“WLAD”); (6) the Fourteenth Amendment Due
2 Process Clause; and (7) the American Bar Association Commission on Mental and
3 Physical Disability Law. *Id.* at 11.

4 Dr. Weber filed her initial complaint on September 3, 2015. ECF No. 1.

5 Dr. Weber filed an amended complaint on September 8, 2015. ECF No. 4.

6 Dr. Weber then moved the Court for leave to file a second amended complaint on
7 September 23, 2015. ECF No. 8. The Court granted leave to amend on October 14,

8 2015. ECF No. 20. Dr. Weber filed a second amended complaint on October 14,

9 2015. ECF No. 21. Mr. Eash filed his motion to dismiss on October 27, 2015. ECF

10 No. 32. Dr. Weber filed her response memorandum on October 29, 2015, and an

11 amended response memorandum on October 30, 2015. ECF Nos. 36 and 38.

12 Mr. Eash filed his reply memorandum on November 12, 2015. ECF No. 45.

13 Dr. Weber filed her surreply memorandum on November 20, 2015. ECF No. 50.

14 DISCUSSION

15 I. Rule 12(b)(6) Legal Standard

16 The Federal Rules of Civil Procedure allow for the dismissal of a complaint
17 where the plaintiff fails to state a claim upon which relief can be granted. Fed. R.

18 Civ. P. 12(b)(6). A motion to dismiss brought pursuant to this rule “tests the legal

19 sufficiency of a claim.” *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In

20 reviewing the sufficiency of a complaint, a court accepts all well-pleaded

21 allegations as true and construes those allegations in the light most favorable to the

1 non-moving party. *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir.
2 2010).

3 To withstand dismissal, a complaint must contain “enough facts to state a
4 claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S.
5 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual
6 content that allows the court to draw the reasonable inference that the defendant is
7 liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

8 **II. Title II of the Americans with Disabilities Act**

9 Dr. Weber alleges that Mr. Eash violated Title II of the ADA when he failed
10 to make reasonable accommodations for her allergic reaction. ECF No. 21 at 3–4.
11 Dr. Weber cites a number of statutory and Code of Federal Regulations provisions
12 as well as sections of the Title II Technology Assistance Manual. *Id.*

13 Under Title II of the ADA, “no qualified individual with a disability shall,
14 by reason of such disability, be excluded from participation in or be denied the
15 benefits of the services, programs, or activities of a public entity, or be subjected to
16 discrimination by any such entity.” 42 U.S.C. § 12132. The term “public entity”
17 includes “(A) any State or local government; (B) any department, agency, special
18 purpose district, or other instrumentality of a State or States or local government;
19 and (C) the National Railroad Passenger Corporation, and any commuter
20 authority.” 42 U.S.C. § 12131.

1 In her second amended complaint, Dr. Weber admits that Mr. Eash is a
2 private attorney retained by Dr. Weber to represent her in a chapter 7 bankruptcy
3 proceeding. *See* ECF No. 21 at 3–4. As discussed above, Title II of the ADA only
4 applies to “public entit[ies]” which include instrumentalities of State or local
5 governments. *See* 42 U.S.C. § 12131. As a private attorney, Mr. Eash is not a
6 “public entity” as defined by the ADA.

7 Dr. Weber’s arguments to the contrary are unavailing. Dr. Weber alleges
8 that, as an attorney licensed by the State of Washington who serves the public,
9 Mr. Eash must comply with Title II. *See* ECF No. 21 at 2. The mere fact that
10 Mr. Eash is licensed by the State of Washington does not transform Mr. Eash into a
11 “public entity.” *See Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972)
12 (noting that, under 42 U.S.C. § 1983, “[t]he Court has never held . . . that
13 discrimination by an otherwise private entity would be violative of the Equal
14 Protection Clause if the private entity received any sort of benefit or service at all
15 from the State, or if it is subject to state regulation in any degree whatever”).

16 Dr. Weber has failed to show that Mr. Eash is anything more than a private
17 individual, offering his services to the public as an attorney. *See Green v. City of*
18 *New York*, 465 F.3d 65, 76 (2nd Cir. 2006) (affirming dismissal of ADA Title II
19 action as the principal actor in the case was “not a proper defendant because he is
20 an individual, not a public entity”). Serving the public does not automatically make
21 an actor an “instrumentalit[y]” of a State or local government, as required by Title

1 II of the ADA. Although it may be true that “[c]ourts could not be held without
2 lawyers,” ECF No. 38 at 14, the fact that an attorney steps through the courthouse
3 door does not transform that attorney into a “public entity” under Title II.

