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Griffen v. Ark. Supreme Court

United States District Court for the Eastern District of Arkansas, Western Division

April 12, 2018, Decided; April 12, 2018, Filed

NO. 4:17CV00639-JM

Reporter

2018 U.S. Dist. LEXIS 239019 *

HONORABLE WENDELL GRIFFEN, PLAINTIFF VS.
ARKANSAS SUPREME COURT, et al., DEFENDANTS

Prior History: [Griffen v. Kemp, 2018 U.S. Dist. LEXIS 5111, 2018 WL 387810 \(E.D. Ark., Jan. 11, 2018\)](#)

Core Terms

immunity, declaratory relief, religious, sovereign
immunity, motion to dismiss, pleadings, waived, cases,
injunctive relief, official capacity, death penalty,
allegations

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For Arkansas Supreme Court, John Dan Kemp, Honorable, in his official capacity as Chief Justice of the Supreme Court of Arkansas, Robin F Wynne, Honorable, in his official capacity as Associate Justice

of the Supreme Court of Arkansas, Shawn A Womack, Honorable, in his official capacity as Associate Justice of the Supreme Court of Arkansas, Defendants: Robert S. Peck, LEAD ATTORNEY, Center for Constitutional Litigation, PC, New York, NY.

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Judges: James M. Moody [*3] Jr., United States District Judge.

Opinion by: James M. Moody Jr.

Opinion

ORDER

Pending are motions to dismiss filed on behalf of Defendants Supreme Court of Arkansas, Justices John Dan Kemp, Robin F. Wynne, and Shawn A. Womack, (ECF No. 23); Justices Josephine L. Hart and Karen R. Baker, (ECF No. 24); Justice Courtney Hudson Goodson, (ECF No. 26); and Justice Rhonda K. Wood, (ECF No. 28). Plaintiff has filed a consolidated response to the pending motions to dismiss and Defendants have filed a consolidated reply. The issues are ripe for determination and the Court will address the arguments of the Defendants collectively.

Facts

On October 5, 2017, the Honorable Wendell Griffen, Judge for the Sixth Judicial Circuit Court, filed suit in this Court claiming that the Supreme Court of Arkansas, and Justices John Dan Kemp, Robin F. Wynne, Courtney Hudson Goodson, Josephine L. Hart, Shawn A. Womack, Karen R. Baker and Rhonda K. Wood, in their official capacities, violated his constitutional rights when

the Court entered Order No. 17-155 which permanently reassigned all cases in the Fifth Division (cases assigned to Judge Griffen) that involve the death penalty or the state's execution protocol ("the disqualification [*4] order"). Plaintiff alleges claims of [First Amendment](#) retaliation on the basis of speech and religion, violation of the Arkansas Religious Freedom Restoration Act, denial of his procedural due process rights, violation of his right to equal protection and civil conspiracy.

Defendants claim that Plaintiff's complaint should be dismissed pursuant to [Fed. R. Civ. P. 12\(b\)\(1\)](#) and [\(b\)\(6\)](#). To survive a motion to dismiss under [Rule 12\(b\)\(6\)](#), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" [Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 \(2009\)](#). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* However, courts are "not bound to accept as true a legal conclusion couched as a factual allegation" and such "labels and conclusions" or "formulaic recitation[s] of the elements of a cause of action will not do." *Id.* (quoting [Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 \(2007\)](#)) (internal quotation marks omitted). In making this determination, the Court must draw all reasonable inferences in favor of the plaintiff, [Crooks v. Lynch, 557 F.3d 846, 848 \(8th Cir.2009\)](#), and must treat the complaint's factual allegations as true. See [Taxi Connection v. Dakota, Minnesota & E. R.R. Corp., 513 F.3d 823, 826 \(8th Cir. 2008\)](#). "When considering a [Rule 12\(b\)\(6\)](#) motion, the court generally must ignore [*5] materials outside the pleadings, but it may consider some materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings." [Smithrud v.](#)

City of St. Paul, 746 F.3d 391, 395 (8th Cir. 2014) (citation omitted).

In a facial challenge to subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), "the court merely [needs] to look and see if plaintiff has sufficiently alleged a basis of subject matter jurisdiction." Branson Label, Inc. v. City of Branson, 793 F.3d 910, 914 (8th Cir. 2015) (alteration in original). "Accordingly, 'the court restricts itself to the face of the pleadings and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6).'" *Id.* (quoting Osborn v. United States, 918 F.2d 724, 729 n.6 (8th Cir. 1990)).

In his Complaint, Plaintiff acknowledges that "in his personal life and his capacity as a pastor, [he] has expressed his personal religious and moral views on the death penalty." (ECF No. 1, ¶12). He admits participating in prayer vigils as an exercise of his religious expression and claims to have "always conducted his religious activities outside the auspices of his judicial role." *Id.* Plaintiff contends that "notwithstanding his personal religious beliefs and moral views about the death penalty, [he] has always attempted to interpret Arkansas law on [*6] the death penalty fairly, without predisposition and according to law and precedent." (ECF No. 1, ¶13). Plaintiff admits that on April 10, 2017 he expressed his personal view, in a blog post about religious faith, that "the death penalty is 'morally' -not legally-unjustified." (ECF No. 1, ¶16).

