District Court Memorandum Opinion & Order

App'x A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

LISA BIRON,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	NO. 4:19-CV-322-A
	§	
FEDERAL MEDICAL CENTER ("FMC") CARSWELL WARDEN JODY UPTON, ET AL.,	§	
	§	
	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Came on for consideration the motion of defendants, Federal Medical Center ("FMC") Carswell Warden Jody Upton ("Warden"), FMC Carswell Psychologist Leticia A. Armstrong ("Armstrong"), and FMC Carswell Psychologist E. Dixon ("Dixon"), to dismiss plaintiff's first amended complaint. The court, having considered the motion, the response of plaintiff, Lisa Biron, the reply, the record, and applicable authorities, finds that the motion should be granted.

I.

Background

On January 31, 2019, plaintiff filed a "Civil Complaint for Damages and Injunctive and Declaratory Relief" in the District Court of Tarrant County, Texas. 141st Judicial District. Doc.[1] 1

[1] The "Doc. __" reference is to the number of the item on the docket in this action.

at PageID[2] 12. On April 22, 2019, defendants filed their notice of removal, bringing the action before this court pursuant to 28 U.S.C. § 1442(a)(1). Doc. 1. Defendants filed a motion to dismiss. Doc. 11. In response, plaintiff filed her first verified complaint. Doc. 15.

In her amended complaint, plaintiff alleges:

Plaintiff was convicted of sex offenses. Doc. 15 ¶ 8. Plaintiff was directed by God to research, pray about, study the Bible concerning God's view of morality involving sex and sexual conduct, and to record these findings in writing for use in her rehabilitation and to help educate others. Id. ¶ 13. On or about September 25, 2015, Dixon conducted a search of plaintiff's locker and removed 144 pages of her manuscript draft and notes. Id. ¶ 16. The removal caused plaintiff extreme emotional distress, resulting in panic attacks and an upset stomach. Id. ¶ 18. On or about September 30, 2015, plaintiff sent an email to Warden asking for help, but he refused to intervene. Id. ¶ 23. On or about October 15, 2015, Armstrong, who then had plaintiff's writing, told plaintiff that the writing would not be returned to her because it was sexually explicit and constituted "hard contraband." Id. ¶ 19. The taking of plaintiff's writing served

[2]The "PageID ___" reference is to the page number assigned by the court's electronic filing system and is used because the pages of the document are not consecutively numbered.

solely as forced treatment to alter her behavior. Id. ¶ 24. On May 2, 2017, plaintiff received the final denial of her administrative remedy regarding the writing. Id. ¶ 27.

Plaintiff says that she brings claims under the Fifth Amendment's Due Process and Equal Protection Clauses, the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 ("RFRA"), the Administrative Procedures Act ("APA"), the First Amendment's Free Exercise, Freedom of Expression, and Establishment Clauses, and for declaratory judgment and injunctive relief. Doc. 15 at ¶ 2. She sues Warden in his official capacity and Alexander and Dixon in their official and individual capacities. Id. ¶¶ 6-7.

II.

Grounds of the Motion

Defendants maintain that the personal capacity claims must be dismissed because plaintiff cannot show that a Bivens[3] remedy is available; nor can she show that a claim for money damages is authorized by RFRA or any other source of law. Further, even if such claims were possible, defendants are entitled to qualified immunity, and the challenge to sex offender treatment is barred by Heck v. Humphrey, 512 U.S. 477 (1994).

[3]Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

Defendants maintain that the official capacity claims must be dismissed under the doctrine of derivative jurisdiction, since the state court did not have jurisdiction over those claims. In addition, no jurisdiction exists for any claim relating to sex offender treatment since plaintiff is no longer housed at FMC Carswell. Doc. 17 at 1-2.

III.