4 Along similar lines, merely entering the federal courthouse does not subject
5 Mr. Eash to Title II liability. Dr. Weber cites a law review article for the
6 proposition that “once lawyers enter into a Federal Courthouse they must follow all
7 Federal rules.” ECF No. 36 at 2 (citing Judith A. McMorrow, *The (F)utility of*
8 *Rules: Regulating Attorney Conduct in Federal Court Practices*, 58 SMU L. REV.
9 3 (2005)). This article, however, only discusses the applicability of the Federal
10 Rules of Civil Procedure, Criminal Procedure, and Evidence, as well as the
11 Modern Rules of Professional Conduct. *See* McMorrow, *supra*, at 5–6. The article
12 does not advocate for the applicability of otherwise inapplicable statutes such as
13 Title II of the ADA.

14 Dr. Weber also cites “Drew v. Merrill,” which she alleges “involves a
15 physician’s refusal to provide the cost of an interpreter for a female patient’s deaf
16 husband.” ECF No. 38 at 10. Although Dr. Weber did not provide a citation for
17 “Drew,” the Court was able to uncover what it believes to be the correct case. The
18 lawsuit, which settled via consent judgment,² appears to have arisen under Title III
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20 ² The Court found what it believes to be the consent judgment at
21 <http://www.ada.gov/drew.htm>.

1 of the ADA against a private obstetrician. *See* Enforcing the ADA: A Status Report
2 from the Department of Justice, at 5–6, <http://www.ada.gov/octdec99.pdf>. As
3 “Drew” arose under Title III, the case is irrelevant to any discussion of
4 Dr. Weber’s claims under Title II. The Court finds that Mr. Eash is not subject to
5 the restrictions imposed by Title II of the ADA. Therefore, Dr. Weber’s cause of
6 action under Title II of the ADA against Mr. Eash is **dismissed with prejudice** for
7 failure to state a claim upon which relief can be granted.

8 **III. The Rehabilitation Act**

9 The Rehabilitation Act states that “[n]o otherwise qualified individual with a
10 disability . . . shall, solely by reason of his or her disability, be excluded from
11 participation in, be denied the benefits of, or be subjected to discrimination under
12 any program or activity receiving Federal financial assistance or under any
13 program or activity conducted by any Executive agency.” 29 U.S.C. § 794(a). To
14 state a claim under the Rehabilitation Act, Dr. Weber must allege that she was
15 subjected to discrimination under a qualifying “program or activity.” *Id.* The term
16 “program or activity” potentially includes the operations of instrumentalities of
17 State or local governments, educational institutions, and business organizations. 29
18 U.S.C. § 794(b). The definition does not include the actual operations of federal
19 instrumentalities. *See id.*

20 As operations of the federal government, neither the bankruptcy proceeding
21 nor the federal courthouse qualify as a “program or activity.” Further, although

1 “program or activity” could include “an entire corporation, partnership, or other
2 private organization”, *see* 29 U.S.C. § 794(b)(3), such organization must receive
3 federal financial assistance to fall under the Rehabilitation Act. *See* 29 U.S.C.
4 § 794(a). Although Dr. Weber discusses Mr. Eash’s law firm, ECF No. 50 at 6–7,
5 there is no indication or allegation that Mr. Eash’s firm receives federal financial
6 assistance. As such, there is no plausible allegation that Mr. Eash discriminated
7 against Dr. Weber with respect to a qualifying “program or activity.” Dr. Weber’s
8 cause of action against Mr. Eash under the Rehabilitation Act is **dismissed with**
9 **prejudice** for failure to state a claim upon which relief can be granted.

10 **IV. Title III of the Americans with Disabilities Act**

11 Under Title III of the ADA, “[n]o individual shall be discriminated against
12 on the basis of disability in the full and equal enjoyment of the goods, services,
13 facilities, privileges, advantages, or accommodations of any place of public
14 accommodation by any person who owns, leases (or leases to), or operates a place
15 of public accommodation.” 42 U.S.C. § 12182(a). “Public accommodation”
16 includes various private entities, if the operations of such entities affect commerce,
17 including places of lodging, establishments serving food or drink, theaters, places
18 used for public transportation, and places of education. 42 U.S.C. § 12181(7).

