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CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: SN-2023-CV-300030
PII COMPLIANT



Court: Shawnee County District Court
Case Number: SN-2023-CV-300030
Case Title: Bryn Green vs. Kansas State Board of
Cosmetology, et al
Type: ORD: Order Originated by Judge MEMORANDUM
DECISION AND ORDER

SO ORDERED,

A handwritten signature in black ink, appearing to read 'T. Watson', is written in a cursive style.

/s/ Honorable Teresa L Watson, District
Court Judge

**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION THREE**

BRYN GREEN,

Plaintiff

SN-2023-CV-300030

KANSAS STATE BOARD OF
COSMETOLOGY, et al.,

Defendants

MEMORANDUM DECISION AND ORDER

Bryn Green is a Kansas resident who wants to perform sugaring, a temporary hair removal technique, for paying clients without obtaining a cosmetology or esthetician license as required by law. She asserts that obtaining a license requires an expensive education and passing exams that only marginally address the practice of sugaring. She asks this Court to declare unconstitutional and permanently enjoin the occupational licensing requirements imposed by the State of Kansas upon those who wish to perform sugaring. Green asserts that the licensing requirements violate her right to earn a living free from unreasonable government restrictions, and her right to equal treatment under the law guaranteed by the Kansas Constitution.

The State of Kansas, the Kansas Board of Cosmetology (“Board”), the Board’s executive director, and the individual members of the Board are the named Defendants. Defendants filed a motion to dismiss Green’s petition for declaratory and injunctive relief. Green later filed an amended petition with minor changes that did not affect the original motion to dismiss. The matter has been fully briefed and argued to the Court. The Court denies the Defendants’ motion to dismiss for the reasons set forth below.

STATEMENT OF FACTS

Because this is a motion to dismiss Green’s amended petition, the facts are taken from that document. The Board regulates the practice of cosmetology in Kansas. See K.S.A. 74-2701(a); K.S.A. 65-1901 *et seq.* A cosmetologist “practices the profession of cosmetology for compensation.” K.S.A. 65-1901(c). An esthetician practices a more limited version of cosmetology for compensation. An esthetician is authorized to provide services limited to temporary hair removal, eyebrow and eyelash enhancement, and noninvasive skin treatments. K.S.A. 65-1901(f).

Kansas law requires every cosmetologist and esthetician to obtain a license. Those applicants who meet specified qualifications are granted a license by the Board. All new applicants must complete the required hours of training at a licensed school and pass a written examination. The Board holds the power to license schools and to adopt rules and regulations for the exam.

Kansas law defines cosmetology to include “temporary hair removal from the face or any part of the body by use of the hands or mechanical or electrical appliances other than electric needles.” K.S.A. 65-1901(d)(1)(C). Sugaring is a temporary hair removal technique. Sugaring

involves applying a paste of sugar, lemon juice, and water to a person's skin by hand. The paste is peeled off and unwanted hair is pulled out along with it.

Green states in her amended petition that sugaring is different than waxing, another common cosmetology technique. Green asserts that sugaring does not involve the use of heat, chemicals, or sharp objects; however, she also asserts that paste is applied at body temperature. She claims that there is no risk of burns to the skin, and the paste is safe on all areas of skin regardless of the presence of varicose and spider veins, psoriasis, or eczema on or below the skin. She says sugaring paste has “natural antiseptic properties, which inhibit bacterial growth.”

Those who offer sugaring services fall within the statutory definition of cosmetologists or estheticians and are required to be licensed. K.S.A. 65-1901(d)(1)(C); K.S.A. 65-1901(f)(2). Practicing cosmetology or esthetics without a license is a class C misdemeanor. K.S.A. 65-1902(a)(1) and (e). The Board may issue cease and desist orders to violators and/or impose fines of up to \$1,500.00. K.S.A. 65-1902(a)(1) and (d). The Board may bring a civil action to enjoin a person from practicing cosmetology or esthetics without a license, and the court may impose fines against that person of up to \$1,500.00. K.S.A. 65-1909(c).

