APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

VLADIK BYKOV,

Plaintiff-Appellant,

v.

STEVEN G. ROSEN, and his marital community; et al.,

Defendants-Appellees.

No. 15-35929

D.C. No. 2:15-cv-00713-JCC

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Submitted June 27, 2017**
San Francisco, California

Before: THOMAS, Chief Judge, and HAWKINS and McKEOWN, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Vladik Bykov appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action, which alleged federal and state law violations in connection with the imposition and enforcement of probation conditions. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's dismissal under Fed. R. Civ. P. 12(b)(6). *Taylor v. Yee*, 780 F.3d 928, 935 (9th Cir. 2015). We affirm in part, vacate in part, and remand.

I

The district court properly dismissed without leave to amend Bykov's constitutional right-to-medical-privacy claims for monetary damages against Judge Rosen and Officer Rogers because they are entitled to judicial and quasi-judicial immunity, respectively. *Duvall v. County of Kitsap*, 260 F.3d 1124, 1133 (9th Cir. 2001) (describing factors relevant to whether an act is judicial in nature and therefore subject to judicial immunity).

II

The district court properly dismissed Bykov's constitutional right-to-medical-privacy claim against the City of Seattle because a municipality may not be held vicariously liable for its employees' alleged constitutional violations, and the amended complaint fails to allege any facts showing that Seattle had a policy or custom that caused Bykov's alleged injury. *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 403

(1997) ("[A] municipality may not be held liable under § 1983 solely because it employs a tortfeasor," and plaintiff must "identify a municipal policy or custom that caused the plaintiff's injury." (citations and internal quotations marks omitted)).

III

The district court properly dismissed Bykov's claims under Title II of the Americans with Disabilities Act of 1990 ("ADA") and the Washington Law Against Discrimination ("WLAD") because Bykov failed to allege facts sufficient to show any discriminatory motivation for Judge Rosen's and Officer Rogers's actions. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002) (ADA claim requires establishing that plaintiff was discriminated against due to plaintiff's disability); *Duvall*, 260 F.3d at 1135 (WLAD claim requires establishing that plaintiff's disability was a substantial factor causing discrimination).

IV

The district court properly dismissed Bykov's legal malpractice claims against defendants Murphy and Naylor because Bykov failed to allege facts sufficient to state plausible claims, and documents subject to judicial notice contradict Bykov's allegation that Murphy failed to inform Judge Rosen that Bykov signed the medical records release form. *Hizey v. Carpenter*, 830 P.2d 646, 651–52 (Wash. 1992) (listing elements of legal malpractice claim); *Sprewell v. Golden State Warriors*, 266 F.3d

979, 988 (9th Cir. 2001) (when reviewing dismissal for failure to state a claim, the court need not "accept as true allegations that contradict matters properly subject to judicial notice").

However, in opposing the defendants' motions to dismiss his claims, Bykov alternatively requested leave to amend his complaint to cure any deficiencies. "We are very cautious in approving a district court's decision to deny pro se litigants leave to amend," *Flowers v. First Hawaiian Bank*, 295 F.3d 966, 976 (9th Cir. 2002), and in this case the district court dismissed Bykov's claims without considering whether to grant Bykov leave to amend any claim dismissed without prejudice. Therefore, we vacate the judgment with respect to the legal malpractice claims, the negligent hiring and supervision claim, the constitutional right-to-medical-privacy claim against the City of Seattle, and the discrimination claims brought under the ADA and the WLAD. On remand, the district court shall consider whether Bykov should be given an opportunity to amend these claims or whether amendment would be futile. *Lucas v. Dep't of Corr.*, 66 F.3d 245, 248–49 (9th Cir. 1995) ("Unless it is absolutely clear that no amendment can cure the defect, . . . a pro se litigant is entitled to notice of the complaint's deficiencies and an opportunity to amend prior to dismissal of the action."). In addition, the district court shall consider on remand whether Bykov alleged plausible claims for relief under the First Amendment, the Fourth Amendment,

and the Fourteenth Amendment (procedural due process and equal protection).

V

The district court did not abuse its discretion by taking judicial notice of the Washington State court proceedings. Fed. R. Evid. 201(b)(2); *United States v. Woods*, 335 F.3d 993, 1000–01 (9th Cir. 2003) (setting forth standard of review); *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (a court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue" (citation omitted)).