Applicable Legal Standards

A. Fed. R. Civ. P. 12(b)(1)

Dismissal of a case is proper under Rule 12(b)(1) of the Federal Rules of Civil Procedure when the court lacks the statutory or constitutional power to adjudicate the case. Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss., 143 F.3d 1006, 1010 (5th Cir. 1998). When considering a motion to dismiss for lack of subject matter jurisdiction, the court construes the allegations of the complaint favorably to the pleader. Spector v. L Q Motor Inns, Inc., 517 F.2d 278, 281 (5th Cir. 1975). However, the court is not limited to a consideration of the allegations of the complaint in deciding whether subject matter jurisdiction exists. Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir. 1981). The court may consider conflicting evidence and decide for itself the factual issues that determine jurisdiction. Id. Because of the limited nature of federal court jurisdiction, there is a

presumption against its existence. See Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978); McNutt v. General Motors Acceptance Corp. of Ind., Inc., 298 U.S. 178, 189 (1936). A party who seeks to invoke federal court jurisdiction has the burden to demonstrate that subject matter jurisdiction exists. McNutt, 298 U.S. at 189; Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001).

B. Fed. R. Civ. P. 12(b)(6)

Rule 8(a)(2) of the Federal Rules of Civil Procedure provides, in a general way, the applicable standard of pleading. It requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), "in order to give the defendant fair notice of what the claim is and the grounds upon which it rests," Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotation marks and ellipsis omitted). Although a complaint need not contain detailed factual allegations, the "showing" contemplated by Rule 8 requires the plaintiff to do more than simply allege legal conclusions or recite the elements of a cause of action. Twombly, 550 U.S. at 555 & n.3. Thus, while a court must accept all of the factual allegations in the complaint as true, it need not credit bare legal conclusions that are unsupported by any factual underpinnings. See Ashcroft v. Iqbal,

556 U.S. 662, 679 (2009) ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.").

Moreover, to survive a motion to dismiss for failure to state a claim, the facts pleaded must allow the court to infer that the plaintiff's right to relief is plausible. Iqbal, 556 U.S. at 678. To allege a plausible right to relief, the facts pleaded must suggest liability; allegations that are merely consistent with unlawful conduct are insufficient. Id. In other words, where the facts pleaded do no more than permit the court to infer the possibility of misconduct, the complaint has not shown that the pleader is entitled to relief. Id. at 679. "Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id.

C. Qualified Immunity

Qualified immunity insulates a government official from civil damages liability when the official's actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). For a right to be "clearly established," the right's contours must be "sufficiently clear

that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). Individual liability thus turns on the objective legal reasonableness of the defendant's actions assessed in light of clearly established law at the time. Hunter v. Bryant, 502 U.S. 224, 228 (1991); Anderson, 483 U.S. at 639-40. In Harlow, the court explained that a key question is "whether that law was clearly established at the time an action occurred" because "[i]f the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." 457 U.S. at 818. In assessing whether the law was clearly established at the time, the court is to consider all relevant legal authority, whether cited by the parties or not. Elder v. Holloway, 510 U.S. 510, 512 (1994). If public officials of reasonable competence could differ on the lawfulness of defendant's actions, the defendant is entitled to qualified immunity. Mullenix v. Luna, 136 S. Ct. 305, 308 (2015); Malley v. Briggs, 475 U.S. 335, 341 (1986); Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir. 1992). "[A]n allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner." Malley, 475 U.S. at 341.

In analyzing whether an individual defendant is entitled to qualified immunity, the court considers whether plaintiff has alleged any violation of a clearly established right, and, if so, whether the individual defendant's conduct was objectively reasonable. Siegert v. Gilley, 500 U.S. 226, 231 (1991); Duckett v. City of Cedar Park, 950 F.2d 272, 276-80 (5th Cir. 1992). In so doing, the court should not assume that plaintiff has stated a claim, i.e., asserted a violation of a constitutional right. Siegert, 500 U.S. at 232. Rather, the court must be certain that, if the facts alleged by plaintiff are true, a violation has clearly occurred. Connelly v. Comptroller, 876 F.2d 1209, 1212 (5th Cir. 1989). A mistake in judgment does not cause an officer to lose his qualified immunity defense. In Hunter, the Supreme Court explained:

> The qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." Malley, [475 U.S.] at 343. . . . This accommodation for reasonable error exists because "officials should not err always on the side of caution" because they fear being sued. . . .

502 U.S. at 229. Further, that the officer himself may have created the situation does not change the analysis. That he could have handled the situation better does not affect his entitlement to qualified immunity. Young v. City of Killeen, 775 F.2d 1349, 1352-53 (5th Cir. 1985).