Some activities are exempt from the definition of cosmetology, including hair braiding or application of hair extensions that do not involve “dyes, reactive chemicals or other preparations” to change the color of hair, or curl or straighten it. K.S.A. 65-1901(d)(2)(A).

“Threading” is also exempt from the definition of cosmetology. K.S.A. 65-1901(d)(2)(B).

Threading is defined as:

a method of temporary hair removal from the face or the front of the neck by use of a strand of thread to pull hair from follicles. “Threading” may include the use of over-the-counter astringents, gels, powders, tweezers or scissors incidental to

threading, but does not include the use of chemicals, electric needles, heat or any type of wax or the manipulation of thread using teeth. K.S.A. 65-1901(1).

A person who practices these exempt services, and only these exempt services, is not engaged in the practice of cosmetology and does not require a license. K.S.A. 65-1901(d)(2).

The Board may inspect the facilities of cosmetology license holders for cleanliness and sanitation. K.A.R. 69-13-2. Sanitation standards are set by the Secretary of Health and Environment and enforced by the Board. K.S.A. 65-1,148(b). Cleanliness and sanitation requirements include proper handwashing, disposal of single use items, and cleaning and disinfecting of equipment and facilities. K.A.R. 28-24-1 to 28-24-14. Kansas law regulates the sugar paste used for sugaring. K.A.R. 28-24-7. This includes requiring the paste to be maintained at the proper temperature, prohibiting cosmetologists from leaving the paste standing, and requiring single-use applicators be disposed of. *Id.*

Green's amended petition states that a cosmetologist's license requires 1,500 hours of instruction at a licensed school; an esthetician's license requires 1,000 hours. The cost of a cosmetologist's education is as much as \$19,000.00; the cost of an esthetician's education is as much as \$16,000.00. Green asserts that less than one percent of the licensed schools' curriculum is devoted to sugaring, including only a few paragraphs in a textbook. Green states that Kansas' written licensing exams have "virtually nothing to do with sugaring," and the written practical exam includes no questions specific to sugaring.

Green does not hold a cosmetology or esthetician license, and therefore may not provide sugaring services for compensation under existing law. Green states that if she had a license, or was exempt from the licensing requirement, she would provide such services. She seeks a declaration from this Court that the cosmetology licensing statutes violate Sections 1, 2, 18, and

20 of the Kansas Constitution, as applied to Green and others similarly situated. See K.S.A. 60-1701 *et seq.* She also seeks a permanent injunction preventing the enforcement of licensing statutes as they apply to sugaring. See K.S.A. 60-901 *et seq.*

CONCLUSIONS OF LAW

STANDARD FOR MOTIONS TO DISMISS.

Defendants move to dismiss Green’s entire amended petition for failure to state a claim. The appellate court has recently explained the standard for motions to dismiss under these circumstances:

Kansas district courts are courts of general jurisdiction. This means that a person filing a lawsuit in Kansas does not need to affirmatively demonstrate that they may pursue their claims in our courts for a case to proceed. Instead, the Kansas Rules of Civil Procedure merely require a petition to include a short and plain statement of the claim showing the plaintiff is entitled to relief and a demand for judgment. In other words, to initiate a lawsuit in Kansas, a petition need only include a short and plain statement of a claim that will give the defendant fair notice of what the plaintiff’s claim is and the ground upon which it rests. Courts commonly refer to this practice as notice pleading. *Rogers v. Wells Fargo Bank, N.A.*, 64 Kan. App. 2d 290, 295, 551 P.3d 142 (2024) (internal quotes and cites omitted).

