

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**

Northern Division

DONNA HARRIS,

Plaintiff,

vs.

Civil Action No.: 3:20-cv-120-DPJ-FKB

ELAYNE H. ANTHONY, PH.D.; DR. ED. D. BARHAM; DR. J. EDWARD HILL; DR. LUCIUS M. LAMPTON; EDWARD J. LANGTON; ROBERT J. MOODY; JAMES L. PERRY; SAMMIE R. REA; DR. DWALIA S. SOUTH; WHEELER TIMOTHY TIMBS, III; and DR. THAD WAITES, all in their official capacities as Members of the Mississippi State Board of Health,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This is a constitutional challenge to government censorship of speech on the age-old topic of weight loss. Plaintiff Donna Harris is a privately certified personal fitness trainer who has a bachelor's degree in food science, nutrition and health promotion, with a concentration in nutrition, and a master's degree in occupational therapy. At the request of her clients, Mrs. Harris recently organized a weight-loss program. The information Mrs. Harris planned to provide is widely available in hundreds of books, on television, and online. But because Mrs. Harris planned to offer this information to paying customers, the Mississippi State Board of Health considers her to be engaged in the unauthorized practice of dietetics and has ordered her to stop speaking.

2. The actions of the Mississippi State Board of Health violate the free speech protections of the United States Constitution and the Mississippi Constitution. Conversations about what healthy people should eat to lose weight and stay healthy are older than modernity itself. This speech does not lose its constitutional protection merely because it is compensated. While Mississippi certainly has the authority to regulate who may claim to be licensed by the state as a dietitian, it has no legitimate authority to grant licensed dieticians a monopoly on advice about what healthy adults should buy at the grocery store.

3. The laws that the Mississippi State Board of Health seeks to enforce are also unconstitutionally vague, and such enforcement further exceeds the scope of authority granted to the Board by statute, as the legislature has specifically provided that unlicensed individuals may furnish exactly the type of “general nutrition information” that Mrs. Harris intends to furnish.

PARTIES

4. Plaintiff Donna Harris is a resident of Madison, Madison County, Mississippi.

5. The members of the Mississippi State Board of Health (“the Board”), namely Elayne H. Anthony, Ph.D.; Dr. Ed. D. Barham; Dr. J. Edward Hill; Dr. Lucius M. Lampton; Edward J. Langton; Robert J. Moody; James L. Perry; Sammie R. Rea; Dr. Dwalia S. South; Wheeler Timothy Timbs, III; and Dr. Thad Waites, govern the Mississippi State Department of Health and are responsible for enforcing the Mississippi Dietetics Practice Act of 1986. They are being sued in their in their official capacities only.

JURISDICTION AND VENUE

6. Plaintiff brings this civil rights lawsuit pursuant to the First Amendment to the United States Constitution, the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02.

7. Plaintiff seeks declaratory and injunctive relief against the enforcement of Mississippi's dietetics regulatory regime – the Mississippi Dietetics Practice Act of 1986, Miss. Code. § 73-10-1, *et seq.* (“the Act”), its implementing rules and regulations, 15 Miss. Admin. Code Pt. 19, Subpt. 60, R. 3.1.1, *et seq.*, and the policies and practices of the Mississippi State Board of Health – as it is applied to restrict persons, including Plaintiff, from communicating general information about how to achieve or maintain a healthy weight to healthy individuals who are willing listeners.

8. This Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

9. This Court has supplemental jurisdiction over claims arising under the Mississippi Constitution pursuant to 28 U.S.C. § 1367(a).

10. Venue lies in this Court pursuant to 28 U.S.C. § 1391(b).

FACTS

Plaintiff Donna Harris's Eight Week Weight-Loss Challenge

11. Plaintiff Donna Harris earned a bachelor of science in food science, nutrition and health promotion, with a concentration in nutrition from Mississippi State University in 2009.

12. Mrs. Harris also earned a master of science in occupational therapy from the University of Mississippi Medical Center in 2013.