When a defendant relies on qualified immunity, the burden is on the plaintiff to negate the defense. Kovacic v. Villarreal, 628 F.3d 209, 211 (5th Cir. 2010); Foster v. City of Lake Jackson, 28 F.3d 425, 428 (5th Cir. 1994). Although Supreme Court precedent does not require a case directly on point, existing precedent must place the statutory or constitutional question beyond debate. White v. Pauly, 137 S. Ct. 548, 551 (2017). That is, the clearly established law upon which plaintiff relies should not be defined at a high level of generality, but must be particularized to the facts of the case. Id. at 552. Thus, the failure to identify a case where an officer acting under similar circumstances was held to have violated a plaintiff's rights will most likely defeat the plaintiff's ability to overcome a qualified immunity defense. Id.; Surratt v McClarin, 851 F.3d 389, 392 (5th Cir. 2017).

IV.

Analysis

As the Supreme Court has explained, a Bivens claim may only be asserted in three limited sets of circumstances. They are: for a Fourth Amendment violation by federal agents in conducting a warrantless search and seizure in a home; for a Fifth Amendment equal protection claim based on gender discrimination by a congressman against an employee; and, for an Eighth Amendment

claim for deliberate indifference to serious medical needs. Ziglar v. Abbasi, 137 S. Ct. 1843, 1854-55 (2017). The three cases recognizing those claims, Bivens itself, Davis v. Passman, 442 U.S. 228 (1979), and Carlson v. Green, 446 U.S. 14 (1980), are "the only instances in which the [Supreme] Court has approved of an implied damages remedy under the Constitution itself." Abbasi, 137 S. Ct. at 1855. The Court has "consistently refused to extend Bivens to any new context or new category of defendants." Id. at 1857 (quoting Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001)). Here, none of the factors set forth in Abassi would support the recognition of a new Bivens claim in favor of plaintiff. See Reichle v. Howards, 566 U.S. 658, 663 n.4 (2012)(Supreme Court has never held that Bivens extends to First Amendment claims).

Plaintiff does not dispute that the APA does not provide relief against the individual defendants.

RFRA allows for "appropriate relief against a government." 42 U.S.C. § 2000bb-1(c). It does not appear that the Fifth circuit has determined whether RFRA provides a private right of action against federal employees acting in their personal capacities. At least one district court has held that it does not, Bloch v. Samuels, No. H-04-4861, 2006 WL 2239016, at *7 (S.D. Tex. Aug. 3, 2006), and this court is inclined to agree.

The court need not decide, however, as it is clear that Dixon and Alexander are entitled to qualified immunity.

Plaintiff has not pointed out any case showing that defendants' confiscation of her manuscript violated a clearly established constitutional or statutory right of which reasonable officials would have known. Her failure to cite any case where an official acting under similar circumstances was held to have violated a plaintiff's rights is fatal.

As defendants note, a further bar to plaintiff's claims regarding sex offender treatment, to the extent she asserts any, is Heck v. Humphrey, 512 U.S. 477 (1994). See Pearson v. Holder, No. 3:09-CV-682-O, 2011 WL 13185719, at *4-6 (N.D. Tex. Apr. 29, 2011).

Plaintiff's official capacity claims are claims against the government itself, Kentucky v. Graham, 473 U.S. 159, 165-66 (1985), over which the state court had no jurisdiction absent a specific waiver of sovereign immunity. See Lane v. Pena, 518 U.S. 187, 192 (1996). Because the state court lacked jurisdiction over these claims, this court could not acquire it upon removal. Lopez v. Sentrillon Corp., 749 F.3d 347, 350-51 (5th Cir. 2014). This is the doctrine of derivative jurisdiction. Id. at 350 ("when a case is removed from state to federal court, the jurisdiction of the federal court is derived from the state court's

jurisdiction"). Here, defendants argue that because the court does not have derivative jurisdiction over the official capacity claims, plaintiff simply cannot re-assert those claims through her amended complaint to establish jurisdiction. Doc. 17 at 24-25; Doc. 23 at 9-10. See Francis v. ENI Exploration Program 1980-II, No. 84-0005-CV, 1984 WL 817, at *2 (W.D. Mo. May 25, 1984)(citing Pavlov v. Parsons, 574 F. Supp. 393, 396-97 (S.D. Tex. 1983)). Again, the court need not decide. Plaintiff is no longer incarcerated at FMC Carswell and it appears that the declaratory or injunctive relief she seeks is moot. See Tamfu v. Ashcroft, 54 F. App'x 408, 2002 WL 31689212 (5th Cir. 2002); Edwards v. Johnson, 209 F.3d 772, 776 (5th Cir. 2000).

