IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JACQUELINE STEVENS, Plaintiff, v. ERIC H. HOLDER, JR., Attorney General of the United States, *et al*., Defendants.	)	CIVIL ACTION NO. 1:12-CV-1352-ODE

FEDERAL DEFENDANTS' MEMORANDUM OF LAW SUPPORTING THEIR RENEWED MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff, Jacqueline Stevens, a political science professor, challenges the closure of two immigration hearings on October 7, 2009 and one on April 19, 2010, and Defendants' subsequent investigation of Plaintiff's administrative complaint concerning the 2010 closure. After several rulings by this Court, the remaining allegations include violations of the United States Constitution under the First and Fifth Amendments. Plaintiff seeks *Bivens*[1] damages and declaratory and injunctive relief.[2]

[1] *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

[2] The Court has dismissed *Bivens* damages claims in their entirety against individual Federal Defendants Cassidy, Long, Mooney, Summers, and Doe. Dkt 55 at 15-16; Dkt 97 at 12-15. The remaining *Bivens* defendants are Assistant Chief Immigration Judges Smith and Keller, and the sole remaining *Bivens* claim against them is at Count Three, which alleges a due process violation in the investigation of Plaintiff's administrative complaint. Dkt 97 at 13-15.

As ordered by the Court, *see* Dkt 97 at 17, 27; Dkt 141 at 13-14, the parties have conducted discovery. The fully developed record shows Federal Defendants (i) acted constitutionally when they closed the immigration hearings to the entire public; (ii) did not order Plaintiff's removal from the building housing the Atlanta Immigration Court; (iii) provided Plaintiff with due process in investigating her administrative complaint; and (iv) provided support for their administrative finding that closure was appropriate and that Immigration Judge Cassidy did not order Plaintiff's removal from the building.

Given the record, Plaintiff's claims fail for three reasons. First, absolute quasi-judicial immunity shields the remaining individual Federal Defendants from *Bivens* damages. Second, the individual Federal Defendants are also protected by qualified immunity. Finally, Federal Defendants are entitled to summary judgment on the remaining claims seeking declaratory and injunctive relief because there are no genuine issues of material fact concerning the actions Plaintiff challenges.

II. PROCEDURAL HISTORY

Plaintiff initially filed a *pro se* suit against Federal Defendants on April 18, 2013, seeking damages for violations of her rights under the First, Fourth, and Fifth Amendments. Dkt 1. This Court construed Plaintiff's *pro se* Complaint as a two-count Complaint. Dkt 55. Count I was construed as a damages claim against the

private security company and Immigration Judge Cassidy in his individual capacity. *Id.* Count II was construed as a claim for injunctive relief against all named Defendants. *Id.* On Federal Defendants' motion, the Court dismissed Immigration Judge Cassidy as a *Bivens* Defendant. *Id*.

This Court subsequently granted leave for Plaintiff to amend her Complaint by adding new *Bivens* claims against some of the Federal Defendants and a civil conspiracy claim. Dkt 69. In response to Plaintiff's newly amended Complaint, Federal Defendants filed a motion to dismiss or, in the alternative, for summary judgment as to the remaining individual capacity claims against Federal Defendants on July 18, 2014. Dkt 73. While Federal Defendants' motion was pending, Federal Defendants filed another motion for summary judgment on January 25, 2014. Dkt 96. In support of this motion, Federal Defendants added additional exhibits and argued that, based on the record, Federal Defendants were entitled to judgment as a matter of law. *Id.*

Subsequently, on January 31, 2014, the Court granted Defendants' motion to dismiss that was filed as to individual Federal Defendants Long, Mooney, Summers, and Inspector Doe. Dkt 97. The motion was partially denied as to individual Federal Defendants Keller and Smith. *Id.* Additionally, the Court dismissed Plaintiff's newly added civil conspiracy claim. *Id.*

Pursuant to this Court's orders, *see* Dkts 97 and 141, the parties engaged in limited discovery regarding the remaining claims. Now pending before this Court are Plaintiff's claims for injunctive and declaratory relief against Federal Defendants for violation of the First and Fifth Amendments, as well as claims for *Bivens* damages against individual Federal Defendants Keller and Smith under Count Three. Dkts 97, 141.