13. Mrs. Harris works as a privately certified personal trainer. Mrs. Harris received her personal-training certification in 2018 from the International Sports Conditioning Association, a private, accredited organization founded in 1988 that trains a variety of health professionals.

14. Mrs. Harris is currently earning a certification in group fitness from the American Council on Exercise, a private, accredited organization founded in 1985 that trains fitness professionals.

15. Mrs. Harris's life passion is sharing information about nutrition and physical fitness.

16. Mrs. Harris is knowledgeable about nutrition and physical fitness, including strategies to obtain or maintain a healthy weight.

17. In 2018, Mrs. Harris began working at a local fitness center offering personal fitness training services to clients in a group setting.

18. Mrs. Harris has many very loyal clients who regularly enjoy her personal training services.

19. Many of Mrs. Harris's clients are aware that she is knowledgeable about nutrition and has a bachelor's degree in food science, nutrition and health promotion. As a result, many of Mrs. Harris's personal training clients often ask her questions related to nutrition and weight loss.

20. Many of Mrs. Harris's clients have asked her to offer a weight-loss class, relaying that they would gladly pay for her instruction on this topic.

21. Mrs. Harris's personal training clients are healthy individuals.

22. In June, 2019, Mrs. Harris started a private Facebook group where she began sharing general information about food and nutrition to group members for free.

23. Mrs. Harris's Facebook group quickly rose in popularity. Within months, the group included over 1,100 members.

24. Members of Mrs. Harris's private Facebook group continued to request that she offer an instructional weight-loss program.

25. In response to these continued requests, in January, 2020, Mrs. Harris publicly announced that she planned to offer an eight week weight-loss challenge.

26. Mrs. Harris launched a website where prospective clients could read about her background and the weight-loss program, and sign up to participate for \$99.00.

27. The website included disclaimers stating that Mrs. Harris was not a licensed dietician and that she would only be providing general information on weight-loss strategies for healthy individuals and would not be offering information to treat specific medical conditions.

28. The weight-loss challenge was scheduled to take place from February 3, 2020, through March 30, 2020.

29. Mrs. Harris planned to offer one-on-one weight-loss coaching to her clients. She also planned for her clients to engage with each other in a private Facebook group where participants could discuss their results and challenges, encourage one another, share healthy recipes, and receive educational information from Mrs. Harris on how to achieve weight-loss goals.

30. Seventy (70) participants signed up for Mrs. Harris's weight-loss challenge, which would have resulted in \$6,970.

The Government's Orders and Threats

31. On January 22, 2020, Mrs. Harris received a letter from an officer with the Mississippi State Department of Health, alleging that Mrs. Harris was engaging in dietetic services without a license.

32. The letter advised Mrs. Harris that her actions were punishable by imprisonment for up to six months, or a fine of up to \$1,000.00, or both.

33. The letter enclosed printed copies of Mrs. Harris's website, as well as other materials.

34. On or about January 23, 2020, Mrs. Harris received a cease and desist order from a different officer with the Mississippi State Department of Health, sent via certified mail, return receipt requested.

35. The cease and desist order alleged that Mrs. Harris was unlawfully practicing as a dietitian when she was not licensed.

36. The cease and desist order advised Mrs. Harris that her actions were punishable by imprisonment for up to six months, or a fine of up to \$1,000.00, or both.

37. The cease and desist order stated: "THEREFORE, I HEREBY ORDER YOU TO IMMEDIATELY CEASE AND DESIST PRACTICING DIETITIAN/NUTRITIONIST AT ANY LOCATION IN MISSISSIPPI" (*sic*).

38. The cease and desist order also threatened Mrs. Harris with criminal charges and a civil suit, stating: "Failure to comply with this Order may result in the filing of criminal charges, and the Department may authorize the Office of the Attorney General to file a civil action against you in the Chancery Court of Madison County for a court order enjoining you from practicing as a Dietitian/Nutritionist."

39. Upon information and belief, Mrs. Harris received this letter and cease and desist order because of a complaint filed by a licensed dietitian.

The Government Only Allows Government-Approved Speech

40. On January 23, 2020, Mrs. Harris called the Mississippi State Department of Health and spoke with the officer who sent her the letter that was received first ("the health officer").

