

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED

John J. Dierlam § JUN 28 2023
Plaintiff §
versus § Nathan Ochsner, Clerk of Court
Joseph R. Biden, in his official capacity § CIVIL ACTION NO. 4:16-cv-00307
as President of the United States et. al. §
Defendants §

**REPLY TO DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Argument

I. The government's contention on pp.4-5 of their Response To Plaintiff's Motion For Summary Judgment Dkt#144 is self contradictory.

Here the issue is not whether "the retrospective and prospective portions of a claim involving RFRA cannot be adjudicated separately." The issue here is more properly whether an entitlement to retrospective relief can be acknowledged, but an entitlement to prospective relief can be denied for the same or related continuing violations. By the *Korte v. Sebelius* decision mentioned on p.2 of the Plaintiff's Motion for Summary Judgment, the entitlement of prospective and retrospective relief is simultaneous once a violation of RFRA is established. A violation has been admitted by the defendants in this case. The issue posed by the defendants here is one of standing which is separate and apart from this entitlement. The defendants confound these separate issues. See *infra* for more on the issue of standing and mootness.

In the instant case, clearly the language of RFRA and case precedent indicates I should not be exposed to the same or similar violations of RFRA in the future by definition of

prospective. As given on pp.62-65 of the 3AC, the violation of RFRA involved a forced participation in activities supporting abortion or face other penalties. However, the defendants have extended this violation with their notifications and proposed new rules, as anticipated in the 3AC. See the next section for more information. Therefore, these new violations of RFRA should be considered connected to and a continuation of the previous violations. The Motion for Summary Judgment contains evidence of continuing hostility of the defendants to my religion in an attempt to supplant its principals for those of the defendants. Evidence continues to accumulate in support of this conclusion. FRCP 54(b) indicates a Court decision or order "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." In reply to the defendant's request for authority concerning reimbursement of legal expenses on pp.6-7 of the government's Response, 28 U.S. Code § 2412 and FRCP 54(d) provides for an award of litigation costs of a plaintiff. In addition, I have 30 days after a favorable final judgment to provide a schedule of costs.

II. Standing and Mootness.

From the web page, <https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html> HHS makes it perfectly clear they intend to enforce under the current 2020 FINAL RULE prohibitions of discrimination based upon sexual orientation and gender identity.

(See the May 10, 2021 announcement at this link,

<https://public3.pagefreezer.com/browse/HHS.gov/28-12-2022T07:11/https://www.hhs.gov/about/news/2021/05/10/hhs-announces-prohibition-sex-discrimination-includes-discrimination-basis-sexual-orientation-gender-identity.html>)

The HHS web page states,

Consistent with the Supreme Court's decision in Bostock and Title IX, beginning

May 10, 2021, OCR will interpret and enforce Section 1557's prohibition on discrimination on the basis of sex to include: (1) discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity. This interpretation will guide OCR in processing complaints and conducting investigations, but does not itself determine the outcome in any particular case or set of facts.

Likewise on the web page <https://www.hhs.gov/civil-rights/for-providers/laws-regulations-guidance/laws/index.html> HHS lists the "Laws and Regulations Enforced by OCR." Here also HHS indicates it will enforce under the current rule discrimination based upon "...sex (including pregnancy, sexual orientation, and gender identity..." <https://www.hhs.gov/civil-rights/for-individuals/section-1557/1557faqs/index.html> states,

This prohibition applies to all health insurance issuers that are recipients of Federal financial assistance, which includes premium tax credits and cost sharing reductions associated with coverage offered through the Health Insurance Marketplaces or Medicare Parts A, C and D payments....The final rule on Section 1557 does not include a religious exemption...

Clearly, the proposed HHS rule of 8/4/2022 merely formalizes what HHS has in essence already enacted and is currently enforcing. (See pp. 6-9 of the Opposed Motion For Temporary Injunction and Expedited Consideration on Defendant's Partial Motion To Dismiss. Dkt#130, and p.8 of the REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION Dkt#133) Contrary to the statement of the defendants on p.6 of their Response regarding the notice of proposed rule making, the defendants are CURRENTLY imposing requirements. More than a notice of proposed rule making is involved since two announcements were made indicating the defendants will ENFORCE their expanded definition of "sex" under the current rule.

