IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Magistrate Judge Kathleen M. Tafoya

Civil Action No. 20–cv–00487–KMT

MADISON SMITH,

Plaintiff,

v.

DEPARTMENT OF DEFENSE,
UNITED STATES DEPARTMENT OF THE AIR FORCE, and
UNITED STATES AIR FORCE ACADEMY,

Defendants.

ORDER

This matter is before the court on Defendants' "Motion to Dismiss Due-Process Claims and Request for Damages" (Doc. No. 30 [Mot.], filed September 14, 2020). Plaintiff filed her response in opposition (Doc. No. 34 [Resp.], filed October 14, 2020), and Defendants filed their reply (Doc. No. 35 [Reply], filed October 27, 2020).

STATEMENT OF THE CASE

Plaintiff filed her Complaint on February 24, 2020, asserting jurisdiction under 28 U.S.C. §§ 1331 and 2201 and also under the Administrative Procedures Act ("APA"), 5 U.S.C. § 701, et seq. (Doc. No. 1 [Compl.], ¶¶ 2–3.)

Plaintiff states she was a cadet at the United States Air Force Academy ("USAFA"), admitted in August 2017. (*Id.*, ¶ 1.) In or around October 2017, Plaintiff received an honor

violation and administrative proceedings were initiated. (*Id.*, ¶ 10.) Plaintiff believes these proceedings were administered twice due to procedural defects. (*Id.*) Plaintiff was subsequently placed on Honor Probation in February 2018. (*Id.*, ¶ 11.) Plaintiff served on Academic Probation from January to April 2018. (*Id.*, ¶ 12.) In October 2018, Plaintiff failed Honor Probation. (*Id.*, ¶ 13.) A Congressional inquiry was opened and Plaintiff's case was reviewed by the Superintendent of the Academy. (*Id.*)

In October 2018, Plaintiff was given a choice to transfer squadrons. (*Id.*, ¶ 14.) Plaintiff was subsequently placed in CS-07 prior to making her determination. (*Id.*) Before transferring to CS-07, Plaintiff was temporarily assigned to CS-08. (*Id.*) Plaintiff alleges during her time in this squadron, she was subjected to a hostile environment. (*Id.*) Maj. Haig was Plaintiff's Air Officer Commander ("AOC"). (*Id.*, ¶ 15.) Plaintiff alleges her former and current AOCs had a close social relationship, and her AMTs[1] were engaged to be married. (*Id.*, ¶ 16.) Plaintiff believes her former AMT accused her of an honor violation that was subsequently found to be meritless. (*Id.*, ¶ 17.)

In November 2018, Plaintiff was disenrolled from the USAFA. (*Id.*, ¶ 18.) Plaintiff was placed on both Honor and Conduct/Aptitude Probation. (*Id.*) As a result of these probations, upon information and belief, Plaintiff was required to, and did complete, 162 journals; 5 book reports; 50 tours; 50 confinements; and attended several appointments with mentors, AOCs and SPEAs[2]. (*Id.*, ¶ 19.) Plaintiff states she was satisfactorily completing her requirements, but nevertheless, on November 29, 2018, Maj. Haig noted that Plaintiff should continue on

[1] Plaintiff does not define this initialism.
[2] Plaintiff also does not define this initialism.

probation. (*Id.*, ¶ 20.) Plaintiff alleges the "arbitrary and capricious decision to continue Plaintiff on Academic probation led Plaintiff to suffer emotional distress." (*Id.*, ¶ 21.) On December 4, 2018, Plaintiff's mother suddenly passed away, causing Plaintiff to suffer severe mental anguish; nevertheless, Plaintiff was able to overcome this obstacle and continued to satisfactorily complete her probation requirements. (*Id.*, ¶ 22.) However, Plaintiff's mental health continued to deteriorate as a result of the passing of her mother and the rigorous demands of both probations. (*Id.*, ¶ 23.)