We do not consider arguments and allegations raised for the first time on appeal. *Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

Bykov's motion for a waiver of PACER fees, filed on December 24, 2015, is denied.

The parties shall bear their own costs on appeal.

AFFIRMED in part, VACATED in part, REMANDED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VLADIK BYKOV, Plaintiff-Appellant, v. STEVEN G. ROSEN, and his marital community; et al., Defendants-Appellees.	No. 18-35121 D.C. No. 2:15-cv-00713-JCC MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Submitted July 9, 2019**
San Francisco, California

Before: THOMAS, Chief Judge, and HAWKINS and McKEOWN, Circuit Judges.

Vladik Bykov appeals pro se from the district court's orders denying leave to amend, striking parts of his Second Amended Complaint, and declining supplemental jurisdiction over his remaining state-law claims. We have

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

jurisdiction under 28 U.S.C. § 1291. We review for abuse of discretion a district court's decision to deny leave to amend, *Hines v. Youseff*, 914 F.3d 1218, 1227 (9th Cir. 2019), strike matter under Rule 12(f), *Nurse v. United States*, 226 F.3d 996, 1000 (9th Cir. 2000), and decline jurisdiction over supplemental state-law claims once the federal claims have been dismissed, *Tritchler v. Cty. of Lake*, 358 F.3d 1150, 1153 (9th Cir. 2004). We affirm. Because the parties are familiar with the history of the case, we need not recount it here.

I

The *Rooker-Feldman* doctrine does not bar jurisdiction because Bykov does not seek to overturn or vacate the state court's orders. *See Noel v. Hall*, 341 F.3d 1148, 1162 (9th Cir. 2003) (explaining that the *Rooker-Feldman* doctrine bars jurisdiction when a "plaintiff in federal district court complains of a legal wrong allegedly committed by the state court, and seeks relief from the judgement of that court").

II

The district court did not abuse its discretion by denying Bykov leave to amend his discrimination claims under Title II of the Americans with Disabilities Act of 1990 ("ADA") and the Washington Law Against Discrimination ("WLAD") against Judge Rosen and Officer Rogers because they are protected by judicial and

quasi-judicial immunity, respectively. *See Swift v. California*, 384 F.3d 1184, 1188 (9th Cir. 2004) ("It is well established that state judges are entitled to absolute immunity for their judicial acts."); *Lutheran Day Care v. Snohomish Cty.*, 829 P.2d 746, 750 (Wash. 1992) ("Quasi-judicial immunity attaches to persons or entities who perform functions that are so comparable to those performed by judges that it is felt they should share the judge's absolute immunity while carrying out those functions.").

III

The district court did not abuse its discretion by denying Bykov leave to amend his constitutional right-to-medical-privacy claim against the City of Seattle because Judge Rosen and Officer Rogers acted legally when they requested Bykov's medical records and ordered that he be incarcerated for failure to comply. *See United States v. Lopez*, 258 F.3d 1053, 1055–56 (9th Cir. 2001) (holding that a "condition requiring participation in a mental health program is a routine . . . condition of supervised release."); *State v. Bennett*, 666 P.2d 390, 391 (Wash. Ct. App. 1983) ("Requiring a defendant to undergo psychiatric treatment is a common condition of probation and is generally considered to be reasonable."). Thus, any official policy or custom requiring such conduct would also be permissible.

IV

The district court did not abuse its discretion by denying Bykov leave to amend his discrimination claims under the ADA and WLAD against the City of Seattle because any allegation Bykov could make alleging discrimination would directly contradict the judicially-noticed records showing probationary motives on behalf of Judge Rosen and Officer Rogers—not discriminatory ones. *See Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 532 (9th Cir. 2008) (holding that a court may deny leave to amend where amendment would be futile).

V

The district court did not abuse its discretion by striking claims in Bykov's Second Amended Complaint that contravened its previous order granting Bykov leave to amend as long as his allegations did not contradict the judicially-noticed records. *See Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 559–60 (9th Cir. 2009) (affirming decision to strike claims under Rule 12(f) because they "exceeded the bounds of the limited intervention granted").

VI

The district court did not abuse its discretion by declining supplemental jurisdiction over the remaining state-law claims (legal malpractice claims) because resolution of these claims will predominately involve the application of state law. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988) ("[I]n the usual

case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims.").

AFFIRMED.