41. The health officer told Mrs. Harris that, without a license, she was only allowed to provide general information.

42. When Mrs. Harris asked what constituted “general information,” the officer informed her that she could only speak using government-approved information from sources such as the “Food Pyramid” or “myplate.gov”.

43. Mrs. Harris was also informed that, if she used non-government-approved information in her speech, she would be criminally charged and civilly sued in order to censor her non-government-approved speech.

44. On January 23, 2020, Mrs. Harris made changes to her website in an attempt to conform to demands of the health officer.

45. On January 23, 2020, Mrs. Harris emailed the health officer and asked if the changes to the website were sufficient. The health officer said that a superior would have to approve the changes.

46. On January 28, 2020, Mrs. Harris sent emails to the health officer seeking clarification on what was considered “general information” that she could provide her clients. The health officer responded that the Mississippi Council of Advisors in Dietetics and the Mississippi State Department of Health’s legal counsel would have to review her questions.

47. Mrs. Harris was ultimately informed by the health officer that she was not allowed to provide any individualized weight-loss information to specific individuals.

48. On January 29, 2020, (five days before the weight-loss challenge was scheduled to begin) Mrs. Harris canceled the challenge and refunded \$6,970 to the participants who had signed up.

Dietitian Licensure in Mississippi

49. Mississippi regulates dietetics through the Mississippi Dietetics Practice Act of 1986, Miss. Code. § 73-10-1, *et seq.*, and regulations promulgated pursuant to the Act, 15 Miss. Admin. Code Pt. 19, Subpt. 60, R. 3.1.1, *et seq.*

50. Violating the Act is misdemeanor offense, punishable by up to six months in jail, or a fine of up to \$1,000.00, or both. Miss. Code. § 73-10-23.

51. The Mississippi State Board of Health has authority to enforce the Act against unlicensed persons, investigate potential violations of the Act and associated regulations, conduct various administrative proceedings, and bring injunctive actions to halt violations of the Act. Miss. Code. § 73-10-21.

52. “Dietetics practice” is defined as “the integration and application of the principles derived from the sciences of nutrition, biochemistry, food, physiology, management and behavioral and social sciences to achieve and maintain people’s health. Dietetics practice includes, but is not limited to: (i) Providing medical nutrition therapy. (ii) Development, administration, evaluation and consultation regarding nutritional care standards of quality in food services and medical nutrition therapy. (iii) Providing case management services.” Miss. Code. § 73-10-3(j).

53. “Medical nutrition therapy” is in turn defined as a “nutritional diagnostic therapy and counseling services for the purpose of disease management. It means the assessment of the nutritional status of patients with a condition, illness or injury that appropriately requires medical nutrition therapy as part of the treatment. The assessment includes review and analysis of medical and diet history, blood chemistry lab values and anthropometric measurements to determine nutritional status and treatment modalities. Therapy ranges from diet modification and nutrition counseling to administration of specialized nutrition therapies such as intravenous medical

nutritional products as determined necessary to manage a condition or treat illness or injury.”
Miss. Code. § 73-10-3.

54. “Diet modification and nutrition counseling” is in turn defined as “intervention and advice in assisting individuals or groups in the development of personal diet plans to achieve appropriate nutritional intake. To develop the diet plan, the dietitian integrates information from the nutritional assessment with information on food and other sources of nutrients and meal preparation consistent with cultural background and socioeconomic status.” *Id.*

55. It is unlawful for any person to send out billings as providing services covered in the Act, unless he or she is licensed or meets the exemptions in Section 73-10-13 of the Act. Miss. Code. § 73-10-7.

56. Section 73-10-13 of the Act, in turn, specifically exempts persons who furnish “general nutrition information as to the use of food, food materials or dietary supplements.” Miss. Code. § 73-10-13.