Around January 2019, Plaintiff and Maj. Haig discussed moving Plaintiff to a different squadron in the Academy. (*Id.*, ¶ 24.) Maj. Haig recommended that Plaintiff remain in her current squadron CS-07 in order to remain in her current support network. (*Id.*) Plaintiff recalls Maj. Haig's reasoning for this decision to be a good working relationship between the two; and the perception that Plaintiff seemed to perform better under female leadership. (*Id.*) Immediately following this meeting, Plaintiff repeated the reasons to her roommate, other cadets, and her father. (*Id.*, ¶ 25.)

Plaintiff alleges on February 5, 2019, Maj. Haig recommended that the sanctions imposed on Plaintiff remain in place, despite Maj. Haig acknowledging that Plaintiff had met all her deadlines for her honor probation as well as her conduct/aptitude probation in the memorandum. (*Id.*, ¶ 26.) In February 2019, Plaintiff was evaluated at the three-month period for both probations. (*Id.*) During this evaluation an Honor MEP[3] board recommended that Plaintiff's sanctions be reduced. (*Id.*) Despite several recommendations that sanctions be reduced, Vice

[3] Plaintiff does not define this initialism.

Commandant Col. Campbell "arbitrarily and capriciously rejected the recommendation of the MEP board." (*Id.*) As a result, Plaintiff alleges she suffered further mental anguish. (*Id.*, ¶ 28.)

On April 19, 2019, Plaintiff discussed a potential squadron transfer with Col. Storm. (*Id.*, ¶ 34.) During this conversation Plaintiff advised Col. Storm that she would be remaining in CS-07 and stated her reasons as those that were previously mentioned by Maj. Haig. (*Id.*)

On April 25, 2019, Maj. Haig signed a leave request for Plaintiff, at which time there was no indication Plaintiff was failing probation. (*Id.*, ¶ 36.)

On May 2, 2019, Plaintiff spoke with Col. Stephens to discuss what was currently going on in her life. (*Id.*, ¶ 38.) During this conversation, Plaintiff was informed that Col. Stephens had a discussion with Maj. Haig regarding Maj. Haig's decision not to reduce Plaintiff's sanctions. (*Id.*) On May 2, 2019, Col. Stephens spoke with Maj. Haig and informed her that if she intended to fail Plaintiff documentation would need to be presented. (*Id.*, ¶ 39.) Maj. Haig indicated that she would ensure adequate documentation was present that would justify disenrolling Plaintiff form the Academy. (*Id.*)

Plaintiff attended a mentoring session with Col. Storm and Lt. Col. Burnett on May 2, 2019. (*Id.*, ¶ 40.) When the session began, Col. Storm informed Plaintiff that she had failed probation and was being recommending for disenrollment. (*Id.*) Col. Stephens contacted Maj. Haig to inform her that she must have documentation that explicitly states the reason for failing Plaintiff on probation and the recommendation for disenrollment. (*Id.*, ¶ 41.)

Prior to May 2, 2019, Plainitff never received any indication, oral or written, that she was failing probation and/or was at risk of failing probation. (*Id.*, ¶¶ 43, 45.) On May 3, 2019, Plaintiff met with Col. Storm and Lt. Col. Burnett for a morale and health check. (*Id.*, ¶ 46.)

Moments before this meeting, Plaintiff was informed that Maj. Haig would be in attendance. (*Id.*) During this meeting Plaintiff was subject to an allegedly unwarranted interrogation by superior officers without prior notice that she would be subjected to such conduct. (*Id.*) Plaintiff was issued a Letter of Reprimand from Maj. Haig on May 7, 2019. (*Id.*, ¶ 47.) The conduct that formed the basis for the reprimand was alleged to have occurred on April 11, 2019, during a mentoring session between Plaintiff and Maj. Haig. (*Id.*) Maj. Haig drafted the above-mentioned Letter of Reprimand on April 29, 2019, eighteen days after the allegedly disrespectful statements were made. (*Id.*, ¶ 48.) The Letter of Reprimand alleged that Plaintiff was disrespectful to Maj. Haig, the Superintendent, and the Academy during a mentoring session. (*Id.*, ¶ 49.)