V.

Order

The court ORDERS that defendants' motion to dismiss be, and is hereby, granted, and that plaintiff's claims be, and are hereby, dismissed.

SIGNED July 23, 2019.

JOHN McBRYDE
United States District Judge

Fifth Circuit Order on Petition for Rehearing

United States Court of Appeals for the Fifth Circuit

No. 19-10862

LISA A. BIRON,

Plaintiff—Appellant,

versus

JODY UPTON, *Warden*; LETICIA A. ARMSTRONG; EMILY DIXON,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:19-CV-322

ON PETITION FOR REHEARING

Before STEWART, ELROD, and GRAVES, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

Fifth Circuit Judgment

United States Court of Appeals for the Fifth Circuit

No. 19-10862

LISA A. BIRON,

Plaintiff—Appellant,

versus

JODY UPTON, WARDEN; LETICIA A. ARMSTRONG; EMILY DIXON,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:19-CV-322

Before STEWART, ELROD, and GRAVES, *Circuit Judges.*

PER CURIAM:*

Plaintiff-Appellant Lisa Biron, a federal inmate proceeding pro se, appeals the dismissal of her complaint seeking monetary damages and injunctive relief arising from prison psychologists' confiscation of a lengthy manuscript she had written. Finding no reversible error, we AFFIRM.

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

I.

Biron was convicted by a New Hampshire federal jury of eight counts involving the sexual exploitation of her minor daughter. *Biron v. United States*, No. 16-CV-108-PB, 2017 WL 4402394, at *1 (D.N.H. Oct. 2, 2017). She was sentenced to 480 months' imprisonment.

Biron is currently housed at Waseca Federal Correctional Institution in Minnesota, but she previously received mental health and sex offender treatment at Carswell Federal Medical Center (FMC Carswell) in Fort Worth, Texas. The judgment entered in Biron's criminal case recommended that she "participate in a sex offender treatment program while incarcerated." Biron, a former attorney, filed a pro se civil complaint in Texas state court against federal officials based on actions arising out of her treatment at FMC Carswell. She sued the following FMC Carswell personnel: Jody Upton, warden; Leticia A. Armstrong, psychologist; and Emily Dixon, psychologist. Her claims against Armstrong and Dixon are based on their confiscation of a 144-page manuscript Biron was writing to record her conclusions on Christian morality of sexual conduct. In Biron's complaint filed in state court, she alleged that she "was directed by God to research, pray about, study the Bible concerning God's view of morality involving sex and sexual conduct, and to record these findings in writing for use in her rehabilitation and to help educate others." Her claim against Upton asserted that he failed to intervene to order the manuscript's return. Biron alleged violations of her rights under the First Amendment, the Religious Freedom Restoration Act (RFRA), the Fifth Amendment, and Texas law.

The defendants removed the case to federal court, and there moved to dismiss for lack of jurisdiction and failure to state a claim. In response, Biron filed an amended complaint seeking money damages for violations of

her rights under the Fifth Amendment's Due Process Clause; RFRA; the Administrative Procedures Act (APA); and the First Amendment's Free Exercise, Freedom of Expression, and Establishment Clauses. She further seeks injunctive relief ordering the return of her manuscript and cessation of her psychological treatment. Biron sues Upton in his official capacity and Armstrong and Dixon in their official and individual capacities. The defendants renewed their motion to dismiss, and full briefing on the motion followed.

The district court granted the motion in a twelve-page memorandum opinion, concluding that Biron's transfer mooted most of her claims, Biron's individual claims are barred by qualified immunity and a lack of a cause of action under *Bivens*, and that sovereign immunity bars Biron's official-capacity claims. Biron timely appealed. Construed broadly, she challenges the dismissal of her First Amendment claims under rule 12(b)(6) and of her official-capacity claims for want of jurisdiction. We have jurisdiction under 28 U.S.C. § 1291 over this appeal from a final judgment dismissing all of Biron's claims in this removed case.

II.