57. To become a licensed dietitian, a person must have earned a bachelor’s degree with course work approved by the Academy of Nutrition and Dietetics’ Accreditation Council for Education in Nutrition and Dietetics (ACEND); completed 1200 hours of supervised practice; passed a licensure examination that costs \$200; and paid fees of \$100. Miss. Code. § 73-10-9; 15 Miss. Admin. Code Pt. 19, Subpt. 60, Rs. 3.4.1, 3.11.2, and 3.11.3; *RD Eligibility Requirements*, <https://www.cdrnet.org/rd-eligibility> (last visited Feb 24, 2020); *Entry-level Registration Examinations for Dietitians and Dietetic Technicians Frequently Asked Questions*, <https://admin.cdrnet.org/vault/2459/web/files/2017%20Examination%20FAQ.pdf> (last visited Feb. 24, 2020).

58. Effective January 1, 2024, a bachelor's degree will no longer meet the eligibility requirements to become a licensed dietitian, and the minimum degree requirement will be a graduate degree. *RD Eligibility Requirements*, <https://www.cdrnet.org/rd-eligibility> (last visited Feb 24, 2020).

59. The Act exempts a number of people who may provide dietary advice without a license, including salaried nutrition educators for government agencies and schools, and government employees involved with programs providing services to help prevent disease and maintain good nutritional health. Miss. Code. § 73-10-13.

60. The Act also does not cover dietary advice distributed to the public through books, on television, or online. Upon information and belief, such advice is widespread throughout the State of Mississippi.

61. A dietitian has no authority under the law to prevent a person from eating food, to compel a person to eat food, to prescribe medications, to make any medical diagnosis, to perform any medical procedure, or to perform any physical act or engage in any physical conduct with a person, such as cooking a meal or testing blood sugar, that the client or any lay person is not legally allowed to perform without the assistance of or presence of a dietitian. A person may legally follow the advice of a dietitian or not, or follow it in part and reject it in part.

INJURY TO PLAINTIFF

62. Defendants, through the Mississippi State Department of Health, have ordered Plaintiff to cease giving any advice about weight loss or diet to any specific individuals, and have threatened legal action if she continues to offer weight-loss advice to paying customers in Mississippi.

63. The Department issued this order and made this threat based solely on the fact that Plaintiff offered to talk for pay with other healthy adults about weight-loss strategies, and not based on any evidence that anyone anywhere has ever been harmed or defrauded by Plaintiff.

64. Based on the threat of future civil and criminal action against her by Defendants, Plaintiff has been forced to cease providing advice about weight-loss strategies.

65. Currently, the only way for Plaintiff to resume offering weight-loss advice is to become a licensed dietitian, a process that would take her an additional 1200 hours (on top of the years she has already spent earning a bachelor's degree in food science, nutrition and health promotion) and cost hundreds of dollars, at minimum. Plaintiff cannot undertake that time and expense.

66. But for these legal threats against her and the extreme burden of becoming licensed as a dietitian, Plaintiff would immediately resume providing weight-loss advice to clients, secure in the knowledge that such speech is legal.

CAUSES OF ACTION

Count 1: Free Speech

67. Plaintiff re-alleges and incorporates the allegations set forth in the preceding paragraphs.

68. The free-speech and association clauses of the First Amendment to the United States Constitution protect the right to speak and associate freely.

69. Article 3, Section 13 of the Mississippi Constitution is more protective of the individual's right to freedom of speech than is the First Amendment to the United States Constitution.

70. Content-based and speaker-based restrictions on the exercise of these rights – including restrictions based on the subject matter of speech and the identity of the speaker – are subject to strict scrutiny.

71. Mississippi's dietetics regulatory regime, as interpreted by the Board and applied to persons engaging in speech about weight-loss strategies for healthy individuals, is content-based and speaker-based.

72. Mississippi's dietetics regulatory regime, as interpreted by the Board and applied to persons engaging in speech about weight-loss strategies for healthy individuals, is not appropriately tailored to serve a sufficiently important governmental interest.

73. Plaintiff's weight-loss coaching service for healthy individuals consisted of dietary advice that is substantially identical to advice that is widely available to Mississippians in books, online, and from uncompensated speakers, none of which are regulated under the Act.