III. STATEMENT OF FACTS

Defendants respectfully refer the Court to the attached Statement of Undisputed Material Facts ("SUMF") for the background and facts of this matter.

IV. APPLICABLE REGULATIONS

Three immigration regulations are of particular relevance to this Court's determination of whether the record warrants a grant of summary judgment for Federal Defendants ("Defendants") – 8 C.F.R. §§ 1003.27, 1208.6, and 1240.10.[3]

[3] The regulation at 8 C.F.R. § 1003.27(b) provides in relevant part as follows: "All hearings, other than exclusion hearings, shall be open to the public *except that . . . [f]or the purpose of protecting witnesses, parties, or the public interest, the Immigration Judge may limit attendance or hold a closed hearing*." (emphasis supplied).

The regulation at subsections (a) and (b) of 8 C.F.R. § 1208.6 provides in relevant part as follows: "Information contained in or pertaining to any asylum application, records pertaining to any credible fear determination conducted pursuant to § 1208.30, and records pertaining to any reasonable fear determination conducted pursuant to § 1208.31, *shall not be disclosed* without the written consent of the applicant, except as permitted by this section or at the discretion of the Attorney General." (emphasis supplied). It also provides that the "confidentiality of other records kept by the Service and the Executive Office for Immigration Review that

These regulations describe the circumstances justifying closure of an immigration hearing.

V. ARGUMENT

A. Absolute Quasi-Judicial Immunity Shields the Remaining Individual Defendants from *Bivens* Liability

Quasi-judicial immunity derives from absolute judicial immunity and protects government officials when their actions are within the scope of their authority and have "an integral relationship" to the judicial process. *Roland v. Phillips*, 19 F.3d 552, 555 (11th Cir. 1994) (quoting *Ashbrook v. Hoffman*, 617 F.2d 474, 476 (7th Cir. 1980)) (citation omitted). The nature of the *function performed*, rather than the *identity of the actor* who performed it, determines entitlement to quasi-judicial immunity. *Forrester v. White*, 484 U.S. 219, 229 (1988) (emphasis supplied).

The protections of quasi-judicial immunity extend beyond law enforcement officers to include judicial personnel and necessary participants in the judicial process, such as law clerks, clerks of court, secretaries, parole board members, and other government staff whose work is integral to the judicial process. *See, e.g.*, *Scott*

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indicate that a specific alien has applied for asylum, received a credible fear or reasonable fear interview, or received a credible fear or reasonable fear review *shall also be protected from disclosure*." (emphasis supplied).

The regulation at 8 C.F.R. § 1240.10(b) provides in relevant part as follows: "Removal hearings shall be open to the public, *except that the immigration judge may, in his or her discretion, close proceedings* as provided in § 1003.27 of this chapter." (emphasis supplied).

v. Dixon, 720 F.2d 1542, 1546-47 (11th Cir. 1983) (applying absolute judicial immunity to court clerk for actions in facilitating issuance of criminal warrant). The rationale for the application of immunity to government officials functioning as an integral part of the judicial process is to free the judicial process from harassment and intimidation. *See Forrester*, 484 U.S. at 225-26; *Weissman v. National Ass'n of Securities Dealers, Inc*., 500 F.3d 1293, 1306 (11th Cir. 2007) ("Because absolute immunity exists 'to shield officials from the distractions of litigation arising from the performance of their official functions,' its protections are 'effectively lost' if not applied vigorously to prevent a case from advancing to pretrial discovery or trial where appropriate.") (citing *Brown v. Crawford County, Ga*., 960 F.2d 1002, 1010 n.12 (11th Cir.1992)).

Individual Defendants Keller and Smith are entitled to absolute protection against *Bivens* liability through the shield of quasi-judicial immunity. Each one of them acted within the scope of their authority, and their function and actions have "an integral relationship" to the judicial process. *See Roland*, 19 F.3d at 555 (citation omitted). Because Defendants Keller and Smith meet the Eleventh Circuit's *Roland* standard for quasi-judicial immunity, this Court should dismiss Defendants Keller and Smith as individual Defendants.