Further,

When a defendant requests dismissal under K.S.A. 60-212(b)(6), the district court must resolve every factual dispute in the plaintiff’s favor. In doing so, the court must assume all the factual allegations in the petition—along with any reasonable inferences from those allegations—are true. The court then determines whether the plaintiff has stated a claim based on the plaintiff’s theory or any other possible theory. Dismissal is only appropriate when the well-pleaded facts and inferences therefrom fail to support any claim upon which relief can be granted. *Id.* at 295-96 (internal quotes and cites omitted).

The upshot is that dismissal for failure to state a claim “is the exception, not the rule.” *Minjarez-Almeida v. Kansas Bd. of Regents*, 63 Kan. App. 2d 225, 232, 527 P.3d 931 (2023).

If on a motion under K.S.A. 60-212(b)(6) the parties present and the Court considers matters outside the pleadings, the motion must be treated as one for summary judgment. K.S.A. 60-212(d). But the appellate court has determined that, as part of a motion to dismiss, the Court may consider the petition itself and documents attached to the petition under certain circumstances. *Rogers*, 64 Kan.App.2d at 303. The Court should not consider attached documents “that are not central to the plaintiff’s claim or when there is a reasonable question about their applicability or authenticity.” *Id.* at 305.

Here, Green attached 66 pages of documents to a 35-page petition. The attached documents, Exhibits A-H, include unauthenticated copies of cosmetology school course curricula, esthetics training requirements, instructor training requirements, the Kansas Instructor Exam candidate bulletin, the Kansas Cosmetology Exam candidate bulletin, the Kansas Esthetician Exam candidate bulletin, a list of “approved assessable fines” by the Board, and a list of schools licensed by the Board. Green says these documents deserve the Court’s consideration because they are, she asserts, publications of the Board. But they are not necessarily central to her claim, and there is, at this point in the litigation, a question about their applicability. These documents may be worthy of consideration on summary judgment, but the Court will not consider them as part of the instant motion to dismiss. The Court will consider only the four corners of Green’s amended petition.

ANALYSIS.

Green’s claims are grounded in Sections 1, 2, 18 and 20 of the Kansas Constitution.

Section 1 of the Kansas Constitution Bill of Rights.

Section 1 of the Kansas Constitution Bill of Rights says: “All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.” Section 1 has no counterpart in the federal Constitution “and therefore has its own independent meaning and effect.” *Rivera v. Schwab*, 315 Kan. 877, 893, 512 P.3d 168 (2022), *cert. denied sub nom. Alonzo v. Schwab*, 143 S. Ct. 1055, 215 L. Ed. 2d 279 (2023). The Kansas Supreme Court has held that it confers unique substantive rights, specifically the right to abortion. *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 624, 440 P.3d 461 (2019) (Section 1 protects a right to “personal autonomy,” which “allows a woman to make her own decisions regarding her body, health, family formation, and family life—decisions that can include whether to continue a pregnancy.”).

Green claims a Section 1 right to “earn an honest living, free from unreasonable government restrictions.” No such right has been articulated by the Kansas courts, nor has it been specifically rejected. Green says she has put forth an adequate statement of her claim in the amended petition and seeks an opportunity to argue for the existence of such a right under the Kansas Constitution. Defendants ask the Court to determine at this juncture whether the right to “earn an honest living, free from unreasonable government restrictions” exists under the Kansas Constitution. Given the notice pleading standard, and the existence of other fact-reliant questions set forth below, the Court declines to decide this issue on a motion to dismiss. Defendants’ motion to dismiss Green’s Section 1 claim is denied.

Section 2 of the Kansas Constitution Bill of Rights.

Section 2 says:

All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked or repealed by the same body; and this power shall be exercised by no other tribunal or agency.

Section 2 of the Kansas Constitution Bill of Rights is a counterpart to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Section 2 rights are coextensive with Fourteenth Amendment rights. Thus, Kansas courts follow federal precedent interpreting and applying equal protection guarantees of the Fourteenth Amendment even in a Section 2 context. *Rivera*, 315 Kan. at 894.

