UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

NDOBIA NIANG, et al.	)	
	)	
Plaintiffs	)	
	)	
v.	)	Civil Case No. 4:14-cv-01100 JMB
	)	
EMILY CARROLL, et al.,	)	Magistrate Judge Bodenhausen
	)	
Defendants	)	

Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment

Introduction

Defendants offer the following memorandum in opposition to Plaintiffs' Motion for Summary Judgment. Defendants also reiterate and incorporate all arguments made in their own Motion for Summary Judgment and the memorandum in support thereof.

Plaintiffs' Statement of Undisputed Material Fact

Plaintiffs submitted in conjunction with their Motion for Summary Judgment a Statement of Undisputed Materials Facts containing 350 claimed undisputed facts. Many of those facts remain in dispute. Defendants are filing a response specifically to the Statement of Undisputed Material Fact to highlight those disputes.

Specifically, Plaintiffs claim "the Board admits" a large number of argumentative claims based on the Executive Director's failure to argue with a huge number of propositional questions posed by Plaintiffs' counsel during 15 hours of depositions. Such statements are nothing more than what the Executive Director was able to say in response to an immense period of examination by Plaintiffs' counsel, and those statements are not legal admissions of the Board or of any defendant other than the Executive Director.

Much of the time the Executive Director was under examination, it was as an organizational representative under the terms of Rule 30(b)(6) of the Rules of Civil Procedure. Rule 30(b)(6) authorizes the testimony of an organizational representative to testify "about information known or reasonably available to the organization." The Executive Director's testimony is only binding on the Board defendants to the extent it addresses information known to the Board or actions taken by the Board.

The Executive Director did not submit to examination in order to admit or deny any legal question or proposition Plaintiffs' counsel could pose, and her statements in response to those argumentative questions are not admissions binding on the Board (which is not a defendant) or any other defendant. The Defendants dispute any "statement of undisputed material

fact" based only on counsel's theoretical questions of the Executive Director during her two days of depositions.

I. Constitutional Right to Earn a Living

Plaintiffs claim a right to earn a living arising from *Truax v. Raich,* 239 U.S. 33, 41 (1915), which states "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure." There is no question that the state must comply with the requirements of equal protection and due process in its regulation of 'common occupations," and in its licensing process Missouri does so, providing an extensive array of protections in the form of administrative and judicial review of licensing decisions, human relations laws, and other protections. Legislatures are permitted to condition the performance of common occupations on licensure in order to serve important interests such as health and safety, consumer protection, professional accountability, and other concerns. The boundaries of licensed occupations and professions and the requirements imposed for licensure are matters within the purview of the legislature, to which courts must give due deference.

The "right to earn a living" identified in Truax addresses "common occupations." It does not create a right of any niche of a recognized occupation or profession to have the courts override the legislative definitions of the boundaries of licensed occupations and judicially create a separate, unregulated occupation.

Truax addressed a law that limited the number of non-native-born employees a business could have. It had nothing to do with occupational licensing. *Schware v. Board of Bar Examiners of State of New Mexico,* 353 U.S. 232 (1957), cited by plaintiffs in a quotation devoid of context, concerned a plaintiff who was barred from taking the bar examination based on his past membership in the Communist Party and arrests in his distant past, which the Supreme Court found bore no relationship to his current fitness to practice law, a recognized and regulated profession. Plaintiffs cite *Singleton v. Cecil,* 176 E.3d 419 (8th Cir. 1999), but that case provides them no comfort, stating, ""[t]he protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." 176 E.3d at 425. None of these cases provide any support to the notion that a "constitutional right to earn a living" forbids the legislature to require practitioners of a particular subset of a common occupation to seek full licensure on the same basis as other practitioners.