APPENDIX B

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VLADIK BYKOV, Plaintiff, v. STEVEN ROSEN, *et al.*, Defendants.	CASE NO. C15-0713-JCC ORDER GRANTING MOTION TO DISMISS BY DEFENDANTS ROSEN, ROGERS, AND CITY OF SEATTLE

This matter comes before the Court on the motion to dismiss by Defendants Steven Rosen, Brian Rogers, and the City of Seattle.[1] (Dkt. No. 27.) Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motion for the reasons explained herein.

I. BACKGROUND

The present suit arose from Washington state court legal proceedings wherein Defendant Judge Steven Rosen ordered Plaintiff Vladik Bykov to disclose medical records as a condition of Mr. Bykov's criminal sentence. Mr. Bykov's complaint touches on this factual background. (*See* Dkt. No. 8 at 4-8.) Defendants ask the Court to take judicial notice of state court records to flesh out that background. (See Dkt. No. 27 at 2.)

[1] Co-defendants Micheline Murphy and Marcus Naylor have been dismissed from this case. (Dkt. No. 49.) Any reference to "Defendants" pertains only to the current movants.

Typically, the Court looks only at the face of a complaint to decide a motion to dismiss. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002). However, at any stage of the proceeding, the Court may judicially notice a fact that is not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b)(2), (d). The Court must take such notice if a party requests it and supplies the Court with the necessary information. Fed. R. Evid. 201(c)(2).

Here, Defendants ask the Court to take judicial notice of the existence of the state court legal proceedings, the arguments made therein, and the outcomes reached. (*See* Dkt. No. 27 at 2-6.) The Court finds that these facts cannot be reasonably disputed, because they come from public court records whose accuracy cannot be reasonably questioned. (*See* Dkt. No. 27 at 8; Dkt. No. 28, Exs. 1-29; Dkt. No. 48, Exs. 1-6.) Defendants have supplied the Court with the necessary information to make this determination. (*See* Dkt. No. 28, Exs. 1-29; Dkt. No. 48, Exs. 1-6.) Therefore, the Court takes judicial notice of the documents,[2] which establish the following:

On November 3, 2011, Mr. Bykov was convicted in Seattle Municipal Court of one count of harassment. (Dkt. No. 48, Ex. 2 at 2.) Judge Rosen sentenced Mr. Bykov to 364 days in jail with 343 days suspended. (Dkt. No. 48, Ex. 2 at 2.) The conditions of the suspended sentence included "Mental health evaluation and complete follow-up treatment as required by . . . probation." (Dkt. No. 48, Ex. 2 at 3.)

On November 17, 2011, Mr. Bykov met with his probation officer, Defendant Brian Rogers, to discuss the terms and obligations of his supervision. (*See* Dkt. No. 48, Ex. 3 at 2.) Mr. Bykov had previously informed Mr. Rogers that he was admitted to an inpatient psychiatric hospital and had a report from a psychologist. (*See* Dkt. No. 48, Ex. 3 at 2.) Mr. Rogers requested a copy of the report, which Mr. Bykov refused to disclose. (*See* Dkt. No. 48, Ex. 3 at 2.) Mr. Rogers thus recommended that Judge Rosen direct Mr. Bykov to release the report,

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[2] Mr. Bykov's motion to strike the documents (Dkt. No. 45 at 4) is denied.

because it would provide an important part of Mr. Bykov's mental health history, allowing Probation to understand how best to treat him. (*See* Dkt. No. 48, Ex. 3 at 3.)

On December 29, 2011, Judge Rosen ordered Mr. Bykov to sign a release of information. (Dkt. No. 48, Ex. 4 at 3.) On January 12, 2012, Mr. Bykov submitted a release of information to Probation. (Dkt. No. 48, Ex. 4 at 3.) The release had lines crossed out, and, under his signature, Mr. Bykov wrote "signed under duress threatened with arrest and imprisonment if not signed." (Dkt. No. 48, Ex. 4 at 3.) Mr. Rogers thus recommended that Judge Rosen sentence Mr. Bykov to jail for an amount of time sufficient to bring compliance. (Dkt. No. 48, Ex. 4 at 3.)

On January 26, 2012, Mr. Bykov applied for a writ of prohibition in King County Superior Court, seeking to prevent Judge Rosen or the City from ordering Mr. Bykov to participate in any mental evaluation or disclose his medical records. (Dkt. No. 48, Ex. 5 at 1.) He argued that Judge Rosen "acted without or in excess of legal authority in compelling [Mr. Bykov] to mental evaluation and compelling, under threat of arrest and imprisonment, to sign release of confidential medical records that are almost twenty years old and not related to any crime." (Dkt. No. 48, Ex. 5 at 3.) He further argued that Judge Rosen violated his right to privacy under the U.S. constitution. (See Dkt. No. 48, Ex. 5 at 15.)

