

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20274
(Summary Calendar)

LISA MARIE COLEMAN,

Plaintiff-Appellant,

versus

THE DIOCESE OF GALVESTON-
HOUSTON, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-93-3861)

(February 7, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM*:

Lisa Marie Coleman filed a complaint in federal district court against the Diocese of Galveston-Houston, the St. Anne's Catholic School, and their respective leaders because her son, Richard, was not allowed to continue to attend St. Anne's. After a pretrial hearing, the district court, *inter alia*, ordered Coleman not to file any additional federal court litigation in connection with the facts comprising the action without the court's leave to amend.

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

The district court also granted the defendants a period of time to file a motion to dismiss for lack of jurisdiction.

Coleman subsequently filed an amended complaint, which the defendants moved to strike as a violation of the district court's previous order that enjoined her from filing further pleadings without the leave of the court. The district court granted the defendants' motion to dismiss for lack of jurisdiction and struck Coleman's amended complaint, noting that the amended complaint provided no basis for federal jurisdiction. Coleman appeals. We affirm.

FACTS

According to the allegations in Coleman's original complaint, filed November 29, 1993, Richard attended school at St. Anne's in the 1993 fall semester. In September 1993, Coleman was terminated from her job and lost her ability to pay the private school tuition. Coleman alleged that St. Anne's denied her request for financial aid and that the Diocese of Galveston-Houston did not provide her with tuition assistance or work out a payment plan to keep Richard in school. Coleman contended that Pastor Rev. Charles Christopher slandered Coleman and Richard in an attempt to prevent Richard from being enrolled at another school. Coleman also contended that Bishop Fiorenza physically assaulted her in the presence of her son when she attempted to talk to him about his alleged promise to allow Richard to stay in school until the end of the semester. Coleman alleged that St. Anne's practiced sexual discrimination and "reverse discrimination" because the amount of

financial aid given to African-American and Hispanic families with female students outweighs the financial aid given to single white parents of male students. Finally, Coleman alleged that St. Anne's did not adequately protect Richard from another schoolmate's assaults, and that the parents of the other child also made slanderous and vicious statements regarding Coleman and Richard.

Coleman also alleged a number of state law claims, including breach of contract, negligence, intentional infliction of emotional distress, slander, assault, and conspiracy. Coleman requested various forms of relief, including monetary damages, Richard's immediate reinstatement into St. Anne's with a tuition waiver for the 1993-1994 school year, the dismissal of all of the defendants from their positions, including the release of Bishop Fiorenza as bishop of the Diocese of Galveston-Houston and Rev. Charles A. Christopher as school pastor.

Following a December 23, 1993 hearing before the district court, the court enjoined Coleman from (1) communicating with parties to the lawsuit except in writing and through the parties' attorneys, and (2) intimidating or harassing any party, counsel, or witness in the action. The Court also ordered Coleman not to file any additional federal court litigation in connection with the facts comprising the action without the court's leave to amend. The district court also extended to the defendants a period of time to file a motion to dismiss for lack of jurisdiction. The defendants filed their motion to dismiss within the extended time period.

On February 10, 1994, Coleman filed an amended complaint which alleged federal court jurisdiction because St. Anne's received federal funds and because Coleman was a federal taxpayer. In her amended complaint she added as parties the attorneys for the defendants and alleged that they had violated her right to privacy and caused her son's dismissal from St. Anne's by informing the school of another civil matter in which Coleman was involved and in which the attorneys represented the opposing party.¹ She also alleged that Gogi Dickerson, the principal of St. Anne's, had embezzled federal funds which were used, in part, to remodel Dickerson's office.

The defendants moved to strike the amended complaint as a violation of the district court's previous order enjoining her from filing further pleadings without the leave of the court. Noting that the amended complaint provided no basis for federal jurisdiction, the district court granted both this motion and the defendants' motion to dismiss for lack of jurisdiction. Coleman appeals.

DISCUSSION

ISSUE 1:

Coleman alleges that the district court erred in dismissing her action for lack of subject matter jurisdiction. She contends

¹Coleman explains in her appellate brief that this other civil matter was a Title VII action against her former employer, in which St. Anne's attorneys represented her former employer. She alleges that her former employer retained the attorneys before she filed her suit against St. Anne.

that there is jurisdiction under the Civil Rights Act of 1964, 20 U.S.C. § 1681, and her status as a federal taxpayer.

Coleman also contends, for the first time on appeal, that the district court has jurisdiction over her suit pursuant to 42 U.S.C. § 1983 and the "Open Records Act." "[I]ssues raised for the first time on appeal are not reviewable by this [C]ourt unless they involve purely legal questions and failure to consider them would result in manifest injustice." Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). Thus, we do not address these two contentions.