1. Absolute Quasi-Judicial Immunity Protects Defendant Keller from *Bivens* Liability

Defendant Keller, an Assistant Chief Immigration Judge at the Executive Office for Immigration Review ("EOIR"), is "responsible for managing investigations of misconduct complaints against immigration judges." First Amended Complaint ("FAC") ¶ 7. Plaintiff alleges Defendant Keller violated Plaintiff's due process rights when she "failed to properly investigate, properly document their investigation, and obstructed the investigation of Plaintiff's administrative complaints,[4] thus depriving Plaintiff of an available remedy by which to seek redress for her grievances, in violation of Plaintiff's due process rights." *Id.* ¶ 71.

Applying *Roland's* two-part test, Defendant Keller's actions fall squarely within her scope of duties as the Assistant Chief Immigration Judge ("ACIJ") for Conduct and Professionalism and satisfy the "scope" portion of the *Roland* test. Pursuant to EOIR's procedure for investigating complaints against Immigration Judges, *see* Ex. A - EOIR Immigration Judge Complaint Investigation Procedure, Defendant Keller is tasked with receiving complaints and assigning them to the appropriate supervisory ACIJ. *Id.*; FAC ¶ 7; SUMF ¶ 23; Ex. B – Keller Trnsc. (25:25; 26:1-4, 17-20); Ex. C – Smith Trnsc. (10:14-16; 12:18-25); Ex. D – Keller

[4] There is *one* administrative complaint at issue here, which Plaintiff filed on April 27, 2010. FAC ¶ 58; SUMF ¶ 22.

Decl'n ¶ 4; *see also* Ex. E – EOIR Immigration Judge Complaint Investigation Flowchart. Here, the undisputed record shows that Defendant Keller did receive Plaintiff's complaint and, after assigning it to Defendant Smith, coordinated to monitor progress of its investigation and resolution. SUMF ¶¶ 23-25; Ex. B (25:25; 26:1-4, 17-20; 47:1-15); Ex. C (10:14-16; 12:18-25; 55:12-16; 57:24-25; 58:1-2). She therefore acted within the scope of her authority, fulfilling the duties for which she was responsible and meeting *Roland's* first requirement concerning scope.

As for whether the action at issue has an integral relationship to the judicial process, the answer to this second part of *Roland's* analysis is again in the affirmative. Investigation of Immigration Judge misconduct is crucial to proper functioning of the Immigration Court and therefore is integral to the judicial process; a court is only as functional as its personnel, particularly its judges. *Cf. Kirkendall*, 1993 WL 360732, at *2-3 (applying quasi-judicial immunity to judge's secretary for two telephone calls and processing of request for a replacement judge); *Manko*, 2011 WL 6019467, at *2–3 (applying absolute quasi-judicial immunity to court clerks for alleged failure to manage court calendar and file documents); *McLynas*, 2007 WL 404706, at *6 (applying absolute quasi-judicial immunity to court chancellor, chancellor's assistant, court clerk, and court referee for allegations concerning

docket control, courtroom proceedings, decision outcomes, scheduling and notification of hearing decisions, and assessed fees and costs).

Just as the court in *McLynas* applied quasi-judicial immunity to protect the actions of court personnel in their investigation of complaints concerning courtroom proceedings and decision outcomes, so too should this Court apply it here. *See McLynas*, 2007 WL 404706, at *6. Defendant Keller's actions – in ensuring Plaintiff's complaint was directed to the appropriate investigator, Defendant Smith, and was pursued to the point of a final determination – demonstrate her integral relationship to the judicial process. She thus meets the second prong of the *Roland* standard for application of quasi-judicial immunity to protect a government official from individual liability, and the Court should grant summary judgment for Defendants on the remaining *Bivens* claim against Defendant Keller.

2. Absolute Quasi-Judicial Immunity Protects Defendant Smith from *Bivens* Liability

Defendant Smith, a former EOIR ACIJ, "oversaw the operations of the Atlanta Immigration Court and was responsible for investigating misconduct complaints against immigration judges in Georgia." FAC ¶ 8. Defendant Smith was assigned to investigate Plaintiff's complaint about Defendant Immigration Judge Cassidy. According to Plaintiff, Defendant Smith "failed to properly investigate, properly document their investigation, and obstructed the investigation of Plaintiff's

administrative complaints, thus depriving Plaintiff of an available remedy by which to seek redress for her grievances, in violation of Plaintiff's due process rights." *Id*. ¶ 71.

