

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

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HOPE MEDICAL GROUP FOR WOMEN, and K.P., M.D.,

Plaintiffs,

v.

No. 2:06-cv-09176-ILRL-KWR

KIM EDWARD LEBLANC, M.D., in his official capacity as President of the Louisiana State Board of Medical Examiners, KWELI J. AMUSA, M.D., in his official capacity as Vice President of the Louisiana State Board of Medical Examiners, MELVIN G. BOURGEOIS, M.D., in his official capacity as Secretary-Treasurer of the Louisiana State Board of Medical Examiners, MARK DAWSON, M.D., in his official capacity as a Member of the Louisiana State Board of Medical Examiners, KEITH C. FERDINAND, M.D., in his official capacity as a Member of the Louisiana State Board of Medical Examiners, LINDA GAGE-WHITE, M.D., Ph.D., in her official capacity as a Member of the Louisiana State Board of Medical Examiners, TONYA HAWKINS SHEPPARD, M.D., in her official capacity as a Member of the Louisiana State Board of Medical Examiners, and CECILIA MOUTON, M.D., personally and in her official capacity as Director of Investigations and Enforcement for the Louisiana State Board of Medical Examiners,

Defendants.

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SECOND AMENDED COMPLAINT

Plaintiffs, by and through their undersigned attorneys, bring this complaint against the above-named defendants, their employees, agents, and successors in office, and in support thereof allege the following:

I. PRELIMINARY STATEMENT

1. This civil rights action is brought under the Constitution of the United States and 42 U.S.C. §§ 1983, to challenge Defendants' application of La. Rev. Stat. § 37:1285, a provision of the Louisiana Medical Practice Act, to Plaintiff K.P., M.D., for performing first-trimester surgical abortions at Plaintiff Hope Medical Group for Women and for redress of the violation of her rights by Defendant Mouton's filing of an administrative complaint against K.P. in retaliation for the commencement of this lawsuit.

2. The challenged application of Section 37:1285 to K.P. includes the issuance of a directive to K.P. to "cease and desist" from performing abortions, the placement of a "letter of concern" in Plaintiff K.P.'s permanent file, and the continuing threat of disciplinary action to revoke, suspend or otherwise impair Plaintiff K.P.'s license to practice medicine if she provides abortion services to her patients. The asserted basis for Defendants' "cease and desist" directive, letter of concern, and continuing threat of disciplinary action is that K.P. has not "completed a residency or other post-graduate medical education in OB/GYN, . . . [and is not] credentialed by a hospital to perform any type of obstetric or gynecological surgical procedure (*i.e.*, as may be necessary to respond to a medical emergency necessitated by your current practice)."

3. Defendants' application of Section 37:1285 to K.P. violates the right to privacy of Plaintiffs' patients seeking abortions as guaranteed by the Fourteenth Amendment to the United States Constitution, violates Plaintiff K.P.'s right to pursue her chosen profession guaranteed by that Amendment, and, insofar as it is vague, violates Plaintiffs' rights to due process secured by that Amendment. In addition, Defendant Mouton's issuance of the cease and desist directive to K.P., and the placement of a false "Letter of Concern" in her permanent file, without first

according K.P. a hearing or other procedural rights, violates K.P.'s right to due process secured by the Fourteenth Amendment.

4. Defendant Mouton's actions in conspiring with Defendants' counsel to file an administrative complaint against K.P. in retaliation for the commencement of this lawsuit violate K.P.'s right to petition the government for a redress of grievances as guaranteed by the First Amendment of the United States Constitution.

5. Plaintiffs seek declaratory and injunctive relief from Defendants' unconstitutional application of Section 37:1285 to K.P. Absent immediate injunctive relief from the "cease and desist" directive, Plaintiffs' patients will continue to suffer irreparable injury, to wit: violation of their constitutional rights and jeopardy to their health. In addition, K.P. seeks damages for the pecuniary harm she has suffered as a result of the cease and desist directive and retaliatory administrative complaint.