We review the district court's dismissal under rules 12(b)(1) and 12(b)(6) de novo. *Childers v. Iglesias*, 848 F.3d 412, 413 (5th Cir. 2017) (rule 12(b)(6)); *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 240 (5th Cir. 2005) (rule 12(b)(1)). We take all well-pled factual allegations as true and view them in the light most favorable to Biron. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007).

III.

We first address Biron's individual-capacity claims. The district court held that the defendants are entitled to qualified immunity against Biron's RFRA claim. We have never squarely held that qualified immunity is

available as a defense for federal officials against RFRA claims,[1] and the district court undertook no analysis to determine the doctrine's applicability here. *Cf. Stramaski v. Lawley*, No. 20-20607, 2022 WL 3274132, at *6 (5th Cir. Aug. 11, 2022) ("Our starting point is a conviction that substantial analysis is necessary before deciding if qualified immunity ever applies to the [Fair Labor Standards Act]."). But Biron does not contend that qualified immunity is unavailable against her RFRA claims, and thus she has forfeited any such argument. We therefore consider whether Biron has alleged a violation of any clearly established Free Exercise right.

Biron has identified no authority holding that a prison official's mistaken designation of an inmate's personal writings as contraband violates the Constitution or any federal law. Assuming that Biron's manuscript was not sexually explicit, Biron cites no cases in which the Fifth Circuit or the Supreme Court have held that prison psychologists' removal of a sex offender's writings about "sexual conduct," erroneously found to be sexually explicit, violates the Constitution. That failure alone forecloses her arguments against the applicability of qualified immunity. *E.g.*, *Collier v. Montgomery*, 569 F.3d 214, 217 (5th Cir. 2009) (noting that a "plaintiff has the burden to negate the assertion of qualified immunity").

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[1] During the pendency of this appeal, the Supreme Court held that damages claims are permissible under RFRA against federal officials sued in their individual capacities. *See Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020). But the Court did not squarely address whether the doctrine applies to RFRA claims against federal officials; instead, both the Government and the plaintiffs in that case "agree[d] that government officials are entitled to assert a qualified immunity defense when sued in their individual capacities for money damages under RFRA." *Id.* at 493 n.* Though we have not resolved this question, we did apply the qualified immunity analysis to a RFRA claim against state officials before RFRA was limited to apply only to federal officials. *See Ganther v. Ingle*, 75 F.3d 207, 211 (5th Cir. 1996).

Moreover, even if qualified immunity is unavailable here, Biron also has not established any constitutional violation. First, Biron has made no showing that the confiscation of her manuscript poses a "substantial[] burden" on her religious exercise. 42 U.S.C. § 2000bb-1(a), (b). And although prisoners retain many First Amendment rights, a prison regulation violates the First Amendment only if it is not "reasonably related to legitimate penological interests." *Butts v. Martin*, 877 F.3d 571, 584 (5th Cir. 2017). Biron has not shown that even a mistaken designation of her manuscript as sexually explicit violates this tenet. Preserving order and security are compelling penological interests, *see Warner v. Wright*, 434 F. App'x 333, 336 (5th Cir. 2011), prison officials may impose reasonable restrictions on the type and amount of property that inmates are allowed to possess, *see Sullivan v. Ford*, 609 F.2d 197, 198 (5th Cir. 1980), and sexually explicit material may constitute contraband in the prison context, *see Thompson v. Patteson*, 985 F.2d 202, 205–06 (5th Cir. 1993).

Accordingly, we need not address the district court's conclusions regarding Biron's official-capacity claims. If the defendants violated no law or constitutional provision in their individual capacities, they cannot be liable in their official capacities. *Cf. Whitley v. Hanna*, 726 F.3d 631, 639 (5th Cir. 2013) ("To the extent Whitley asserts claims against Appellees in their official capacities, we find such claims also fail for lack of an underlying constitutional violation.").

The judgment below is AFFIRMED.

JENNIFER WALKER ELROD, *Circuit Judge*, concurring in part* and dissenting in part:

In my view, the majority opinion goes further than it should by holding that "the defendants violated no law or Constitutional provision." *Ante* at 5. Because I think such a conclusion is premature at this stage, I would reverse in part and remand for further proceedings.