Applying *Roland's* two-part test, Defendant Smith's actions satisfy the "scope" portion of *Roland's* test. Pursuant to EOIR's procedure for investigating complaints against Immigration Judges, *see* Ex. A, Defendant Smith was tasked with investigating complaints – by reviewing the hearing record and obtaining witness statements – directed against judges in Immigration Courts over which Defendant Smith had supervisory responsibility, which included those in Georgia. *Id*.; FAC ¶ 8; SUMF ¶ 24; Ex. F – Smith Decl'n ¶ 3; Ex. B (26:17-20); Ex. C (10:14-16; 12:18-25). Here, once Plaintiff filed her administrative complaint, *see* Ex. G – Plaintiff's Admin. Compl., the record shows that, in accordance with the procedure established in EOIR's Immigration Judge complaint investigation process, Defendant Smith did investigate Plaintiff's complaint against Defendant Immigration Judge Cassidy and issued a final decision. SUMF ¶¶ 24, 25, 35; *see also* Ex. A.

More specifically, as part of his investigation, Defendant Smith reviewed the digital audio recording of the hearing, Ex. C (47:22-25; 48:1); obtained a statement from Defendant Immigration Judge Cassidy, *id*. (47:19-11), Ex. H – Cassidy email; spoke with Officer Jackson, the lead contract guard on duty the day in question, Ex.

C (53:12-17, 62:5-6, 22-25), Ex. I – Smith/Long emails; spoke with and obtained a statement from Defendant Long, the Court Administrator, Ex. C (45:2-7, 19-22), Ex. I – Smith/Long emails; obtained a statement from Defendant Long's assistant, Marion Crosby, Ex. C (45:17-19; 47:17-18; 107:6-11), Ex. J – Crosby email); and obtained a statement from Britney Luckey, who was present at the time of the actions outlined in Plaintiff's complaint, Ex. C (50:15; 62:7-11), Ex. K – Luckey Statement. SUMF ¶¶ 26-31. Keeping in mind these investigation efforts, Defendant Smith's actions comport with established EOIR procedure and fall within the scope of his authority. He accordingly meets *Roland's* first prong.

As to whether the action at issue has an integral relationship to the judicial process, the answer to this second part of *Roland's* analysis is again in the affirmative. As argued above with the immunity analysis for Defendant Keller, investigation of immigration judge misconduct is critical to proper functioning of the Immigration Court and therefore is integral to the judicial process. Just as other courts have applied quasi-judicial immunity to protect court personnel in challenges to the impartiality and fairness of their decisions and actions, *see*, *e.g.*, *McLynas*, 2007 WL 404706, at *5-6, this Court should apply quasi-judicial immunity here to protect challenges to Defendant Smith's investigatory actions in responding to Plaintiff's complaint. Similar to Defendant Keller, Defendant Smith meets the

second prong of the *Roland* standard for application of quasi-judicial immunity to protect a government official from individual liability, and the Court should grant summary judgment for Defendants as regards the remaining *Bivens* claim against Defendant Smith.

B. In Addition to Quasi-Judicial Immunity, Qualified Immunity Shields Individual Defendants Keller and Smith from *Bivens* Liability

Qualified immunity protects a government official from liability if the official's action did not violate a constitutional right and if the constitutional right was not clearly established at the time of the action. *Saucier v. Katz*, 533 U.S. 194, 200-201 (2001), overruled in part, *Pearson v. Callahan*, 555 U.S. 223, 236 (2009); *Andujar v. Rodriguez*, 486 F.3d 1199, 1202-03 (11th Cir. 2007).