II. Categories of Government Interests

Plaintiffs seek to compress the various state interests asserted by the Defendants down to two, which could be described as protecting the health and safety of consumers, and protecting the economic interest of consumers in knowing that those holding themselves out to practice are competent, honest, and accountable. The important point is that plaintiffs have argued their case as though no restriction is valid unless it promotes the ability of braiders to braid hair safely, but they must now concede the legitimacy of requirements designed to promote competence, honesty, fair advertising, and good business practices in those providing hair care services to the public. There are several different means by which the requirement of licensure promotes these interests: by assuring initial competency through educational requirements and the application process, by screening potential licensees for issues such as criminal convictions and prior discipline, and by providing accountability through regular inspections and the prospect of discipline.

III. Equal Protection Does Not Require the Legislature to Provide Special Categories of Licensure for All Specialties within an Occupation or Profession

Review under the Equal Protection Clause does not examine whether the legislative scheme is wise or optimal. In areas of social and economic

policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. *F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 312 (1993). This standard of review is a paradigm of judicial restraint. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." 307 U.S. at 312.

The Missouri legislature has determined that providers of all forms of hair care must be licensed under one of two traditional occupations, barbering or cosmetology. The legislature defined these professions broadly to include any practice of "dressing hair" [barbers, Section 328.10(1), RSMo], or "arranging, dressing, … or similar work upon the hair." [cosmetologists, Section 329.010(5)(a)].

It is not disputed that the legislature did not devote any consideration to the practices of braiding in general and African-style hair braiding in particular. Braiding, either African-style or general, is not mentioned in either chapter.

The issue is whether the Equal Protection Clause requires the legislature to specially provide for a particular subset of a recognized profession. The legislature has created two hair care professions based on traditional occupations, with a substantial overlap. Licensees holding either license may perform "arranging" or "dressing" hair.

Plaintiffs have no argument that the Missouri licensing scheme treats them differently than similarly situated persons, the situation in which the Equal Protection clause is most frequently invoked. Their claim under the Equal Protection Clause rests on the argument that equal protection also prohibits treating differently situated people the same. The only Supreme Court case Plaintiffs cite in support of this dubious proposition is *Jenness v. Fortson*, 403 U.S. 431 (1971).

Jenness v. Fortson does not support the Plaintiffs' proposition at all. This was a challenge to Georgia's nominating process, by which there were two paths to inclusion on the ballot – by party nomination, or by a petition signed by 5% of the eligible voters. The Court found that this process did not violate the Equal Protection Clause, recognizing that Georgia was justified in offering different paths to ballot inclusion. The quotation cited by Plaintiffs occurred in the context of the Court noting that the fact there was some inequality in the effect of the two ballot processes did not create an equal protection issue. In short, the Court's actual holding was the opposite of the

conclusion Plaintiffs urge. The Court made the observation in support of a conclusion that the Equal Protection Clause does not require that differently situated people be treated exactly the same. Plaintiffs misconstrue this holding to argue that it does require that differently situated classes be treated differently. Plaintiffs seek to manufacture a substantive right by taking a quotation completely out of the context of an adverse decision.

The only other cases Plaintiffs cite in support of their "differently situated" argument are the two hairbraiding cases, *Cornwell v. Hamilton,* 80 F. Supp. 3d 1101 (S.D. Cal. 1999), and *Brantley v. Kuntz,* ___ F.Supp. 3d ___, 2015 WL 75244 (W.D.Tex.2015). *Cornwell* states that equal protection is properly before the court and requires explication, but fails to explicate it, and devotes no analysis or support to the proposition, citing only the out-of-context quote from *Jenness* in the same manner Plaintiffs do. 80 F. Supp. 3d at 1103. The court then proceeds entirely on an analysis of rationality, never returning to the question of how the Equal Protection Clause applies to differently situated people treated the same. The *Brantley* court notes that an equal protection claim was dismissed at an early stage of the proceedings, and the plaintiff proceeded only on her substantive due process claim. 2015 WL 75244 at 2. It provides no support to the equal protection argument Plaintiffs advance.

Plaintiffs' "differently situated" argument is a distraction from the main issue of the case, which is the substantive due process claim, and is not supported in any of the authorities they cite. For purposes of judicial clarity and economy, this case should be discussed as the substantive due process claim it presents, and not on extraneous theories which require the manufacture of substantive rights from out-of-context quotations.