When reviewing dismissal under rule 12(b)(6), "[w]e accept all well-pleaded facts as true and draw all reasonable inferences in favor of the plaintiff." *BG Gulf Coast LNG v. Sabine-Neches Navigation Dist.*, 49 F.4th 420, 425 (5th Cir. 2022) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In the operative complaint, Biron alleged that:

- "[D]espite Ms. Biron's refusal to submit to treatment by Emily Dixon, Defendant Dixon conducted a targeted search of Ms. Biron's locker and removed all 144 pages of this manuscript draft and notes written by Ms. Biron . . . ";
- "Defendant Armstrong advised Ms. Biron that her writing would not be returned to her and was permanently confiscated because it was 'sexually explicit'";

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* I agree with the majority opinion that the individual-capacity damages claims were properly dismissed because the officials are entitled to qualified immunity and Ms. Biron has not identified any violation of clearly established law. *Ante* at 4. And to the extent that qualified immunity may be inapplicable to her RFRA claims, she has forfeited any such arguments by failing to brief them. *Id.* The district court also properly dismissed most of Biron's official-capacity injunction claims because she is no longer staying at the Texas facility (FBOP Carswell). Biron argues that these claims are not moot because she may still be subject to the same policy in the Minnesota facility. But even if Biron's assertion is valid, she failed to name the correct defendants because none of the current defendants are associated with the Minnesota facility. Thus, I would dismiss these claims without prejudice.

- "It is Ms. Biron's sincerely held religious belief that she was directed by God to research, pray about, and study the Bible concerning God's view of morality involving sex and sexual conduct, and to record these findings in writing . . . ";
- "Defendants' actions in confiscating Ms. Biron's writing as 'hard contraband' served solely as forced treatment to alter her behavior";
- Her sincerely held religious belief "is diametrically opposed to the philosophical underpinnings of the secular humanistic discipline of psychology."

If these allegations are true, Biron at least has one valid claim for relief that should not be dismissed: her request to have her writings returned. This claim is not moot because there is no indication that the writings have left the defendants' possession. Biron stated in her brief that the "defendants still have [her writing]," and the defendants never denied this allegation. Rather, the defendants argued that they "no longer have custody or authority over Biron and thus are in no position to return any items to her possession." But if the defendants still have possession of the writings, I see no reason why they cannot deliver the writings to Biron. Presumably, Biron would still be able to receive mail in her new correctional facility.

Furthermore, viewed in the light most favorable to Biron, these allegations—which we must accept as true at this stage—could raise a factual issue as to whether the confiscation of her manuscript poses a "substantial burden" on her religious exercise under RFRA. 42 U.S.C. § 2000bb-1. Consequently, I think more factual development is necessary before we can conclude that "the defendants violated no law or Constitutional provision." *Ante* at 5.

* * *

Contrary to the district court's holding, Biron's request to have her writings returned to her is not moot because the defendants still have possession of her writings. And viewed in the light most favorable to Biron, her allegations, if true, could establish that the confiscation of her manuscript poses a "substantial burden" on her religious exercise. 42 U.S.C. § 2000bb-1. Accordingly, I would reverse in part and remand the district court's dismissal of Biron's injunctive relief claim to have her writings returned.

First Verified Amended Complaint

App'x D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Lisa A. Biron Plaintiff, v. FMC Carswell Warden Jody Upton, et al., Defendants.	No. 4:19-cv-322 Civil Complaint for Damages, Declaratory and Injunctive Relief Jury Trial Requested

First Verified Amended Complaint

Plaintiff, Lisa A. Biron, pro se, pursuant to Rule 15(a)(1)(B) of the Federal Rules of Civil Procedure, hereby amends her Complaint.

1. Plaintiff is a federal inmate presently incarcerated in Federal Correctional Institution, Waseca, MN. The events giving rise to the within claims occurred at Federal Medical Center, Carswell, in Fort Worth, Texas.

2. Plaintiff amends to bring claims for damages under the Fifth Amendment's Due Process and Equal Protection Clauses, the Religious Freedom Restoration Act ("RFRA") (42 U.S.C. §§ 2000bb et seq.), the Administrative Procedures Act ("APA"), the First Amendment's Free Exercise, Freedom of Expression, and Establishment Clauses, and for declaratory judgment under 28 U.S.C. §§ 2201 and 2202 and for injunctive relief under 28 U.S.C. § 2284 and Fed. R. Civ. P. 65, to redress the deprivation, under color of federal law, of rights secured under the Constitution and Laws of the United States of America. She requests a jury trial.