With this enforcement action, HHS widens the net and pressures all health insurers to alter their contracts to favor the HHS interpretation of "sex." This interpretation is based on

dogma held by HHS in opposition to Catholic teaching. (See pp.3-6 of the Opposed Motion For Temporary Injunction and Expedited Consideration on Defendant's Partial Motion To Dismiss.)

In addition, as indicated above, HHS is expanding the original HHS Mandate into Medicare as well as forcing acceptance of its beliefs concerning certain sexual activities upon the population. People enrolled in any government subsidized program must now at least partially subsidize and accept these beliefs in order to maintain health coverage. It is required to sign up for Medicare within a 6 month period of your 65th birthday otherwise "...if you fail to sign up for Medicare on time, you'll risk a 10 percent surcharge on your Medicare Part B premiums for each year-long period you go without coverage upon being eligible."¹ I am within a year of this birthday. Not only will I be denied an important government benefit if I follow my religious beliefs and do not sign up for Medicare, I face life long penalties for any delay if I am able to sign up in the future. Considerable pressure exists to violate my religious beliefs in violation of the 1st amendment as well as RFRA.

The health insurance companies are "State Actors" as they are compelled to take certain actions. (See *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 204 L. Ed. 2d 405, 587 U.S. (2019).) At a minimum, Medicare Parts B, C, and D require premiums, deductibles and coinsurance which can be used to support abortion services and sexual activities in contradiction to my faith. Obviously, HHS et. al. has no intention to cease any of the violations which gave rise to this lawsuit and we can expect WILL continue to force, control, and use the property of the insured and insurer to advance its belief system and political interests. Other encroachments of the freedoms of speech and religion are CERTAIN to follow in the future.

¹ <https://www.medicareresources.org/faqs/do-i-need-to-sign-up-for-medicare-at-65-if-im-still-working/>

We recognize that, as a general rule, voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i. e., does not make the case moot. But jurisdiction, properly acquired, may abate if the case becomes moot because

(1) it can be said with assurance that "there is no reasonable expectation . . . that the alleged violation will recur, and

(2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.

When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 99 S. Ct. 1379, 59 L. Ed. 2d 642 (1979). (Internal quotations and citations omitted.)

The language of these two conditions presents a high barrier to moot a case. The defendants can not even come close to meeting either condition. The IM, IMP, and more specifically for the remaining charge after the dismissal, the violations of RFRA not only have an expectation to recur but continue to exist and have expanded. There exists a certainty as provided above and in the MSJ the violations to interfere with my religious practice continue. Further, no event has "irrevocably eradicated" the harms caused by the violations. HHS is determined to impose its religious values upon the population as evidenced by its past history and by the expansion of the original HHS Mandate given above. The TCJA nor the individual religious HHS mandate exemption 83 Fed. Reg. 57,536 (Nov. 15, 2018), which was drawn very narrowly to apply to 45 CFR §147.130 only, have any effect on the new expanded HHS Mandate. It very much appears HHS had plans for future violations and will use the infinite resources of the government and taxpayers to further its goals and wear down any opposition. This case is not moot and I have standing.

III. Relief and Conclusion.

If I was not clear in the Motion for Summary Judgment I will state here explicitly, I will NOT accept retrospective relief without appropriate prospective relief. Retrospective relief is of little value if the government is free to continue to violate RFRA and my Constitutional rights by the same or similar violations. I should not be subject to continued violations of my religious freedoms as demonstrated above which clearly is the intention of the defendants. If despite a) the defendant's actions of the ultra vires imposition of the original HHS Mandate, b) the stated objective of the defendants to burden all insured with "gender affirming care" without scientific basis, c) the current evolving evidence of corruption of the current administration to impose Communist/Fascist ideas in violation of the Constitution for which the ACA served as a template, this Court can not grant any prospective relief. I then request this court to finally dismiss all claims so that I may file an appeal to a court who will hopefully allow a more fair hearing of this case.



Certificate of Service

I certify I have on 6/27/2023 mailed a copy of the above document to the clerk of the court at:

United States District Clerk
Southern District of Texas
515 Rusk, Room 5300
Houston, TX 77002

as I do not have access to the Court's electronic filing system. I have also mailed a copy to Defendant's Counsel at:

Rebecca M. Kopplin
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, DC 20005

I have emailed a courtesy copy to the defendant's counsel at Rebecca.M.Kopplin@usdoj.gov as well as the Case Manager for the Judge of the Court at Arturo_Rivera@txs.uscourts.gov.



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