1. Individual Defendants Did Not Violate Plaintiff's Due Process Rights

In the remaining *Bivens* claim at Count Three, Plaintiff challenges the quality of the investigation of her administrative complaint filed in response to the closure of an immigration hearing held at the Atlanta Immigration Court on April 19, 2010. FAC ¶ 71. Specifically, she alleges Defendants "failed to properly investigate, properly document their investigation, and obstructed the investigation of Plaintiff's administrative complaints, thus depriving Plaintiff of an available remedy . . . ." *Id*. This claim fails for two reasons. First, to the extent that Plaintiff was entitled to an

investigation of her administrative complaint,[5] the record does not show there exists a "clearly established" procedure requiring precise actions in conducting such investigation. Second, the record does not show that the steps the individual Defendants took in conducting their investigation failed to adhere to the investigation procedure that *does* exist. Because Plaintiff cannot make either showing, qualified immunity shields the individual Defendants from *Bivens* liability.

(a) Defendants' procedure for investigating complaints against Immigration Judges allows discretion, rather than requiring investigators to follow a "clearly established" or "particularized" rubric

To the extent that Plaintiff had any right to an investigation of her administrative complaint regarding allegations that she was unlawfully excluded from Immigration Court hearings, such right – and the investigation procedure to determine whether it was infringed – "must be sufficiently clear 'that every reasonable official would [have understood] that what he is doing violates that

[5] Although immigration hearings are presumptively open to the public, as outlined above, regulatory exceptions that are unchallenged in this lawsuit allow their closure. *See* 8 C.F.R. §§ 1003.27, 1208.6, and 1240.10; *see also* SUMF ¶ 19; FAC ¶ 47; Ex. L – Plaintiff's Trnsc. (45:6-8). With these exceptions in view – and given that caselaw leaves open the question of whether there exists a right of access to immigration hearings, *compare North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 201 (3d Cir. 2002) (finding no First Amendment right of access to removal hearings), *with Detroit Free Press v. Ashcroft*, 303 F.3d 681, 700 (6th Cir. 2003) (finding First Amendment right of access to removal hearings) – there remains an open question as to whether or not Plaintiff was constitutionally entitled to *any complaint/investigation process at all*.

right.'" *See Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011)). Further, existing precedent must have placed the statutory or constitutional question of the right beyond debate. *Id*. The right allegedly violated must be established, not as a broad general proposition, but in a "particularized sense" so the "contours" of the right are clear to a reasonable official.[6] *Id*. at 2094.

The record shows EOIR has a defined procedure for investigating administrative complaints concerning Immigration Judges. SUMF ¶ 21; Ex. A; Ex. E. Plaintiff is aware of this procedure and referred to it in her deposition of Defendant Keller. SUMF ¶ 21. Significantly, language in the complaint investigation procedure, as well as Defendant Keller's deposition testimony, shows the procedure allows discretion to investigators, rather than a rigid set of instructions, as to how to conduct their investigations. *See* Ex. A ("If the complaint involves in-court conduct, the investigation will *usually* begin with a review of the

[6] The *Reichle* Court implies that *only Supreme Court precedent* can provide a clearly established constitutional right, and it further implies a requirement that – at a minimum – the existence of a clearly established constitutional right warrants a showing of *controlling circuit court authority*. *Reichle*, 132 S. Ct. at 2094 (holding that a First Amendment right to be free from retaliatory arrest, even if supported by probable cause, was not clearly established because the Supreme Court never recognized such a right and "assuming arguendo that controlling Courts of Appeals' authority could be a dispositive source of clearly established law"). Accordingly, in addition to the open question above concerning whether or not Plaintiff was constitutionally entitled to the complaint/investigation process she received, *Riechle* offers further reason to question the existence of such a right.

hearing record . . . the ACIJ *may* also solicit statements . . . An ACIJ *may* dismiss or conclude a complaint, *with or without* disciplinary action.") (emphasis supplied); Ex. B (41-42:1-6).

Defendants Smith and Keller identify the investigation procedure in their depositions. Ex. C (12:12-14); Ex. B (25:14-16). Defendant Smith highlighted the flexibility the investigation procedure offers "given the circumstances" of each complaint, Ex. C (16:3-9), and Defendants Smith and Keller testified that a case-specific analysis determines whether a complaint may or may not lead an investigation in certain directions. *Id*. (15:5-25; 16:1-25); Ex. B (25:14-16; 28:2-11; 29:16-24; 46:5-25).