19 Dr. Weber’s allegation, as understood by the Court, is that Mr. Eash
20 discriminated against her regarding her use of the federal courthouse. Dr. Weber
21 has failed to state a claim upon which relief can be granted. There is no support for

1 the proposition that a courthouse is a place of public accommodation as the term is
2 defined by the ADA. Unlike the various entities listed in § 12181(7), a courthouse
3 is not a private entity. Further, while Mr. Eash may occasionally work in the
4 courthouse, as a private attorney he does not own, lease, or operate the entity as
5 required by § 12182(a).

6 In her pleadings, Dr. Weber discusses Mr. Eash’s law firm in the context of
7 Title III. ECF No. 50 at 6–7. The Court assumes that Dr. Weber’s discussion of
8 “Drew v. Merrill,” discussed above, is intended to bolster her Title III allegation as
9 “Drew” involved a Title III lawsuit against a private obstetrician. However, as far
10 as the Court can tell, the “Drew” defendant discriminated against the disabled
11 plaintiff at the doctor’s private office, or, in other words, a location owned, leased,
12 or operated by the defendant. *See* Enforcing the ADA: A Status Report from the
13 Department of Justice, at 5–6, <http://www.ada.gov/octdec99.pdf>. The allegations
14 here involve discrimination at the federal courthouse, a location not owned, leased,
15 or operated by Mr. Eash. As such, a Title III claim is unavailable to Dr. Weber.
16 Therefore, Dr. Weber’s cause of action under Title III of the ADA against
17 Mr. Eash is **dismissed with prejudice** for failure to state a claim upon which relief
18 can be granted.

19 V. The Architectural Barriers Act

20 The ABA was designed to “insure whenever possible that physically
21 handicapped persons will have ready access to, and use of, [qualifying] buildings.”

1 42 U.S.C. § 4152. Regardless of whether the federal courthouse may be subject to
2 the ABA, *see* 42 U.S.C. § 4151, the ABA provides for “purely administrative
3 remedies” and does not “provide for a private cause of action.” *Jackson v. Fed.*
4 *Bureau of Prisons*, 06-1347 (MJD/RLE), 2007 WL 843839, at *20 (D. Minn. Mar.
5 16, 2007); *see also* *Fulton v. United States*, 198 F. App’x 210, 216 (3rd Cir. 2006)
6 (noting that the ABA “provid[es] no independent statutory right of
7 action . . . nor . . . an implied right of action”). As the ABA does not authorize a
8 private cause of action, Dr. Weber’s attempted cause of action under the ABA
9 against Mr. Eash is **dismissed with prejudice** for failure to state a claim upon
10 which relief can be granted.

11 VI. Washington Law Against Discrimination

12 The WLAD states that “the right to be free from discrimination because
13 of . . . the presence of any sensory, mental, or physical disability . . . is recognized
14 as and declared to be a civil right.” RCW 49.60.030(1). The WLAD grants “[a]ny
15 person deeming . . . herself injured by any act in violation of this chapter . . . a civil
16 action.” RCW 49.60.010(2). The WLAD makes it “an unfair practice for any
17 person . . . to commit an act which directly or indirectly results in
18 any . . . discrimination . . . in any place of public resort, accommodation,
19 assemblage, or amusement.” RCW 49.60.215(1). In order to make out a prima
20 facie case under RCW 49.60.215, a plaintiff must show that “*the defendant’s*
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1 *business or establishment* is a place of public accommodation.” *Fell v. Spokane*
2 *Transit Auth.*, 128 Wn.2d 618, 637 (1996) (emphasis added).

3 Dr. Weber has failed to state a claim upon which relief can be granted under
4 the WLAD. Even assuming that a courthouse is a place of public accommodation,³
5 the federal courthouse is not Mr. Eash’s “business or establishment.” Mr. Eash, as
6 a private attorney, neither owns nor has any responsibility for the operations of the
7 courthouse. Dr. Weber’s WLAD cause of action against Mr. Eash is therefore
8 **dismissed with prejudice** for failure to state a claim upon which relief can be
9 granted.

10 VII. Fourteenth Amendment

11 Dr. Weber alleges that Mr. Eash violated the Fourteenth Amendment by
12 failing to make reasonable accommodations for her allergic reaction. The
13 Fourteenth Amendment provides that no State shall “deprive any person of life,
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15 ³ The only authority this Court has uncovered has held otherwise. *See Kral v.*
16 *Benton Cty.*, CV-09-5014-RHW, 2009 WL 3856918, at *4 (E.D. Wash. Nov. 10,
17 2009) (noting that the phrase public accommodation is “defined at length in RCW
18 49.60.040(2), which does not include any specific mention of a courthouse or jail”
19 and that “extending RCW 49.60.215 to courthouses and jails would be a significant
20 and wholly unsupported leap from the types of facilities identified in the case law
21 to date”).