The superior court denied Mr. Bykov's request for a writ of prohibition, reasoning that "[t]he trial court did not act in excess of its jurisdiction by ordering [Mr. Bykov] to complete a mental health evaluation and treatment or by ordering him to sign a medical release of information. . . . The trial court's order did not violate [Mr.Bykov]'s right of privacy." (Dkt. No. 28, Ex. 2 at 54.) Mr. Bykov appealed, but did not pay his filing fee. (Dkt. No. 28, Ex. 2 at 5.) His appeal was dismissed. (Dkt. No. 28, Ex. 2 at 70.)

On May 7, 2012, Judge Rosen found that Mr. Bykov failed to comply with Probation by withholding the medical releases. (Dkt. No. 28, Ex. 2 at 56.) Judge Rosen imposed 150 days of the suspended jail time and struck all probation conditions. (Dkt. No. 48, Ex. 6 at 2.)

On May 8, 2012, Mr. Bykov filed a RALJ appeal, in which he petitioned the King

County Superior Court for a writ of habeas corpus. (Dkt. No. 48, Ex. 1 at 39; Dkt. No. 28, Ex. 2 at 62.) The court denied his petition, reasoning that he "has not established a constitutional right to protect his medical records from a court under which he is on probation." (Dkt. No. 28, Ex. 2 at 62.) His appeal was ultimately dismissed for want of prosecution. (Dkt. No. 28, Ex. 3 at 20.)

On August 9, 2012, Mr. Bykov filed another RALJ appeal. (Dkt. No. 48, Ex. 1 at 40; Dkt. No. 28, Ex. 3 at 2.) He asserted that the trial court erred in revoking his probation for refusing to release medical records, because (1) his conviction did not warrant the condition; (2) the records were privileged; (3) the order violated his right to privacy under the Washington Constitution; and (4) he received insufficient notice. (Dkt. No. 28, Ex. 3 at 2.) The superior court affirmed, finding that Mr. Bykov's appeal was moot and that Judge Rosen had "the authority, after imposing a mental health and evaluation and treatment as a sentence condition, to order a defendant to sign a release of prior mental health treatment." (Dkt. No. 28, Ex. 3 at 47.) Mr. Bykov moved for, and was denied, discretionary review in both the Court of Appeals and the Washington Supreme Court. (Dkt. No. 28, Ex. 3 at 61, 65.)

On May 12, 2015, Mr. Bykov initiated the present suit against Defendants. (Dkt. No. 6.) He alleges that, by forcing him to disclose medical records upon threat of incarceration, Judge Rosen and Mr. Rogers violated the U.S. Constitution, the Americans with Disabilities Act (ADA), and the Washington Law Against Discrimination (WLAD). (Dkt. No. 8 at 9-16.) Mr. Bykov maintains that Judge Rosen's conduct also constituted intentional infliction of emotional distress (IIED). (Dkt. No. 8 at 10.) He further asserts that the City, as Judge Rosen's and Mr. Rogers' employer, is vicariously liable for their violations of the U.S. Constitution and the ADA. (Dkt. No. 8 at 15, 17.)

Defendants move to dismiss Mr. Bykov's complaint for failure to state a claim upon which relief may be granted. (Dkt. No. 27 at 1.) They assert that Judge Rosen merely imposed and enforced probation conditions as part of Mr. Bykov's sentence and that the King County Superior Court and the Washington State Court of Appeals affirmed the sentence and conditions.

(Dkt. No. 27 at 1-2.) As a result, Defendants argue, Mr. Bykov's claims are collaterally estopped. (Dkt. No. 27 at 2.) They further allege that his claims are barred by judicial, quasi-judicial, or qualified immunity. (Dkt. No. 27 at 2.) In addition, they argue that Mr. Bykov fails to articulate a claim against the City. (Dkt. No. 27 at 2.)