II. JURISDICTION AND VENUE

6. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4).

7. Plaintiffs' claims for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201 and 2202; by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the general legal and equitable powers of this Court.

8. Venue is appropriate under 28 U.S.C. § 1391(a) because the defendants reside in this district.

III. PARTIES

A. Plaintiffs

9. Plaintiff Hope Medical Group for Women (“Hope”) is a health care facility located in Shreveport, Louisiana, that is licensed to perform abortions by the Louisiana State Department of Health and Hospitals (“DHH”). Plaintiff Hope sues on its own behalf and on behalf of its patients seeking abortions.

10. Plaintiff K.P., M.D., is a physician licensed to practice medicine in Louisiana who, prior to receiving a cease and desist directive from Defendants, had performed first-trimester abortions at Hope. Plaintiff K.P. sues on her own behalf and on behalf of her patients seeking abortions. She sues using only her initials pursuant to the Court’s order to protect herself from public disclosure of her identity and the consequent risk of harassment or violence.

B. Defendants

11. Defendants Kim Edward LeBlanc, M.D., Kweli J. Amusa, M.D., Melvin G. Bourgeois, M.D., Mark Dawson, M.D., Keith C. Ferdinand, M.D., Linda Gage-White, M.D., Ph.D., and Tonya Hawkins Sheppard, M.D., are sued their official capacities as members of the Louisiana State Board of Medical Examiners (“Board”).

12. Defendant Cecilia Mouton, M.D., is Director of Investigations for the Louisiana State Board of Medical Examiners. This action is brought against her in both her official and personal capacities.

IV. STATUTORY BACKGROUND

13. By statute, Louisiana prohibits the performance of abortions except by physicians licensed to practice medicine in the State. La. Rev. Stat. § 40:1299.35.2(a). No statute imposes any higher level of training for the performance of abortions.

14. The Louisiana Department of Health and Hospitals, of which the Louisiana Board of Medical Examiners is a unit, has promulgated a regulation, consistent with the statute cited above, under which “An abortion shall be performed only by a physician who is licensed to practice medicine in Louisiana.” La. Admin. Code 48:I ch. 44 § 4409(4). The regulations promulgated by DHH governing abortion facility licensure contain no requirement of any higher level of training for the performance of abortions.

15. The Louisiana Board of Medical Examiners has statutory authority to discipline physicians (including license suspension, revocation, and fines of up to \$5000.00) for a variety of causes. La. Rev. Stat. § 37:1285. The Board of Medical Examiners has promulgated no rule, regulation or other guidance concerning the type of training a physician must obtain, the admitting hospital privileges that must be secured, or any other requirement a licensed physician must meet to perform first-trimester surgical abortions.

16. The Louisiana Administrative Procedure Act authorizes the Board summarily to suspend a physician’s license without prior notice or opportunity to be heard. La. Rev. Stat. § 49:961(C). A rule promulgated by the Board provides that the Board may wait up to 45 days before conducting a hearing following a summary suspension. La. Admin. Code, tit 46 § 9905(A).

V. FACTUAL ALLEGATIONS

17. On October 25, 2006, K.P. received a letter from Dr. Mouton, advising her to “immediately *Cease and Desist* from performing surgical abortions on patients.” That letter is annexed hereto as **Exhibit A** and incorporated herein by reference. It alleged that, since K.P. had not “completed a residency or other post-graduate medical education in OB/GYN, . . . [and is not] credentialed by a hospital to perform any type of obstetric or gynecological surgical

procedure (*i.e.*, as may be necessary to respond to a medical emergency necessitated by your current practice),” she could be subject to disciplinary action under Section 37:1285, including summary suspension of her license, for performing first-trimester surgical abortions. The Cease and Desist Letter was the first communication that K.P. received from Dr. Mouton or anyone associated with the Board concerning allegations that she had violated Section 37:1285 by performing first-trimester abortions.