74. Advice about weight loss is protected by the First Amendment and by Article 3, Section 13 of the Mississippi Constitution and does not lose its constitutional protection simply because Plaintiff charges a fee for providing that advice or because the advice was provided in person or in a social media group, rather than through television, a book or blog.

75. Defendants' enforcement against Plaintiff of Mississippi's dietetics regulatory regime cannot survive any level of First Amendment or Article 3, Section 13 scrutiny, and is unconstitutional as applied.

76. Plaintiff has no other remedy by which to prevent or minimize the continuing irreparable harm to her constitutional rights.

77. Unless Mississippi's dietetics regulatory regime, as interpreted by the Board and applied to persons engaging in speech about weight-loss strategies for healthy individuals, is

declared unconstitutional, as applied, and permanently enjoined, Plaintiff will continue to suffer great and irreparable harm.

Count 2: Overbreadth

78. Plaintiff re-alleges and incorporates the allegations set forth in the preceding paragraphs.

79. The First Amendment to the United States Constitution, and Article 3, Section 13 of the Mississippi Constitution, prohibit overbroad laws.

80. Mississippi's dietetics regulatory regime, as interpreted by the Board and applied to persons engaging in speech about weight-loss strategies for healthy individuals, is overbroad.

81. Judged in relation to any legitimate sweep that Mississippi's dietetics regulatory regime may have, as interpreted by the Board and applied to persons engaging in speech about weight-loss strategies for healthy individuals, it restricts and punishes a substantial amount of protected speech.

82. The overbreadth of Mississippi's dietetics regulatory regime, as interpreted by the Board and applied to persons engaging in speech about weight-loss strategies for healthy individuals, results in the chilling and silencing of speech by Plaintiff, and consumers, in turn, are denied truthful information about weight loss.

83. Mississippi's dietetics regulatory regime, as interpreted by the Board and applied to persons engaging in speech about weight-loss strategies for healthy individuals, violates the First Amendment to the United States Constitution and Article 3, Section 13 of the Mississippi Constitution, as applied.

84. Plaintiff has no other remedy by which to prevent or minimize the continuing irreparable harm to her constitutional rights.

85. Unless Mississippi's dietetics regulatory regime, as interpreted by the Board and applied to persons engaging in speech about weight-loss strategies for healthy individuals, is declared unconstitutional and permanently enjoined, Plaintiff will continue to suffer great and irreparable harm.

Count 3: Vagueness

86. Plaintiff re-alleges and incorporates the allegations set forth in the preceding paragraphs.

87. The First Amendment and Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Free Speech Clause of Article 3, Section 13 and the Due Process Clause of Article 3, Section 14 of the Mississippi Constitution prohibit vague laws.

88. Defendants have alleged that Plaintiff violated Section 73-10-7 of the Mississippi Code because she was providing services covered in Section 73-10-3(j) and did not meet the exemptions in Section 73-10-13.

89. Section 73-10-7 of the Mississippi Code makes it unlawful for any person to send out billings as providing services covered in the Act, unless he or she is licensed or meets the exemptions in Section 73-10-13 of the Act. Miss. Code. § 73-10-7.

90. Section 73-10-13 of the Act, in turn, specifically exempts persons who furnish "general nutrition information" as to the use of food, food materials or dietary supplements.

91. The Act does not define the term "general nutrition information" as used in Section 73-10-13. Thus, Section 73-10-7's restrictions on the practice of dietetics are fatally vague.

92. Because the Act does not define the term "general nutrition information" as used in Section 73-10-13 of the Mississippi Code, persons of common intelligence must necessarily guess as to the meaning of Section 73-10-7's restrictions on the practice of dietetics, and would differ as

to its proper application. Because Plaintiff and others similarly situated must engage in such guessing and face fines, penalties, and/or jail time if they guess wrong, their speech is necessarily chilled or ultimately foregone.

93. The lack of clarity in Section 73-10-7 of the Mississippi Code leaves Plaintiff and others similarly situated at risk of arbitrary, discriminatory, and *ad hoc* enforcement by the Mississippi State Board of Health.