II. DISCUSSION

A. Fed. R. Civ. P. 12(b)(6) Standard

A defendant may move for dismissal when a plaintiff "fails to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To grant a motion to dismiss, the court must be able to conclude that the moving party is entitled to judgment as a matter of law, even after accepting all factual allegations in the complaint as true and construing them in the light most favorable to the non-moving party. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). However, to survive a motion to dismiss, a plaintiff must cite facts supporting a "plausible" cause of action. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). A claim has "facial plausibility" when the party seeking relief "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) (internal quotes omitted). Although the Court must accept as true a complaint's well-pleaded facts, conclusory allegations of law and unwarranted inferences will not defeat an otherwise proper Rule 12(b)(6) motion. *Vasquez v. L.A. County,* 487 F.3d 1246, 1249 (9th Cir. 2007); *Sprewell v. Golden State Warriors,* 266 F.3d 979, 988 (9th Cir. 2001). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do; nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Iqbal,* 556 U.S. at 678 (internal quotations and citations omitted). In other words, a plaintiff must plead "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* Because Mr. Bykov has proceeded *pro se* he "must be held to less stringent standards than formal pleadings drafted by lawyers." *Hebbe v. Pliler,* 627 F.3d 338, 342 (9th Cir. 2010).

B. Collateral Estoppel

Defendants assert that, in light of the state court proceedings, Mr. Bykov's claims are barred by collateral estoppel. (Dkt. No. 27 at 9-10.) They assert that "the permissibility of [Judge Rosen's and Mr. Roger's] actions has already been affirmed" and that the "specific issues of having [Mr.] Bykov sign a release for medical information has already been addressed" by the state courts. (Dkt. No. 27 at 10.)

This Court takes Defendants' point that the Washington courts upheld the sentence condition underlying Mr. Bykov's present claims. However, that does not automatically estop any claim arising out of the condition. Rather, collateral estoppel "bars successive litigation of an *issue of fact or law actually litigated and resolved* in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." *ReadyLink Healthcare, Inc. v. State Compensation Ins. Fund*, 754 F.3d 754, 760 (9th Cir. 2014) (emphasis added) (internal quotations omitted). Here, the issues that have been actually litigated and resolved are: (1) whether Judge Rosen had the statutory authority to impose and enforce the sentence conditions, (*see* Dkt. No. 48, Ex. 5 at 4-8, 12-14), which the state court answered in the affirmative; and (2) whether the sentence condition violated Mr. Bykov's right to privacy under the U.S. constitution (*see* Dkt. No. 48, Ex. 5 at 15-16), which the state court answered in the negative (Dkt. No. 28, Ex. 2 at 54).[3]

In the present suit, Mr. Bykov does not challenge Judge Rosen's statutory authority, but does allege a violation of his constitutional right to privacy. (Dkt. No. 8 at 14.) For collateral estoppel to bar this claim, three other requirements must also be present: the state court

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[3] In denying Mr. Bykov's habeas petition in Case No. 12-1-03823-2-SEA, the state court also held that Mr. Bykov "ha[d] not established a constitutional right to protect his medical records from a court under which he is on probation." (Dkt. No. 28, Ex. 2 at 62.) However, Defendants did not submit Mr. Bykov's petition to the Court. Thus, the Court cannot judicially notice the contents of the petition and cannot determine whether he raised the same constitutional arguments as he does here.

determination must have been a final judgment on the merits; Mr. Bykov must have been a party to, or in privity with a party to, the state court adjudication; and application of the doctrine must not work an injustice on Mr. Bykov. *See Hadley v. Maxwell,* 27 P.3d 600, 602 (Wash. 2001). The Court finds that each requirement is met here. (*See* Dkt. No. 28, Ex. 2 at 70; Dkt. No. 48, Ex. 5 at 15.) Therefore, Mr. Bykov is collaterally estopped from alleging that the imposition and enforcement of the sentence condition violated his constitutional right to privacy. This claim is DISMISSED with prejudice.

C. *Rooker-Feldman* Doctrine

The parties dispute whether the *Rooker-Feldman* doctrine bars Mr. Bykov's remaining claims. (Dkt. No. 45 at 19; Dkt. No. 47 at 5.) Under this doctrine, federal district courts lack jurisdiction to hear direct appeals from the judgments of state courts. *Cooper v. Ramos*, 704 F.3d 772, 777 (9th Cir. 2012). The *Rooker-Feldman* doctrine not only bars direct appeals, but actions that are the "de facto equivalent" of a direct appeal. *Id.* To determine whether an action is a de facto appeal, courts pay close attention to the relief sought by the plaintiff. *Id.* at 777-78.