This Court reviews a district court's dismissal under Fed. R. Civ. P. 12(b)(1) de novo. Hobbs v. Hawkins, 968 F.2d 471, 475 (5th Cir. 1992). A Rule 12(b)(1) motion for lack of subject matter jurisdiction is considered by the district court before other challenges "since the court must find jurisdiction before determining the validity of a claim." Moran v. Kingdom of Saudi Arabia, 27 F.3d 169, 172 (5th Cir. 1994) (internal quotation and citation omitted). "[D]ismissal for want of jurisdiction is appropriate if the federal claim is frivolous or a mere matter of form." Sarmiento v. Texas Bd. of Veterinary Medical Examiners, 939 F.2d 1242, 1245 (5th Cir. 1991). When a party challenges subject matter jurisdiction, the court may hold a hearing and consider evidence beyond the pleadings. Moran, 27 F.3d at 172.

Coleman contends that 20 U.S.C. § 1681 provided the district court with jurisdiction to hear her action. Section 1681 prohibits sexual discrimination in educational programs receiving federal

funding. Wheat v. Mass, 994 F.2d 273, 276 (5th Cir. 1993). St. Anne's received \$3,036 in ESEA Chapter 2 allocations from local educational agencies that administer federal funds. However, this fact does not necessarily provide the district court with jurisdiction over this action.

Coleman contended sex discrimination on the basis that the private school allegedly provided financial aid to more female students than to male students.² Coleman's § 1681 allegations are such that, even if true, they do not contradict the defendants' position that Richard was dismissed from school because Coleman could no longer afford to pay the tuition. Coleman does not make any allegations that the refusal of financial assistance was made on the basis of Richard's sex. Thus, she does not demonstrate federal jurisdiction under § 1681. See and compare, Wheat, id. at 276-277. The district court did not err in finding no jurisdiction under § 1681.

Coleman also alleges that the district court had jurisdiction over her action pursuant to the Civil Rights Act of 1964. Coleman does not allege which portion of the act presumably gave the district court jurisdiction. We liberally construe Coleman's allegation to be a claim of jurisdiction under Title VI of the Civil Rights Act of 1964.

² If Coleman presented any evidence of this allegation at the hearing before the district court, the record does not reflect it. There is no transcription of the hearing in the record. It is Coleman's responsibility to present this Court with all portions of the record that are pertinent to her appeal. See Fed. R. App. P. 10(b).

Section 601 of Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. 2000d (1981). Coleman alleged that Richard was denied tuition assistance because he was white and the school favored giving tuition assistance to recipients that were African-American and Hispanic. Coleman's allegations indicate that she is attempting to gain federal jurisdiction, rather than to make a credible claim of racial discrimination. Coleman's complaint, amended complaint, and brief --as well as the relief she requests--are couched in emotional terms which reveal that the underlying basis of her claim is that she is upset over not having, or receiving, the money to pay for her son's private, religious education. Her alleged federal claim appears to be frivolous, thus justifying dismissal for lack of jurisdiction. See Sarmiento, 939 F.2d at 1245. The district court did not err in finding no jurisdiction under this theory.

Coleman also contends that her status as a taxpayer gives the district court subject matter jurisdiction over her action. To establish taxpayer standing that will invoke a federal court's jurisdiction, Coleman must demonstrate that: 1) as a taxpayer, she "will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution" and 2) "the challenged enactment exceeds specific constitutional limitations imposed upon

the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." Flast v. Cohen, 392 U.S. 83, 102-03, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968). Coleman cannot demonstrate taxpayer standing to invoke federal jurisdiction because she has not challenged any exercise of the Art. I, § 8, congressional spending power. The district court properly granted the defendants' motion to dismiss for lack of subject matter jurisdiction on the basis of taxpayer status.

ISSUE 2:

Coleman argues that the district court erred in striking her amended complaint. When Coleman submitted her motion to amend, she had not yet amended her complaint as of right under Fed. R. Civ. P. 15(a), and the defendants had not filed a responsive pleading. See McGruder v. Phelps, 608 F.2d 1023, 1025 (5th Cir. 1979) (motion to dismiss is not a responsive pleading for purposes of Rule 15(a)). Coleman, therefore, was entitled to amend without leave of court. Id. However, as demonstrated above, even if the district court erred in refusing the amendment by striking the amended complaint, the proposed amendment would have offered Coleman no avenue of redress because she failed to allege subject matter jurisdiction in either the original or the amended complaint. See and compare, Davis v. United States, 961 F.2d 53, 57 (5th Cir. 1991). For this reason, we find no abuse of the district court's discretion because Coleman was not prejudiced by the denial of her motion to amend.

CONCLUSION

For the foregoing reasons, the district court judgment is
AFFIRMED.