On Good Friday, April 14, 2017, Plaintiff attended a rally organized to demonstrate opposition to the death penalty on the steps of the Arkansas Capitol. (ECF No. 1, ¶18). On the same day, he attended a prayer vigil outside the Arkansas Governor's Mansion. *Id.* During the prayer vigil, Plaintiff "laid on a cot in solidarity with Jesus. . . ." *Id.* Plaintiff claims that his participation in

these gatherings was a constitutionally protected expression of his deeply held religious beliefs. (ECF No. 1, ¶20).

Also on April 14, 2017, Plaintiff, as the presiding judge in McKesson Medical-Surgical Inc. v. State of Arkansas, et al., Case No. 60CV-17-1921, issued a temporary restraining order which prevented the State from using the drug vercuronium bromide in the administration of capital punishment. (ECF No. 1, ¶26). Plaintiff set a hearing for the following Tuesday, April 18, 2017. (ECF No. 1, ¶27). On [*7] April 15, 2017, the Arkansas Attorney General filed an emergency petition for writ of mandamus, writ of certiorari, or supervisory writ with the Arkansas Supreme Court seeking to vacate the McKesson TRO and remove Judge Griffen from the McKesson case. (ECF No. 1, ¶28). In the State's emergency petition before the Arkansas Supreme Court, the State contended that Plaintiff's public display of partiality demonstrated actual bias and that he could not avoid the appearance of unfairness. On April 17, 2017 the Arkansas Supreme Court issued Order No. 17-155 which removed Plaintiff from the McKesson case, referred him to the Judicial Discipline and Disability Commission to consider whether he had violated the Code of Judicial Conduct, and "immediately reassign[ed] all cases in the Fifth Division [the cases assigned to Judge Griffen] that involve the death penalty or the state's execution protocol, whether civil or criminal." (ECF No. 1, ¶29-30). The Court ruled that it was to be a "permanent reassignment" in present cases and future cases involving this subject matter. *Id.* Plaintiff alleges that "the Arkansas Supreme Court entered Order No. 17-155 in retaliation for [his] exercise of his religious [*8] freedom through attendance at the Good Friday prayer vigil and gathering and out of discriminatory racial animus toward him as a person of African-American ancestry and racial identity." (ECF No. 1, ¶40).

Discussion

Sovereign Immunity

Defendants argue that Plaintiff's claims against the Arkansas Supreme Court are barred by sovereign immunity. Plaintiff responds by clarifying that he only named the Arkansas Supreme Court as a party defendant for the claims made in Count III of his Complaint which allege violations of the Arkansas Religious Freedom Restoration Act ("ARFRA"). The [Eleventh Amendment](#) bars suit against state governments brought in federal court unless the state has clearly and unequivocally waived its immunity, [Faibisch v. Univ. of Minn., 304 F.3d 797, 800 \(8th Cir. 2002\)](#), or Congress has abrogated the states' [Eleventh Amendment](#) immunity with respect to that particular cause of action, [Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54-56, 116 S. Ct. 1114, 134 L. Ed. 2d 252 \(1996\)](#). "A state's interest in sovereign immunity pertains not only to whether it may be sued but also to where it may be sued." [Faibisch, 304 F.3d at 800](#). The [Eleventh Amendment](#) bars suit against states and state agencies "for any kind of relief, not merely monetary damages." [Monroe v. Ark. State Univ., 495 F.3d 591, 594 \(8th Cir. 2007\)](#). Plaintiff does not dispute that the Arkansas Supreme Court is an agency of the State of Arkansas.

Plaintiff argues that with respect to the ARFRA, the Arkansas [*9] legislature has waived sovereign immunity. The ARFRA provides as follows:

(a) A government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except that a government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is:

(1) In furtherance of a compelling

governmental interest; and

(2) The least restrictive means of furthering that compelling governmental interest.

(b)(1) A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

(2) Standing to assert a claim or defense under this section is governed by the general rules of standing under statute, the Arkansas Rules of Criminal Procedure, the Arkansas Rules of Civil Procedure, or any court holding from the state's appellate courts.

[Ark. Code Ann. §16-123-404](#). In part, the purpose of the ARFRA as explained in [Ark. Code Ann. §16-123-402](#) is "[t]o provide a claim or defense to persons whose religions exercise is substantially burdened by government." "Government" is defined as "a branch, department, [*10] agency, instrumentality, political subdivision, official, or other person acting under color of state law." [Ark. Code Ann. §16-123-403\(3\)](#).