Green claims that the Kansas licensing scheme as applied to her and others who seek to practice only sugaring, for compensation, is a violation of equal protection rights under Section 2 of the Kansas Constitution. She points to the fact that others who provide limited beauty-related services are exempt from licensing, including those who practice only “threading,” hair braiding, or application of hair extensions. She argues that there is no factual or legal justification for treating sugaring as an “inherently dangerous” (therefore licensed) activity because sugaring is a “safe activity” which should be exempt from licensing.

Defendants argue that Green fails to state a claim for an equal protection violation because she is not similarly situated to others who are exempt from licensing. Defendants assert that sugaring involves risks not present in “threading” or performing hair braiding or extensions, including burns, torn skin, and infections from improper hygiene. This is a fact-based question not amenable for determination on a motion to dismiss.

The parties also differ about the standard of scrutiny to be applied to Green's equal protection claim. Green advocates for strict scrutiny; Defendants argue that a rational basis standard applies, and if it does, they assert that Green's claim fails as a matter of law. But the Kansas appellate courts have made clear their wish to hew closely to a simple notice pleading standard. Even if Green's claim may ultimately fail under a more thorough analysis, she has pled enough in her amended petition to survive the motion to dismiss. Defendants' motion to dismiss Green's Section 2 claim is denied.

Section 18 of the Kansas Constitution Bill of Rights.

Section 18 of the Kansas Constitution Bill of Rights says: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." The phrase "due course of law" implicates due process rights. *League of Women Voters of Kansas v. Schwab*, 318 Kan. 777, 806, 549 P.3d 363 (2024). Section 18 does not create new substantive rights. *State v. Boysaw*, 309 Kan. 526, 537, 439 P.3d 909 (2019). Rather, "it means only that for such wrongs that are recognized by the law of the land, the courts of this state shall be open and afford a remedy." *Schmeck v. City of Shawnee*, 231 Kan. 588, 594, 647 P.2d 1263 (1982) (internal quotes omitted).

Green asserts that there exists in the Kansas Constitution Bill of Rights the right to "earn an honest living, to conduct business free from unreasonable governmental interference, and to be free from arbitrary, unreasonable, oppressive, protectionist, or irrational government restrictions." Further, she asserts, Section 18 protects her right to redress violations of this right in the courts of this state. Defendants argue that there is no such right, and Green's claim is doomed to fail. Again, there is no Kansas precedent to support the existence of "the right to earn an honest living," nor is

there any Kansas case that clearly forecloses it. The claim has been adequately pled; a decision on the merits must wait for another day. For that reason, the Defendants' motion to dismiss Green's Section 18 claim is denied.

Section 20 of the Kansas Constitution Bill of Rights.

Section 20 of the Kansas Constitution Bill of Rights says: "This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people." Green argues that the "unenumerated rights" protected by Section 20 include the right to "earn an honest living, to conduct business free from unreasonable governmental interference, and to be free from arbitrary, unreasonable, oppressive, protectionist, or irrational government restrictions."

Much like the Section 18 argument, Green posits Section 20 as an untried legal theory applied to the allegations of her amended petition. Her counsel acknowledged at oral argument the novelty of the claim. Defendants believe it will certainly fail. The nature and operation of unenumerated rights under the Kansas Constitution has been a topic of discussion in recent Kansas Supreme Court jurisprudence. See, e.g., *League of Women Voters*, 318 Kan. at 838-59 (Standridge, J., concurring in part and dissenting in part). Green's Section 20 claim under the facts alleged presents a question of first impression that is better decided at some point beyond a motion to dismiss. For that reason, the Defendants' motion to dismiss Green's Section 20 claim is denied.

CONCLUSION

For the reasons set forth above, the Defendants' motion to dismiss Green's amended petition is denied.

This order is effective on the date and time shown on the electronic file stamp.

IT IS SO ORDERED.

**HON. TERESA L. WATSON
DISTRICT COURT JUDGE**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was filed electronically providing notice to counsel of record.

/s Administrative Assistant