18. In response to the letter, K.P. submitted to Dr. Mouton documentation of her training in the performance of first-trimester abortions, as well as a copy of a written transfer agreement between K.P. and Hope’s Medical Director, confirming the Medical Director’s commitment to “provide or make appropriate arrangements for the provision of continuing medical care for patients who develop complications medically related to an abortion procedure performed by [K.P.]” Those documents, together with the cover letter to Dr. Mouton, are annexed hereto as **Exhibit B** and incorporated herein by reference.

19. Defendant Mouton rejected the documentation as insufficient, but did not inform K.P. what evidence of training or experience—other than completion of an OB/GYN residency or some unspecified “formal” training—would suffice. Further, Dr. Mouton refused to withdraw the Cease and Desist Letter. Instead, she offered to conduct an “informal” meeting, off the record, with K.P. Dr. Mouton had made the same offer of a meeting in the Cease and Desist Letter.

20. K.P. is adequately trained to provide first-trimester abortions. The type of first-trimester abortion training received by K.P. satisfies the prevailing and usually accepted standards of practice applicable to abortion services throughout the United States.

21. Plaintiffs have never received a complaint concerning the quality of care provided by K.P. Upon information and belief, defendants have never received such a complaint either.

22. On October 4, 2006, the Department of Health and Hospitals conducted an inspection of Hope. During the inspection, DHH reviewed the credentials of Hope's abortion providers, including K.P., and found that all were properly credentialed.

23. K.P. has performed over 1500 first-trimester surgical abortions without a major complication.

24. Out of fear of the threat against her medical license, K.P. has not performed any abortion procedures since receiving the Cease and Desist Letter. As a result, Plaintiffs' patients have had procedures delayed and K.P. has lost substantial income.

25. K.P. would like to resume providing abortion services for her patients. If the threat to her medical license were removed, K.P. would resume providing abortion services.

26. On November 9, 2006, after Plaintiffs commenced this action and after proceedings of substance on the merits concerning contested issues had taken place before this Court, Dr. Mouton filed an administrative complaint with the Board, charging K.P. with "professional or medical incompetency," "unprofessional conduct," and "continuing or recurring medical practice which fails to satisfy the prevailing and usually accepted standards of medical practice in this state." The administrative complaint alleged that by performing surgical abortions with insufficient training in obstetrics and gynecology, by evaluating patients for abortions using ultrasound with limited training in ultrasonography, and by performing abortions without hospital privileges or a formal agreement for admitting patients to a hospital, K.P. violated La. Rev. Stat. § 37:1285A(12)-(14). The administrative complaint demanded the revocation or suspension of K.P.'s license to practice medicine and the imposition of fines and other sanctions. The Board accepted the administrative complaint for filing and docketed it for a hearing. The administrative complaint is annexed hereto as **Exhibit C** and incorporated herein by reference.

27. Dr. Mouton would have sought summary suspension of K.P.'s medical license at the time that she filed the administrative complaint had an order of the Court not prohibited her from doing so.

28. Dr. Mouton filed the administrative complaint against K.P. in retaliation for the filing of this lawsuit and to deter her from proceeding with it.

29. Dr. Mouton agreed with Defendants' counsel to file the administrative complaint against K.P. in order to deter K.P. by intimidation and threat from attending and testifying in this Court as to the allegations in her complaint in this action.

30. Dr. Mouton did not complete an investigation of the facts and circumstances concerning K.P.'s performance of first-trimester abortions before commencing the disciplinary proceeding against K.P. According to Defendants' counsel, "in the normal course" of the Board's enforcement activities, an administrative complaint is not filed until an investigation is completed, but that, in this case, Dr. Mouton filed an administrative complaint before completing the investigation because Plaintiffs had filed this lawsuit.

31. As a result of Defendants' commencement of the disciplinary action against her, K.P. has suffered severe emotional distress.