Defendants assert that Mr. Bykov "attack[s] and seek[s] relief from . . . the same order that was litigated and decided by the trial and appellate courts that heard [his] criminal case." (Dkt. No. 47 at 5.) But, Mr. Bykov's current suit does not seek to overturn or vacate the state court's orders. Instead, he seeks damages for the alleged violations under 42 U.S.C. § 1983, tort law, the ADA, and WLAD. (Dkt. No. 8 at 1.) The *Rooker-Feldman* doctrine does not apply.

D. Immunity

Defendants argue that Judge Rosen, acting in his official capacity, is entitled to absolute judicial immunity and that Mr. Rogers, acting as an arm of the court, is entitled to quasi-judicial immunity. (Dkt. No. 27 at 12, 15.)

Generally, judges are immune from suits for money damages. *Duvall v. County of Kitsap*, 260 F.3d 1124, 1133 (9th Cir. 2001). However, absolute judicial immunity does not apply for non-judicial acts. *Id.* Courts look to the follow factors as relevant to the determination of whether

a particular act is judicial in nature:

> (1) the precise act is a normal judicial function; (2) the events occurred in the judge's chambers; (3) the controversy centered around a case then pending before the judge; and (4) the events at issue arose directly and immediately out of a confrontation with the judge in his or her official capacity.

Id. Judicial immunity also extends to "certain others who perform functions closely associated with the judicial process." *Id.* (internal quotations omitted). This form of immunity, called quasi-judicial immunity, applies when those officials' "judgments are functionally comparable to those of judges—that is, because they, too, exercise discretionary judgment as part of their function." *Id.* (internal quotations omitted). The lynchpin of judicial and quasi-judicial immunity is that the acts in question are "an integral part of the judicial process." *Greater Los Angeles Council on Deafness v. Zolin*, 812 F.2d 1103, 1108 (9th Cir. 1987).

Mr. Bykov asserts that immunity does not apply, because Judge Rosen and Mr. Rogers acted in their personal capacity when they attempted to obtain his medical records. (Dkt. No. 45 at 21, 25.) But, the state court records clearly demonstrate that Judge Rosen and Mr. Rogers were acting in their official capacity when they recommended, ordered, or enforced the condition requiring Mr. Bykov to release his medical records. Mr. Bykov alleges no facts to contradict this. He makes only conclusory allegations as to the personal nature of Defendants' actions. This is insufficient to survive Defendants' motion to dismiss. *See Vasquez*, 487 F.3d at 1249.

It cannot be denied that sentencing is an integral part of the judicial process. And here, all of the challenged acts arose from Judge Rosen's and Mr. Rogers' respective sentencing duties. Therefore, Mr. Bykov's claims against Judge Rosen and Mr. Rogers are barred under judicial and quasi-judicial immunity and are DISMISSED with prejudice.

E. Vicarious Liability

Mr. Bykov alleges that the City, as Judge Rosen's and Mr. Rogers' employer, is vicariously liable for their violations of the U.S. Constitution and the ADA. (Dkt. No. 8 at 15, 17.) Regarding Mr. Bykov's constitutional claims, the City cannot be held liable under § 1983

"solely because it employs a tortfeasor." *See Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 403 (1997). Rather, Mr. Bykov must show that the City had "an official policy or pervasive custom [that] caused [his] injury." *See Bosteder v. City of Renton*, 117 P.3d 316, 326 (Wash. 2005). He alleges no such facts. His § 1983 claim against the City is therefore DISMISSED without prejudice.

Defendants allege, without citation to authority, that the same rule should apply to ADA claims against municipalities. (Dkt. No. 47 at 10.) This assertion is contrary to Ninth Circuit authority stating that, "[w]hen a plaintiff brings a direct suit under the [ADA] against a municipality (including a county), the public entity is liable for the vicarious acts of its employees." *Duvall*, 260 F.3d at 1141. The City can thus be held liable for ADA violations committed by its employees.

To state a claim of disability discrimination under the ADA, a plaintiff must allege four elements: (1) he or she is an individual with a disability; (2) he or she is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities; (3) he or she was either excluded from participation in or denied the benefits of the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (4) such exclusion, denial of benefits, or discrimination was by reason of his or her disability. *McGary v. City of Portland*, 386 F.3d 1259, 1265 (9th Cir. 2004).