Plaintiff alleges the Letter of Reprimand is in complete contradiction of the Form 174 that was drafted by Maj. Haig after the alleged statements were made. (*Id.*, ¶ 50.) In the Letter of Reprimand, Maj. Haig indicated that Plaintiff made a number of alarming statements. (*Id.*) Plaintiff contends that, if these statements were truly alarming and cause for disenrollment then they would have been immediately documented. (*Id.*)

On May 7, 2019, Plaintiff met with Maj. Haig with the intention of continuing her mentoring sessions with Maj. Haig. (*Id.*, ¶ 51.) Instead of concluding Plaintiff's Honor Probation Requirements, which she thought was the purpose of the meeting; Plaintiff was informed of several allegations against her for honor violations. (*Id.*) Plaintiff denies making any disrespectful statements during the hearing. (*Id.*, ¶ 52.)

On May 10, 2019, a formal clarification meeting was held. (*Id.*, ¶ 54.) The only honor violation alleged at that meeting was the gender statement supposedly made during the April 11,

2019 counseling session. (*Id.*) During that meeting Maj. Haig and Plaintiff confirmed that a meeting took place between the two sometime during January of 2019 and that the purpose of that meeting was to discuss moving Plaintiff to a different squadron. (*Id.*, ¶ 55.) Maj. Haig denied making gender-based statements during the January meeting. (*Id.*) During the clarification meeting, Plaintiff attempted to exercise her right to refuse to answer a question, but Plaintiff alleges Defendants ignored this request and continued to press Plaintiff to answer a question. (*Id.*, ¶ 56.) Plaintiff eventually complied with the request due to coercion from superior officers. (*Id.*)

On or about May 21, 2019, Plaintiff received correspondence notifying her that she had failed probation despite never being informed that she was at risk of failing her probation period. (*Id.*, ¶ 57.)

Plaintiff asserts an APA claim (*id.* at 11–12), a procedural due process claim (*id.* at 12–14), and a substantive due process claim (*id.*, at 14–15). Plaintiff seeks declaratory and injunctive relief and money damages. (*Id.* at 15.)

Defendants move to dismiss Plaintiff's due process claims. (Mot.)

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may move to dismiss a claim for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1201 (10th Cir. 2003) (quotation marks omitted).

"A court reviewing the sufficiency of a complaint presumes all of plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff." *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility, in the context of a motion to dismiss, means that the plaintiff pleaded facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. The *Iqbal* evaluation requires two prongs of analysis. First, the court identifies "the allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusion, bare assertions, or merely conclusory. *Id*. at 679–81. Second, the Court considers the factual allegations "to determine if they plausibly suggest an entitlement to relief." *Id*. at 681. If the allegations state a plausible claim for relief, such claim survives the motion to dismiss. *Id*. at 679.

Notwithstanding, the court need not accept conclusory allegations without supporting factual averments. *S. Disposal, Inc., v. Texas Waste*, 161 F.3d 1259, 1262 (10th Cir. 1998). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S at 678. Moreover, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does the complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' " *Id.* (citation omitted). "Where a complaint pleads

facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.' " *Id.* (citation omitted).

ANALYSIS

Plaintiff asserts procedural and substantive due process claims. "[T]o prevail on either a procedural or substantive due process claim, a plaintiff must first establish that a defendant's actions deprived plaintiff of a protectible property, life, or liberty interest." *Fortner v. Cnty. of El Paso*, No. 15–cv–0644–WJM–NYW, 2016 WL 806751, at *5 (D. Colo. Mar. 2, 2016) (citing *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 & n.2 (10th Cir. 2000)).