32. At Defendants' request, K.P. met with Dr. Mouton, on March 5, 2007, to discuss the disciplinary charges pending against her. At the meeting, K.P. informed Dr. Mouton that she had not performed any abortions since receiving the Cease and Desist Letter and that she did not intend to resume performing abortions until she had clarification from a court or some other authority that she could do so without jeopardizing her medical license.

33. On information and belief, at a March 20, 2007, meeting, the Board unilaterally discontinued the disciplinary action against K.P. that had been commenced on November 9, 2006.

34. K.P. incurred substantial attorney's fees in defending against the disciplinary charges.

35. On March 20, 2007, Dr. Mouton sent a "Letter of Concern" to K.P. Upon information and belief, a copy of the Letter of Concern has been placed in the permanent file that the Board maintains on K.P. The letter states that "the Board has authorized the discontinuance of this investigation and dismissal of the pending administrative proceedings with a letter of concern which will be made part of your permanent file."

36. The Letter of Concern contains numerous factual inaccuracies.

37. The Letter of Concern erroneously states that the records that K.P. submitted to Defendants "did not support [her] statements concerning the fact that [she] had observed, and then been proctored for numerous procedures over a period of six months or more."

38. The Letter of Concern falsely states that K.P. told Dr. Mouton that she would not resume performing abortions "until such time as [she] can provide the Board with evidence of more formalized training in the performance of these procedures."

39. K.P. has **never** stated that she would refrain from performing abortions until she obtained additional training. It has always been and continues to be Plaintiffs' position that K.P.'s training is more than sufficient to meet the prevailing and usually accepted standards of practice applicable to abortion services and to satisfy the requirements of Louisiana law.

40. K.P. was not provided an opportunity to review the Letter of Concern prior to receiving an executed copy of it from Dr. Mouton, did not consent to the content of the letter, and did not consent to the placement of the letter in the permanent file maintained by the Board.

41. The Letter of Concern is unauthorized, unwarranted, inaccurate, defamatory, and prejudicial. Its publication will impair K.P.'s ability to practice her profession.

42. Defendants cannot ensure that the fact of their investigation, the commencement of disciplinary proceedings against K.P., or the content of the Letter of Concern will not be published when K.P. applies for licensure as a physician in another state, as she intends to do. Disclosure to licensing authorities in another state of the investigation, disciplinary proceedings or the Letter of Concern will impair K.P.'s ability to obtain such licensure.

43. By letter dated March 22, 2007, K.P., through her counsel, requested that the Letter of Concern be expunged from her permanent file.

44. Upon information and belief, the Letter of Concern has not been expunged from K.P.'s file.

45. Dr. Mouton has not changed her position that K.P. is not qualified to perform abortions.

46. Upon information and belief, if K.P. were to resume performing abortions, as is her desire and her right, Defendants would take further disciplinary action against her.

47. There is a documented shortage of abortion providers nationwide and in Louisiana.

48. One-third of first-trimester abortion providers nationwide are not obstetrician-gynecologists.

49. The imposition of a requirement that first-trimester abortion providers be formally trained in obstetrics and gynecology would place a substantial obstacle in the path of women seeking abortions.

50. Overall, the risks of mortality and morbidity associated with first-trimester abortions are very low. Those risks increase, however, with the gestational age of the fetus. Thus, the longer a woman must wait to obtain an abortion, the greater the risks to her health.

51. K.P.'s absence from Hope, since October 25, 2006, has created a massive backlog of patients seeking abortion services and tremendous delays in the provision of those services.

52. To meet the demand for services, Hope has attempted to recruit another licensed Louisiana physician to serve as an abortion provider. A qualified family practitioner expressed interest in filling that position and Hope has offered to provide him the same training it provided to K.P. Because of Defendants' actions against K.P., he has been unable to accept Hope's offer to begin training and is unwilling to provide services at Hope because doing so could serve as a basis for disciplinary action against him by the Board.