Plaintiffs make several subsidiary arguments in the section of their memorandum devoted to equal protection. Although the premise of their equal protection claim is faulty, these arguments must be addressed.

A. African-style hair braiding is not a distinct occupation under Missouri law.

Plaintiffs argue at length that African-style hair braiding is a different occupation than cosmetology or barbering, because it uses different methods and tools, does not use chemicals, is connected to different cultural traditions, and represents a unique niche within the hair-care industry. In so doing, they concede that African-style hair braiding is part of the hair care industry. This is the same principle that has been argued by Defendants: AHSB is not a distinct occupation, but a hair-care style that reflects in many ways the character of the two hair-care professions recognized by the Missouri legislature. The determination of the Missouri legislature has been to

establish two professions that cover all hair care practice. Several witnesses testified that African-style hair braiding is a style or practice within the scope of the hair care professions as defined in the Missouri statutes. **[Kindle Deposition 124:13-15, 125:9-13, Defendants' Exhibit N; Morris Declaration, Defendants' Exhibit J-02].**

Although some techniques, practices, tools, and roots of African-style hair braiding are different from conventional cosmetology or barbering, many aspects of the practice are the same. African-style hair braiding is performed from salons, it employs tools brought into contact with the hair, requiring similar sterilization and sanitization practices, it involves similar practices such as combing, trimming, and handling hair, and it can affect the health of the hair. While the requirement of a full license in cosmetology or barbering is not an ideal fit to this particular practice, the rational relationship test does not require an ideal fit. *Dandridge v. Williams,* 397 U.S. 471, 485 (1970).

It is not disputed that neither the required curriculum taught by the schools of cosmetology and barbering nor the examinations used to qualify licensees in those professions specifically address African-style hair braiding. The defendants have taken the position throughout this litigation that African-style hair braiding is a specialty within the larger hair care professions, and the qualification process is not designed to assure that licensees will be proficient in that particular style. This does not make the

concentration of a hair care professional in that particular style a separate occupation.

B. The Board has supported separate license, but only legislature has power to create one.

Plaintiffs note that the Board has voted on multiple occasions to support the creation of a separate license for braiders, and this is true. The Board has supported and continues to support separate licensure. However, the Board does not have the power to create such a license, nor does this Court. Only the Missouri legislature can do that.

The Board's support of a separate license does not, however, support a conclusion that this is the only rational approach the state can take to the issue of licensure. The legislature has already distinguished between two hair care professions based on their separate traditions – barbering and cosmetology. Recognizing another would be a rational action on the part of the legislature. However, the fact that one choice is rational does not mean that another is not. It is rational for the Missouri legislature to conclude that the protection of Missouri consumers requires that all hair care professions be accountable through initial qualification and held accountable through the protective mechanisms of inspections and discipline.

In contrast, judicial deregulation of a certain subset of hair care professionals by the grant of the relief Plaintiffs seek would open the public to the possibility of harm from practitioners with no recognized process of qualification, no safeguards through inspection and compliance with health and consumer protection standards, and no accountability through license discipline no matter how severe their misconduct. It is not the role of the Federal Courts to substitute their judgment for that of the legislature in such a way. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. *City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976).

IV and V. Substantive Due Process -- Rational Relationship

The heart of Plaintiffs' complaint lies in their substantive due process argument.

Defendants incorporate the analysis of substantive due process set forth in their Motion for Summary Judgment. As argued there, substantive due process is the principle that states may not infringe fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest. *Lawrence v. Texas,* 539 U.S. 558, 593 (2003).

Substantive due process in the economic realm has a long history, dating back to the late 19th and early 20th Centuries, when it was used to overturn the efforts of elected governments to reform some of the worst excesses of the Industrial Revolution. Subsequently the Supreme Court turned away from substantive due process as a means of undoing legislative economic reform in cases like *Nebbia v. New York*, 291 U.S. 502 (1934), and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

State economic regulations are entitled to a presumption of validity, and the courts have been careful to invoke substantive due process only when fundamental rights are involved. The Supreme Court has stated, "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa,* 372 U.S. 726, 730 (1963). States are not required to convince the courts of the correctness of their legislative judgments. Rather, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Minnesota v. Clover Leaf Creamery,* 449 U.S. 456, 463 (1981).