Mr. Bykov alleges that the City, through Judge Rosen's and Mr. Rogers' actions, punished him for having a disability by ordering him to produce his medical records and incarcerating him when he did not produce them. (*See* Dkt. No. 8 at 15.) However, the state court records contradict his assertion as to the causal link between the challenged acts and his disability. Instead, they demonstrate that Mr. Bykov was ordered to produce medical records because of his criminal sentence and incarcerated because of his lack of compliance with the conditions of his sentence. Mr. Bykov alleges no facts to show a discriminatory motivation. His ADA claim against the City is DISMISSED without prejudice.

III. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss (Dkt. No. 27) is GRANTED. Mr. Bykov's complaint is DISMISSED.

DATED this 6 day of November 2015.

John C. Coughenour
UNITED STATES DISTRICT JUDGE

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VLADIK BYKOV, Plaintiff, v. STEVEN ROSEN, *et al.*, Defendants.	CASE NO. C15-0713-JCC ORDER

This matter comes before the Court on the mandate from the Ninth Circuit Court of Appeals (Dkt. No. 55). The Court of Appeals affirmed this Court's dismissal of Plaintiff Vladik Bykov's claims. (Dkt. No. 54 at 2-4.) However, the Court of Appeals remanded the case for this Court to consider whether Bykov should be given an opportunity to amend the following claims: (1) legal malpractice as to Defendant Micheline Murphy, Bykov's attorney; (2) negligent hiring and supervision as to Defendant Marcus Naylor, Murphy's supervisor; (3) constitutional right to medical privacy claim against Defendant City of Seattle (the City); and (4) discrimination claims under the Americans With Disabilities Act (ADA) and Washington Law Against Discrimination (WLAD) against Defendants Judge Steven Rosen, Probation Officer Brian Rogers, and the City. (*Id.* at 4.) The Court of Appeals further directed this Court to consider whether Bykov alleged plausible claims for relief against Judge Rosen and Rogers under the First, Fourth, and Fourteenth Amendments. (*Id.* at 4-5; *see also* Dkt. No. 8 at 9-13.)

1. Legal Malpractice Claim Against Murphy

Bykov alleged that Murphy negligently represented him in the probation hearings underlying this suit. (Dkt. No. 8 at 13.) The Court found that many of Bykov's allegations as to Murphy's negligent representation were contradicted by judicially noticed documents. (Dkt. No. 49 at 6.) To the extent Bykov's claims were based on contradicted allegations, no amendment could save them and he shall not be granted leave to amend. The Court found that the remaining allegations—*e.g.*, that Murphy failed to "file proper motion(s) to have Mr. Bykov released from jail," "make proper legal arguments," or "properly object"—were too conclusory to constitute a valid claim. (*Id.* at 7.) It is conceivable that an amendment could save this claim if Bykov were to make his allegations more precise. **Thus, the Court GRANTS Bykov leave to amend his legal malpractice claim against Murphy, but only to the extent that his allegations do not contradict the documents judicially noticed by this Court.**

2. Negligent Hiring and Supervision Claim Against Naylor

Bykov alleged that Naylor negligently hired and supervised Murphy. (Dkt. No. 8 at 14-15.) He stated that Naylor "was Ms. Murphy's supervisor from the beginning. Mr. Naylor, as Ms. Murphy's supervisor, was or should have been aware of the facts related to Mr. Bykov's case and could have counselled Ms. Murphy on Mr. Bykov's rights or taken action himself." (*Id.* at 8.) The Court noted that Washington law was unclear as to whether a supervisor can be directly liable for negligent supervision and negligent hiring. (Dkt. No. 49 at 3.) There were two paths Washington courts could follow. (*Id.* at 4.) This Court did not need to determine which was correct, ultimately concluding that the claim should be dismissed under either one. (*Id.*)

The Court first noted that vicarious liability does not attach to a supervisor in Washington. (*Id.*) If Washington courts considered negligent supervision and hiring to be analogous to vicarious liability, Bykov's claim could not be maintained. (*Id.*) On the other hand, Washington courts could extend the doctrines to supervisors who qualify as "masters," which are liable under Washington law. (*Id.*) Under that approach, the Court found that Bykov failed to

allege sufficient facts to show that Naylor was Murphy's "master," *i.e.*, that he engaged Murphy to work at his command and controlled how her work was done. (*Id.*)