53. Defendants have not established any standards concerning the qualifications that a first-trimester abortion provider must possess to satisfy the requirements of Section 37:1285. Defendant Mouton is not aware of what standards the Board would employ in evaluating K.P.'s qualifications.

**FIRST CLAIM FOR RELIEF
(Right to Privacy)**

54. The allegations of paragraphs 1 through 53 are incorporated as though fully set forth herein.

55. Defendants' conduct violates the right to privacy of Plaintiffs' patients under the Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983.

**SECOND CLAIM FOR RELIEF
(Right to Practice Medicine)**

56. The allegations of paragraphs 1 through 53 are incorporated as though fully set forth herein.

57. Defendants' conduct violates K.P.'s right to pursue her chosen profession under the Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983.

THIRD CLAIM FOR RELIEF
(Vagueness)

58. The allegations of paragraphs 1 through 53 are incorporated as though fully set forth herein.

59. Defendants' vague application of La. Rev. Stat. § 37:1285 deprives Plaintiffs of the right to due process guaranteed by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

FOURTH CLAIM FOR RELIEF
(Procedural Due Process)

60. The allegations of paragraphs 1 through 53 are incorporated as though fully set forth herein.

61. Defendant Mouton's issuance of the cease and desist directive to K.P. without first according K.P. a hearing or other procedural rights violated K.P.'s right to due process secured by the Fourteenth Amendment.

62. Defendant Mouton's conduct was malicious, in bad faith and in willful and wanton disregard of K.P.'s rights under the Fourteenth Amendment.

FIFTH CLAIM FOR RELIEF
(First Amendment)

63. The allegations of paragraphs 1 through 53 are incorporated as though fully set forth herein.

64. Defendant Mouton's conduct in filing an administrative complaint against K.P. in retaliation for the commencement of this lawsuit violated K.P.'s right to petition the government

for a redress of grievances and her right to freedom of speech guaranteed by the First Amendment to the United States Constitution and 42 U.S.C. § 1983.

65. Defendant Mouton's conduct was malicious, in bad faith and in willful and wanton disregard of K.P.'s rights under the First Amendment.

**SIXTH CLAIM FOR RELIEF
(Procedural Due Process)**

66. The allegations of paragraphs 1 through 53 are incorporated as though fully set forth herein.

67. Defendant Mouton's placement of the Letter of Concern in K.P.'s permanent Board file deprives K.P. of liberty and property without due process of law in violation of rights guaranteed by the Fourteenth Amendment to the United States Constitution.

68. Defendant Mouton's conduct was malicious, in bad faith and in willful and wanton disregard of K.P.'s rights under the Fourteenth Amendment to the United States Constitution.

ATTORNEYS' FEES

69. Plaintiffs are entitled to an award of reasonable attorneys' fees and expenses pursuant to 42 U.S.C. § 1988.

REQUEST FOR RELIEF

Plaintiffs respectfully request that the Court grant the following relief:

70. Immediate and permanent injunctive relief barring Defendants from enforcing the "cease and desist" directive or using it as a basis to take further disciplinary action against K.P.;

71. Immediate and permanent injunctive relief requiring Defendants to expunge all records of the investigation of K.P., the administrative complaint and the letter of concern from K.P.'s permanent file;

72. Immediate and permanent injunctive relief barring Defendants from vague application of La. Rev. Stat. § 37:1285 to other abortion providers affiliated with Hope;

73. A declaration that Defendants' application of La. Rev. Stat. § 37:1285 in the manner described above is unconstitutional;

74. A declaration that as a matter of federal law, Plaintiff K.P. may resume providing first-trimester abortions in the State of Louisiana without obtaining further training and with no interference by Defendants;

75. An award of compensatory damages in the amount of five-hundred thousand dollars (\$500,000);

76. An award of punitive damages in an amount sufficient to deter unlawful conduct in the future;

77. An award of costs with legal interest and reasonable attorneys' fees; and

78. An award of such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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