94. Section 73-10-7 of the Mississippi Code is void for vagueness, and violates the First Amendment and Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Free Speech Clause of Article 3, Section 13 and the Due Process Clause of Article 3, Section 14 of the Mississippi Constitution, as applied.

95. Plaintiff has no other remedy by which to prevent or minimize the continuing irreparable harm to her constitutional rights.

96. Unless the restrictions on the practice of dietetics at Section 73-10-7 of the Mississippi Code are declared void for vagueness and permanently enjoined, Plaintiff will continue to suffer great and irreparable harm.

Count 4: Illegal Ultra Vires Action

97. Plaintiff re-alleges and incorporates the allegations set forth in the preceding paragraphs.

98. Administrative agencies have only such powers as are expressly granted to them, or necessarily implied, and any such power exercised must be found within the four corners of the statute under which the agency operates. Any acts which are not so authorized are void.

99. The authority of the Mississippi State Board of Health to enforce the Mississippi Dietetics Practice Act of 1986 is provided by Miss. Code. § 73-10-21. That provision only allows

the Mississippi State Board of Health to prohibit any person from providing dietetic services as defined by the Act. It does not allow the Mississippi State Board of Health to prohibit persons from engaging in speech which is not defined as dietetic services by the Act, or which is specifically exempted from licensure by the Act. *Id.*

100. The Mississippi Dietetics Practice Act of 1986 does not define speech providing general information to healthy individuals about how to achieve or maintain a healthy weight as providing dietetic services. *See* Miss. Code. § 73-10-3.

101. In fact, the Mississippi Dietetics Practice Act of 1986 specifically exempts such speech from its provisions, stating: “[t]his chapter shall not be construed to affect or prevent . . . (i) [a]ny person from furnishing general nutrition information as to the use of food, food materials or dietary supplements . . . provided, however, no such individual may call themselves a dietitian unless they are licensed under this chapter.” Miss. Code. § 73-10-13.

102. Plaintiff’s weight-loss coaching service for healthy individuals consisted of general nutrition information as to the use of food, food materials, or dietary supplements, as specifically allowed by the Mississippi Dietetics Practice Act of 1986. *Id.*

103. Consequently, Defendants’ attempts to enforce Mississippi’s dietetics regulatory regime against Plaintiff exceeds the Defendants’ authority under Miss. Code. § 73-10-21.

104. Plaintiff has no other remedy by which to prevent or minimize the continuing irreparable harm to her constitutional rights.

105. Unless enjoined or otherwise prohibited by this Court, Plaintiff will continue to suffer great and irreparable harm by Defendant’s enforcement of Mississippi’s dietetics regulatory regime against her.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the following relief:

A. An entry of judgment declaring that application of the Mississippi Dietetics Practice Act of 1986, its implementing rules and regulations, and the policies and practices of the Mississippi State Board of Health to persons, including Plaintiff, desiring to engage in speech about weight-loss strategies for healthy individuals, is unconstitutional.

B. An entry of judgment declaring that the restrictions on the practice of dietetics under Section 73-10-7 of the Mississippi Code are unconstitutionally vague, and therefore void.

C. An entry of judgement declaring that the Defendants' application of the Mississippi Dietetics Practice Act of 1986, its implementing rules and regulations, and the policies and practices of the Mississippi State Board of Health to persons, including Plaintiff, desiring to engage in speech about weight-loss strategies for healthy individuals, is ultra vires, void, and of no effect because it exceeds the Defendants' authority as provided by Miss. Code. § 73-10-21.

D. A preliminary injunction prohibiting Defendants and their agents from unconstitutionally enforcing these statutes, regulations, policies, and practices against Plaintiff and others similarly situated for the duration of this litigation;

E. A permanent injunction prohibiting Defendants and their agents from unconstitutionally enforcing these statutes, regulations, policies, and practices against Plaintiff and others similarly situated;

F. An award of attorneys' fees, costs, and expenses in this action pursuant to 42 U.S.C. § 1988; and

G. Any other relief as the Court may deem just and proper.

RESPECTFULLY SUBMITTED, this the 28th day of February, 2020.

/s/ Aaron R. Rice
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