3. Defendant Mr. Jody Upton was[1], at all times relevant to this Complaint,

1 As of April 26, 2019, Mr. Upton has retired from the Bureau of Prisons.

the Warden of FMC Carswell. He was legally responsible for the operations of FMC Carswell and for protecting the constitutional rights of the inmates housed therein.

4. Defendant Leticia A. Armstrong is a psychologist involved in sex offender treatment and a correctional officer at FMC Carswell.

5. Defendant Emily Dixon is a psychologist involved in sex offender treatment and a correctional officer at FMC Carswell.

6. Warden Upton was sued in his official capacity only.

7. Leticia Armstrong and Emily Dixon are sued in their individual and official capacities.

Claims

8. As set forth in the following claims, Defendants have acted to force treatment and behavioral change upon Ms. Biron through the secular humanistic discipline of psychology. Ms. Biron was convicted of sex offenses, and Defendants have disregarded her constitutional right to refuse secular programming that contradicts her religious beliefs. Defendants' act of confiscating her writing was not to protect the safety and security of the institution or to protect the public, but was an act of unconstitutional sensorship which violated Ms. Biron's religious liberties and sought to force the religion of secular humanism upon her. See Torasco v. Watkins, 367 U.S. 488, 495, n.11 (1961).

9. Apart from unconstitutional forced sex offender treatment, inmates are permitted under 28 C.F.R. §§ 551.81-83 and FBOP program statement P. 5350.27 (Inmate Manuscripts) to "prepare a manuscript for private use or for publication while in custody without staff approval."

10. It is Ms. Biron's sincerely held religious belief that man is created by the triune-God (Father, Son, and Holy Spirit) in His image as body,

soul, and spirit, and that all of mankind's moral failings result from his separation from God, which is also known as spiritual death, or man's fallen nature. This state of separation from God was caused by Adam and Eve's original rebellion against Him.

11. It is Ms. Biron's sincerely held religious belief that the only way to overcome these moral failings is through the reconnection to God through belief and reliance on the finished, sacrificial work of the Lord Jesus Christ on the cross which paid for mankind's penaly for his sin – past, present, and future. This belief and reliance in Christ results in the forgiveness of sin, a regenerated spirit, and the eternal reconnection to God the Father. Once this reconnection occurs, the Holy Spirit comes to reside in the believer allowing that believer to submit to God and to not fulfill the sinful desires of the fallen nature. It is Ms. Biron's sincerely held religious belief that this power from God is the only way to truly overcome moral failures and to find freedom from sinful behavioral patterns. This overcoming power (the Holy Spirit) that now exists in the believer is made manifest in the believer's life (her body and soul) through the renewing of the human mind to God's truth through His Word (the Bible) and through communication and fellowship with God Himself.

12. The foregoing truth is diametrically opposed to the philosophical underpinnings of the secular humanistic discipline of psychology that deny the spiritual aspect of the human being and its affect on the human body and soul.

13. It is Ms. Biron's sincerely held religious belief that she was directed by God to research, pray about, and study the Bible concerning God's view of morality involving sex and sexual conduct, and to record these findings in writing for use in her rehabilitation and to help disciple and

educate other Christians in this vital subject.

14. In obedience to God and to her sincerely held religious beliefs, Ms. Biron began this course of study and prayer, and began to write.

15. Thus far, her writing includes a comparison of God's interaction with Israel in the Old Testament, and how God considered their idolatry to be spiritual adultery and fornication. Several Biblical texts are quoted and cited in this regard. The writing also includes analysis of how a Christian's ability to hear from God and to grow in their faith is hampered by sexual immorality. Several Biblical texts are quoted and cited in support of this. Some of the writing contains notes taken by Ms. Biron from sermons of other Christian ministers, and notes from research from books on the subject. The writing includes the relevant application of this information to her life and moral failings.

16. On or about September 25, 2015, despite Ms. Biron's refusal to submit to treatment by Emily Dixon, Defendant Dixon conducted a targeted search of Ms. Biron's locker and removed all 144 pages of this manuscript draft and notes written by Ms. Biron which contained the writing described in paragraph 15. Defendant Dixon told Ms. Biron that the document would be reviewed to see if she would be allowed to have it.