"A State's general waiver of sovereign immunity from litigation in state court is insufficient to waive [Eleventh Amendment](#) immunity" from litigation in federal court; "the state must specify an intent to subject itself to federal court jurisdiction." [Santee Sioux Tribe of Neb. v. Nebraska, 121 F.3d 427, 431 \(8th Cir. 1997\)](#). Although the ARFRA contains language indicating that an individual whose religious exercise is substantially burdened by government may bring suit for violations of its provisions, the statute contains no language that specifies its intent to authorize such suits against the state in federal court. "The test for whether a state has waived its immunity ... is a stringent one. A state is deemed to have waived its immunity only where stated by the most express language or by such overwhelming implication from the text as will leave no room for any

other reasonable construction." *Dean v. Minnesota Dep't of Human Servs., No. 16-CV-478 (PJS/LIB), 2016 U.S. Dist. LEXIS 159711, 2016 WL 6821127, at *5 (D. Minn. Oct. 26, 2016)*, quoting, *Santee Sioux Tribe of Neb. v. State of Neb., 121 F.3d 427, 430 (8th Cir. 1997)* (citation omitted). The Court finds that the State has not clearly and unequivocally waived its *Eleventh Amendment* immunity for claims brought pursuant to the ARFRA in federal court. Accordingly, Plaintiff's claims against the Arkansas Supreme Court for violations of ARFRA are barred [*11] by sovereign immunity. The Supreme Court will be dismissed from this action.

Defendants acknowledge that Plaintiff's claims against the individual Justices in their official capacities for injunctive and declaratory relief are not barred by sovereign immunity.

Judicial Immunity

Defendants argue that Plaintiff's claims against the individual Justices are barred by judicial immunity. Unless judges act completely outside all jurisdiction, they are absolutely immune from suit for money damages when acting in their judicial capacity. *Martin v. Hendren, 127 F.3d 720, 721 (8th Cir. 1997)*. The issues giving rise to the disqualification order in this case arose in the context of a legal dispute and came before the Justices on an emergency petition from the Arkansas Attorney General in *McKesson Medical Surgical, Inc. v. State of Arkansas*. The Court finds that the action of the Court in entering the disqualification order constituted a discharge of judicial obligations. It is well settled that "[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" *Stump v. Sparkman, 435 U.S. 349, 356-57, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978)*.

Judicial [*12] immunity does not, however, bar claims for injunctive relief where declaratory relief is unavailable. See *42 U.S.C. §1983* and *Allen v. DeBello, 861 F.3d 433, 439 (3rd Cir. 2017)*. The 1996 amendments to *Section 1983* clarify that in any action against a judicial officer for an act or omission taken in the officer's judicial capacity, "injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." The amended language "does not expressly authorize suits for declaratory relief against judges. Instead, it implicitly recognizes that declaratory relief is available in some circumstances, and then limits the availability of injunctive relief to circumstances in which declaratory relief is unavailable or inadequate"). Here, Plaintiff does not argue that a declaratory decree was violated. Further, Plaintiff cannot claim that declaratory relief is unavailable where Plaintiff seeks declaratory relief in this action. Defendants acknowledge that Plaintiff's claim for declaratory relief is not barred by judicial immunity.¹ (ECF No. 23, p. 12-13). Because no declaratory decree was violated and declaratory relief is available, Plaintiff is precluded from seeking injunctive relief against the individual Justices in their [*13] official capacities pursuant to *Section 1983*.

12(b)(6) Motions to Dismiss

Defendants contend that Plaintiff has failed to state sufficient facts to support his claims for *First Amendment* Speech Retaliation, *First Amendment* Free Exercise Retaliation, Violation of the ARFRA, Violation of Procedural Due Process, Violation of Equal Protection, or Civil Conspiracy. Defendants present

¹ Defendants argue that Plaintiff's claim for declaratory relief is subject to dismissal for failing to state a claim under *Rule 12(b)(6)*.

matters outside the pleadings for consideration in making this determination. The Court declines to convert the Defendants' motions to dismiss into motions for summary judgment. At this stage in the pleadings, the Court must treat the complaint's factual allegations as true. See *Taxi Connection v. Dakota, Minnesota & E. R.R. Corp.*, 513 F.3d 823, 825-26 (8th Cir. 2008). The question is "not whether [the Plaintiff] will ultimately prevail . . . but whether his complaint was sufficient to cross the federal court's threshold." *Skinner v. Switzer*, 562 U.S. 521, 529-30, 131 S. Ct. 1289, 179 L. Ed. 2d 233 (2011). After examining the record and accepting Plaintiff's allegations as true, the Court cannot state that Plaintiff has failed to state plausible claims for relief. Accordingly, Defendants' motions to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)* are denied.

Conclusion

Defendants' motions to dismiss are GRANTED IN PART AND DENIED IN PART as stated herein. Plaintiff's claims against the Arkansas Supreme Court are barred by sovereign immunity. Plaintiff's [*14] claims for injunctive relief against the individual Justices in their official capacities are barred by §1983. Plaintiff's claims for declaratory relief against the individual Justices in their official capacities remain. The temporary stay of discovery is lifted.

IT IS SO ORDERED this 12th day of April, 2018.

/s/ James M. Moody Jr.

James M. Moody Jr.

United States District Judge

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