If the latter approach was followed, it is conceivable that Bykov's claim could be saved by an amendment further detailing the nature of Naylor's supervision. **Accordingly, the Court GRANTS Bykov leave to amend his negligent hiring and supervision claim against Naylor, and the proper legal standard can be determined after more sufficient briefing.**

3. Discrimination and Constitutional Claims Against Judge Rosen and Rogers

Bykov made several allegations against Judge Rosen and Rogers, including that they violated his constitutional right to privacy, discriminated against him in violation of the ADA and WLAD, and violated his First, Fourth, and Fourteenth Amendment rights. (Dkt. No. 8 at 9-17.) The Court held that judicial immunity protected Judge Rosen and Rogers from suit, reasoning that the judicially noticed records demonstrate that Judge Rosen and Rogers were acting in their official capacity when they recommended, ordered, and enforced the condition requiring Bykov to release his medical records. (Dkt. No. 50 at 8.) The Court can imagine no amendment that would negate the clear judicial nature of Judge Rosen's and Roger's actions underlying this suit. **Thus, the Court DENIES Bykov leave to amend any of his claims against Judge Rosen or Rogers.**

4. Right to Medical Privacy & Discrimination Claims Against the City

Bykov alleged that Judge Rosen and Rogers violated his constitutional right to medical privacy and his right against discrimination under the ADA and WLAD, and that the City, as their employer, was vicariously liable for those violations. (Dkt. No. 8 at 12, 14-15.)

As to the constitutional claim, the Court held that Bykov failed to allege that the City had an official policy or custom that caused his injury, a necessary element of a 42 U.S.C. § 1983 claim against a municipality. (Dkt. No. 50 at 9.) The Court now considers whether, if Bykov amended his claim to allege such a policy or custom, the amendment would be futile. The challenged conduct here was a judge's and probation officer's imposition and enforcement of a

probationary term requiring a defendant to produce a medical record. However, under federal and Washington law, this conduct is permissible if reasonable under the circumstances. *See United States v. Knights*, 534 U.S. 112, 119 (2001) ("[A] court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens."); *United States v. Lopez*, 258 F.3d 1053, 1057 (9th Cir. 2001) ("The sentencing judge could well conclude that disclosure to the court and to the probation officer of information about Lopez's [mental health] status was necessary for successfully supervising his reintegration into society. . . . The court was justifiably concerned about whether Lopez was going to be a danger, or whether he would adjust to the freedom and conditions of supervised release."); *State v. Wilkerson*, 31 P.3d 1194, 1197-98 (Wash. Ct. App. 2001) (upholding term imposed by probation department that required defendant to undergo sexual deviancy evaluation). Here, Judge Rosen and Rogers were justifiably concerned about whether Bykov would pose a danger to others and how he would adjust to his suspended sentence. Their conduct was permissible; thus, any City policy or custom requiring such conduct would also be permissible. The Court can imagine no amendment that would cure the defects in Bykov's claim. **The Court DENIES him leave to amend his constitutional right to medical privacy claim against the City.**

As to the discrimination claims, the Court found that the evidence showed sentencing and probationary motives on behalf of Judge Rosen and Rogers—not discriminatory ones. (Dkt. No. 50 at 9.) The Court further noted that Bykov alleged no discriminatory motivation. (*Id.*) Indeed, Bykov would be unable to allege such a motivation without directly contradicting the judicially noticed records. As such, no amendment would save this claim. **The Court DENIES Bykov leave to amend his discrimination claims against the City.**

5. Conclusion

In sum, the Court GRANTS Bykov leave to amend his legal malpractice claim against Murphy and his negligent supervision and hiring claim against Naylor. The Court DENIES

Bykov leave to amend his claims against Judge Rosen and Rogers, as well as his vicarious liability claims against the City.

Bykov shall submit his amended complaint within 45 days of this order's issuance. He is cautioned that the judicially noticed records still stand and no allegations contradicting those records shall be permitted.

DATED this 25th day of July, 2017.

John C. Coughenour
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VLADIK BYKOV, Plaintiff-Appellant, v. STEVEN G. ROSEN, and his marital community; et al., Defendants-Appellees.	No. 18-35121 D.C. No. 2:15-cv-00713-JCC Western District of Washington, Seattle ORDER

Before: THOMAS, Chief Judge, and HAWKINS and McKEOWN, Circuit Judges.

Appellant's petition for rehearing en banc is DENIED. Appellant's petition for panel rehearing is also DENIED.