17. To Ms. Biron's knowledge, no other general population inmate at FMC Carswell has had their writing sensored or confiscated. (Comparator Class).

18. Defendant Dixon's removal of this writing from Ms. Biron caused her extreme emotional distress which resulted in panic attacks and an upset stomach because she could not fathom that this incident could happen in the United States of America.

19. On or about October 15, 2015 Leticia Armstrong had Ms. Biron paged to the lieutenant's office. When Ms. Biron arrived, Defendant Armstrong had in her possession Ms. Biron's 144-page manuscript. Defendant Armstrong advised Ms. Biron that her writing would not be returned to her and was permanently confiscated because it was "sexually explicit". The manuscript, which Defendant Armstrong had in her hands, was marked with little yellow stickers throughout the document. Seeing this, Ms. Biron asked Defendant Armstrong to show even one example of this alleged "sexually explicit writing." Armstrong refused. Armstrong insisted that examples of such would be shown to Ms. Biron through the administrative remedy process. This never occurred. Armstrong said the writing was "hard contraband."

20. Ms. Biron's writing is not sexually explicit as that term is defined in the United States Code, or as defined by any reasonable human being on Earth; but even if it were the next Fifty Shades of Grey, Ms. Biron has the unquestionable constitutional right to write anything she wants to as long as it does not threaten the safety and security of the institution or staff, or of the public.

21. Ms. Biron attempted to explain to Defendant Armstrong that her actions were contrary to the Constitution, to wit, Lieutenant Butler (who was present at the time) told Ms. Biron to "Shut the fuck up!"

22. Devastated that her writing had been stolen, and her religious liberties trampled, Ms. Biron again experience panic attacks and an upset stomach.

23. On or about September 30, 2015 (after the writing was taken from the locker but before it was officially confiscated as "hard contraband"), Ms. Biron sent an email to Warden Upton advising him of the situation and ask-

ing him for his help. He failed to intervene to protect Ms. Biron's civil rights and religious liberties.

24. Defendants' actions in confiscating Ms. Biron's writing as "hard contraband" served solely as forced treatment to alter her behavior.

25. Forcing secular humanist treatment and philosophy violates the Establishment Clause.

26. Title 28 C.F.R. § 553.12 defines "hard contraband" as "any item which poses a serious threat to the security of an institution . . . ." Some examples include weapons and intoxicants. While the pen is at times mightier than the sword, the Defendants did not and cannot offer any rationale that suggests Ms. Biron's Christian writing threatens the safety and the security of the institution.

27. On May 2, 2017, Ms. Biron received the final denial of Administrative Remedy # 842574 (dated 4/10/2017) regarding the stolen writing. In order to affirm these Defendants actions, it is improbable that the writing was actually reviewed by anyone during the process because, although Ms. Biron asked for examples of what was considered "sexually explicit", no explanation was given. If the process was a legitimate review process the writing would have been promptly returned to Ms. Biron.

28. Defendants actions and omissions violated the Constitution, Federal Code, Administrative Law, and their own Program Statement.

Remedies and Relief

29. Ms. Biron seeks compensatory and punitive damages against Leticia Armstrong and Emily Dixon.

30. Ms. Biron's remedy at law, however, is inadequate and incomplete, and she will be irreparable injured by the loss of her writing unless

the Court grants declaratory and injunctive relief.

WHEREFORE, Ms. Biron requests this Honorable Court:

31. Grant her a declaration that the acts and omissions described herein violate her rights under the Constitution and under the Law;

32. Grant a preliminary and permanent injunction ordering the Defendants to return Ms. Biron's writing to her;

33. Order the Defendants to refrain from imposing unconsented-to psychological treatment upon Ms. Biron;

34. Award Ms. Biron compensatory and punitive damages against Defendants Armstrong and Dixon to the fullest extent allowed under the law;

35. Grant Ms. Biron her costs and fees incurred in prosecuting this lawsuit; and

36. Grant such other relief as is deemed just and equitable by this Court.

Repectfully submitted

5/15/19
Date

Lisa A. Biron (#12775-049)
FCI Waseca
P.O. Box 1731
Waseca, MN 56093

Verification

I hereby swear, under penalty of perjury, that the matters and facts in the foregoing First Verified Amended Complaint are true and correct to the best of my knowledge and belief.

5/15/19
Date

Lisa Biron