In order to establish a substantive due process claim, Plaintiffs must show that the restriction attacked infringes a fundamental liberty. While the

right to engage in a particular trade is an important one, it has not been held so fundamental that states are restricted from imposing reasonable qualifications and limitations on its practice. *New Motor Vehicle Board of California v. Orrin W. Fox Co., Inc.*, 439 U.S. 96, 106-107 (1978).

Further, a plaintiff must show that there is no governmental interest reasonably advanced by the restriction in question.

In this case, the Plaintiffs have focused their attack almost entirely on the qualifying education and examinations for the cosmetology and barbering licenses. The Plaintiffs contend they will not use most of the content of the educational program required to enter into either of the hair care professions.

However, the Due Process Clause does not require the state to tailor the entry requirements of each profession to each subset of the profession that may wish to practice within a specialized area of the profession. An exclusive judicial focus on the needs and interests of the particular plaintiffs overlooks the larger public interest in having some sort of screening process for those who would offer services to the public. It also ignores the important interest in consumer protection and accountability provided by the other elements of the licensing process, including the applicability of inspections and the disciplinary process.

There is no dispute that neither the educational requirements nor the qualifying examinations used for licensure in the hair care professions

address African-style hair braiding specifically in any detail. African-style hair braiding is a very small niche in the hair care industry. The Executive Director testified that Missouri has licensed approximately 42,000 Class CA and CH cosmetologists and 3,500 barbers. [Carroll Deposition 395:9-19, Exhibit N]. In contrast, the number of persons specializing in African-style hair braiding is small. While no one knows the precise figure, the number is probably less than 100. Patrice Orr estimated the number of braiding shops in her area in St. Louis at 20 [Orr Deposition 10:7]; Conner identified six in her former region in Kansas City [Conner Deposition 20-21], so fewer than thirty braiding establishments are known to exist in the most urban areas of the state. It is not surprising or irrational that the legislature has not enacted a special licensure for this tiny niche market of the larger professions.

But initial qualification is not the only purpose of the licensing process. One of the principal functions of the licensing system is inspection. As the inspectors Patrice Orr and Michele Conner testified, the inspectors visit each licensed facility at least once per year to assess whether they are maintaining proper sanitation, sterilization, health and consumer protection standards. Patrice Orr inspected the facilities of the two Plaintiffs and found minor violations in each [Orr Deposition, Defendants' Exhibit K-14-17]. If hair braiders are exempted from the requirement of licensing by judicial decision,

the Board will have no authority to inspect their facilities for compliance with the standards. The interest of the state in maintaining an inspection presence in hair braiding establishments is a state interest independent of any served by the qualification process.

The function of accountability through discipline is also an interest protected by licensure. Defendants reiterate the point set forth in their Motion for Summary Judgment that granting the Plaintiffs immunity from licensure does not mean that trained and highly skilled individuals can braid hair; it means that anyone can. Judicial deregulation raises the possibility that untrained and unqualified people, ignorant of even the basics of sanitation and safe practice, will be able to open shops and begin practicing without any consequences for negligent or intentional misconduct. Consumers injured by such persons would have no remedy except bringing private lawsuits against unqualified practitioners, assuming they are even financially responsible.

Plaintiffs assert that they should not be subject to any educational regimen other than a brief course in sanitation and sterilization practices. However, they overlook that a substantial portion of the required curriculum is devoted to teaching practitioners the skills and techniques they will need to safely and competently practice their craft. Plaintiffs assume that the AHSB practitioner comes into the art already trained and skilled, but that is

not a valid assumption for all who might hold themselves out as practitioners.