1 liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.

2 The right of access to the courts is “protected by the Due Process Clause of the
3 Fourteenth Amendment.” *Tennessee v. Lane*, 541 U.S. 509, 523 (2004). However,
4 “the prohibitions of the Fourteenth Amendment are addressed to the States.” *Ex*
5 *parte Virginia*, 100 U.S. 339, 346 (1879).

6 Generally, “state action [is] subject to Fourteenth Amendment scrutiny and
7 private conduct . . . is not.” *Brentwood Acad. v. Tenn. Secondary Sch. Athletic*
8 *Ass’n*, 531 U.S. 288, 295 (2001). Seemingly private action may be considered State
9 action, however, if “there is such a ‘close nexus between the State and the
10 challenged action’ that seemingly private behavior ‘may be fairly treated as that of
11 the State itself.’” *Id.* (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349
12 (1974)). However, as discussed above, merely being licensed by the State does not
13 automatically transform an otherwise private actor into a State actor. *See Moose*
14 *Lodge*, 407 U.S. at 173.

15 Dr. Weber has failed to state a claim upon which relief can be granted.
16 Mr. Eash is a private attorney who was working in the federal courthouse as
17 Dr. Weber’s representative in a chapter 7 bankruptcy proceeding. The only
18 allegation that Mr. Eash was associated with the “State” in any manner is that
19 Mr. Eash, as an attorney, is licensed by the State of Washington. As merely
20 holding a state-issued license is, without more, insufficient to transform an
21 otherwise private actor into a State actor, Mr. Eash was not bound by the

1 Fourteenth Amendment when representing Dr. Weber. What the Court interprets as
2 Dr. Weber's cause of action under the Fourteenth Amendment against Mr. Eash is
3 **dismissed with prejudice** for failure to state a claim upon which relief can be
4 granted.

5 **VIII. American Bar Association Commission on Mental and Physical** 6 **Disability Law**

7 Dr. Weber purports to bring a cause of action against Mr. Eash under the
8 American Bar Association Commission on Mental and Physical Disability Law.
9 ECF No. 21 at 11. Dr. Weber lists a number of obligations that Mr. Eash was
10 allegedly required to comply with according to the American Bar Association. *Id.*
11 at 6. Although Dr. Weber provides various citations, *see id.* at 6 (§ d), 9 (§ e), the
12 Court has been unable to find the exact sources to which Dr. Weber refers.
13 Regardless, American Bar Association rules do not have the force of law and do
14 not provide Dr. Weber with a cause of action against Mr. Eash. Any remedy as to
15 an alleged rule violation would be through a different mechanism, such as a bar
16 complaint or a professional malpractice tort lawsuit. As such, Dr. Weber's
17 purported cause of action under the American Bar Association Commission on
18 Mental and Physical Disability Law against Mr. Eash is **dismissed with prejudice**
19 for failure to state a claim upon which relief can be granted.

20 **IX. Leave to Amend Complaint**

21 In the Ninth Circuit, "a district court should grant leave to amend even if no
request to amend the pleading was made, unless it determines that the pleading

1 could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203
2 F.3d 1122, 1130 (9th Cir. 2000). As discussed above, Dr. Weber has alleged no
3 theory under which Mr. Eash can be held liable for damages resulting from the
4 alleged January 28, 2015, incident in the Thomas S. Foley United States
5 Courthouse. As such, the Court finds that granting leave to amend would be futile.

6 CONCLUSION

7 Accordingly, **IT IS HEREBY ORDERED** that Defendant David Eash’s
8 Motion to Dismiss, **ECF No. 32**, is **GRANTED**. All causes of action against
9 Mr. Eash are **dismissed with prejudice**.

10 The District Court Clerk is directed to enter this Order, provide copies to
11 counsel and *pro se* Weber, and **terminate David E. Eash as a defendant in this**
12 **matter**.

13 **DATED** this 8th day of December 2015.

14
15 *s/ Rosanna Malouf Peterson*
16 ROSANNA MALOUF PETERSON
17 Chief United States District Judge
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