Courts have held, and Plaintiff concedes (Resp. at 4), that "an enlisted member of the armed forces does not have a property interest in [her] employment." *Canonica v. United States*, 41 Fed. Cl. 516, 524 (1998); *see*, *e.g.*, *Guerra v. Scruggs*, 942 F.2d 270, 278 (4th Cir. 1991).; *Rich v. Sec'y of Army*, 735 F.2d 1220, 1226 (10th Cir. 1984). Thus, Plaintiff did not have a property interest in her continued enrollment at the USAFA.

Nevertheless, "courts have held that an enlisted member of the armed forces has a liberty interest in his employment. This liberty interest prevents the military from discharging a service member without due process—but only in cases where a 'stigma' would attach to the discharge." *Canonica*, 41 Fed. Cl. at 524 (citing cases).

In her response, Plaintiff argues that "the documentation surrounding Plaintiff's disenrollment has caused a grave and continuing reputational injury and Defendants have essentially prevented Plaintiff from reentering service when they assigned her a rating of "3" on a DD Form 785." (Resp. at 5.) However, these allegations are not included in Plaintiff's Complaint, and Plaintiff cannot amend her Complaint by adding factual allegations in response to the Motion to

Dismiss. *See Jojola v. Chavez*, 55 F.3d 488, 494 (10th Cir. 1995) (holding that a court is limited to assessing the legal sufficiency of the allegations contained within the four corners of the complaint) (citation omitted); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984) (holding that "it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss") (citations omitted); *Wilson v. Jenks*, Case No. 12–cv–02495–RM–KMT, 2014 WL 6515336, at *4 (D. Colo. Nov. 20, 2014).

Moreover, injury to reputation itself is not a liberty interest protected by due process. *Siegert v. Gilley*, 500 U.S. 226, 223 (1991). In *Workman v. Jordan*, 32 F.3d 475 (10th Cir. 1994), the Tenth Circuit applied Supreme Court precedent to delineate a four-part test that a plaintiff must satisfy to demonstrate a deprivation of his liberty interest:

> [A plaintiff] does have a liberty interest in his good name and reputation as it affects his protected property interest in continued employment. *Paul v. Davis*, 424 U.S. 693, 701 (1976); *McGhee v. Draper*, 639 F.2d 639, 643 (10th Cir. 1981). However, [a plaintiff] must show how the government infringed upon this liberty interest. First, to be actionable, the statements must impugn the good name, reputation, honor, or integrity of the employee. Second, the statements must be false. Third, the statements must occur in the course of terminating the employee or must foreclose other employment opportunities. And fourth, the statements must be published.

32 F.3d at 480–81. *See Melton v. City of Okla.*, 928 F.2d 920, 926–27 (10th Cir. 1991) (en banc) (holding that elements are not disjunctive but must all be satisfied).

Plaintiff argues that maintaining the documentation of her discharge in her "official military file" where it will be available for review by "the appropriate authorities" if she seeks to reenter the military satisfies this requirement. (Resp. at 6.) Again, this allegation is not in her Complaint. Moreover, "[t]o impinge on a liberty interest, the stigmatizing information must be made public by the offending governmental entity." *Rich*, 735 F.2d at 1227 (citing *Gentile v.*

Wallen, 562 F.2d 193, 197 (2d Cir. 1977); *Bishop v. Wood*, 426 U.S. 341, 348 (1976)). A government agency maintaining records is not dissemination, much less *public* dissemination. Furthermore, as Plaintiff has made no allegation that she will seek to reenter the military, there is no reason to believe that an intragovernmental disclosure will ever be made.

Plaintiff has not shown any infringement of a protected liberty interest. Accordingly, Defendants' motion to dismiss Plaintiff's due process claims is granted.

WHEREFORE, for the foregoing reasons, it is

ORDERED that Defendants' "Motion to Dismiss Due-Process Claims and Request for Damages" (Doc. No. 30) is **GRANTED**. Plaintiff's due process claims are **DISMISSED** with prejudice.

Dated this 21st day of September, 2021.

BY THE COURT:

Kathleen M. Tafoya
United States Magistrate Judge