The plaintiff hairbraiders in *Bah v. Attorney General of Tennessee,* 610 Fed.Appx. 547 (6th Cir.2015), made a similar claim in attacking a cosmetology rule that allowed a "natural hair styling" license with a 300 hour curriculum requirement. The Court noted that it is rational for the state not to assume that persons coming into the practice are already skilled when they undertake it, and to impose educational requirements to assure that they are. The court stated,

> The African Hair Braiders further maintain that they are already skilled in their art and, thus, any minimal applicable training would be useless. But simply because the African Hair Braiders already know how to perform their craft does not negate Tennessee's legitimate interest in public health and safety. We can imagine that a number of professionals are already skilled in their craft before attending formal schooling and attaining licensures, but that alone does not negate the state's interest in ensuring that professionals receive training before they are unleashed onto the public.

610 Fed.Appx. at 551.

Exempting braiders from the licensing requirement would allow the practice of hair care by people with no accredited training at all. While it is true that much of the cosmetology or barbering curriculum is irrelevant to the needs of one who chooses only to engage in the single practice of hair

braiding, the alternative sought by the Plaintiffs would require no education or training at all. It is not irrational for the Missouri legislature to conclude that an education related to the practice of hair care, even if much of it may not be used by the practitioner, is preferable to no requirement of education at all.

The Defendants do not dispute that a license specific to hair braiders would be the best fit for meeting the interests of the state without imposing undue burden upon the Plaintiffs and similarly situated individuals. However, neither the Board, the parties, nor even this Court can dictate that result. Only the Missouri legislature can. Until it does so, the Court has before it only the options of allowing the current requirement of licensure or judicially exempting the Plaintiffs and similarly situated individuals from any regulation at all. Faced with that choice, the doctrine of judicial deference requires the Court to accede to the legislature's imperfect determination. Accordingly, the substantive due process count should be dismissed.

VI. Plaintiffs Did Not Plead a Theory of Relief Due to Section 316.265, RSMo, and Cannot Raise Such an Argument at this Stage

At the end of their argument Plaintiffs tack on an attempt to articulate an additional claim based on Section 316.265, RSMo, enacted effective August 28, 2014 by L. 2014 S.B. 808. This section states,

> No employee or employer primarily engaged in the practice of combing, braiding, or curling hair without the use of potentially harmful chemicals shall be subject to the provisions of chapter 329 while working in conjunction with any licensee for any public amusement or entertainment venue as defined in this chapter.

Plaintiffs are correct that the enactment of this legislation represents a departure by the Missouri legislature from its historical decision not to recognize hair braiding as a practice separate from other forms of hair care.

However, the impact of this legislation is not before this Court, because Plaintiffs made a conscious choice not to incorporate it into the Amended Complaint, filed after the effective date of the legislation filed and after the existence of the exception was brought to the attention of counsel for Plaintiffs in the early stages of discovery.

Although the Plaintiffs attempt to argue the effect of Section 316.265 as though it were another piece of evidence on the pile, the argument invokes a new equal protection claim asserting that the legislature has created an irrational classification. Whatever the merits of that argument, it is not a theory Plaintiffs chose to allege in their Amended Complaint.

The proper procedure for raising a new claim is to amend the complaint. A party may not add a new claim through argument in a brief on summary judgment. *Gilmour v. Gates, McDonald, and Company,* 382 F.3d

1312, 1315 (11th Cir. 2004). The statement of claim in the complaint must provide the defendant with fair notice of what the plaintiff's claim is and the grounds upon which it rests, and when a plaintiff decides to stand on its complaint and not amend, it is proper for the court to dismiss a claim added after the pleadings are closed. *Gomez v. Wells Fargo Bank, N.A.*, 676 F.3d 655, 665 (8th Cir.2012). Therefore, Plaintiffs' argument as to Section 316.265 is not properly before the Court and should be disregarded.

CONCLUSION

Plaintiffs' Motion for Summary Judgment should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2015, this Memorandum In Opposition To Plaintiffs' Motion For Summary Judgment and accompanying Response to Statement of Undisputed Material Fact, Declaration, and Exhibits were electronically served on the below parties using the CM/ECF system of the United States District Court for the Eastern District of Missouri.

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