Acknowledging the discretion the EOIR investigation procedure provides to those investigating complaints against Immigration Judges, it cannot be genuinely argued that Defendants Keller and Smith were required to adhere to a "clearly established" or "particularized" method for conducting EOIR's investigation of Plaintiff's complaint. Instead, the procedure – and any right that it provides concerning investigation of a complaint – is flexible and allows the allegations and facts of a particular case to guide the investigation, rather than a rigid or clearly established procedure. *See Reichle*, 132 S. Ct. at 2093-94. As such, no clearly established right to a specific investigative procedure existed, and Plaintiff fails to

meet this required prong to thwart application of qualified immunity. *See Saucier*, 533 U.S. at 200-201; *Andujar*, 486 F.3d at 1202-03 (11th Cir. 2007); *see also Keating v. City of Miami*, 598 F.3d 753, 762 (11th Cir. 2010).

(b) The record shows that Defendants' investigation adhered to the existing investigation procedure and did not violate any process that was due Plaintiff

Testimony by Defendants Keller and Smith demonstrates that their investigation of Plaintiff's administrative complaint regarding the April 19, 2010 hearing closure adhered to the guidelines within EOIR's procedure for investigating complaints against Immigration Judges. Upon receipt of Plaintiff's complaint, Defendant Keller ensured the appropriate investigator, Defendant Smith, addressed the complaint given his supervisory responsibility over Immigration Judges at the Atlanta Immigration Court. SUMF ¶ 24; Ex. B (25:25; 26:1-4, 17-20); Ex. C (10:14-16; 12:18-25); Ex. F ¶ 3. As thoroughly outlined and cited in the record above, as part of his investigation, Defendant Smith reviewed the digital audio recording of the hearing record; obtained a statement from Defendant Cassidy, the Immigration Judge overseeing the April 19, 2010 hearing at issue in Plaintiff's complaint; spoke with Officer Jackson, the lead contract security guard on duty at the Atlanta Immigration Court on April 19, 2010; spoke with and obtained a statement from Defendant Long, Atlanta Immigration Court Administrator,

including obtaining information she received from Federal Protective Services, the agency responsible for building security; obtained a statement from Marion Crosby, assistant to Defendant Long; and obtained a statement from Britney Luckey, Atlanta Immigration Court Student Intern. SUMF ¶¶ 26-31.

Defendants Keller and Smith coordinated in the investigation to enable Defendant Smith to complete his investigation and to reach a final determination. *Id*. ¶ 25. After "[p]iecing the various statements together of the people who [he][] talked with and also who provided statements," Ex. C (50:13-15), Defendant Smith issued his determination to Plaintiff on June 3, 2010, finding that his investigation did not substantiate the claims in Plaintiff's administrative complaint. SUMF ¶¶ 35-36; Ex. M – Smith Determination Letter; Ex. N – Cassidy Decl'n ¶ 15.

The testimony in the record outlined above, along with the documents referenced, demonstrates that Defendants Keller and Smith followed the investigation procedure EOIR established to guide investigations of complaints concerning Immigration Judges. *See* Ex. A. To the extent that EOIR's investigation procedure establishes a due process right, the record shows Defendants provided the rights due to Plaintiff. On this basis, because Plaintiff cannot meet this second required prong to thwart application of qualified immunity, the Court should apply qualified immunity to Defendants Keller and Smith and should grant Defendants'

summary judgment motion with respect to the remaining *Bivens* claim against these individual Defendants. *See Saucier*, 533 U.S. at 200-201; *Andujar*, 486 F.3d at 1202-03 (11th Cir. 2007); *see also City of Miami*, 598 F.3d at 762.

C. The Record Shows that Regulations Authorized Closure of the Hearings and that Government Defendants Did Not Violate Plaintiff's Constitutional Rights

The record supports summary judgment for the government on all remaining counts. As explained below through reference to the record and digital audio recordings of the hearings, each of the three hearings Plaintiff challenges in the FAC involved asylum, issues confidential to the immigrant respondents, and/or counsel's request for hearing closure. Accordingly, and while Plaintiff may disagree with Defendants' actions, regulations authorized closure of the hearings to the public, and Defendants' closure decisions – as well as their investigation of the circumstances of the closures – did not violate Plaintiff's constitutional rights.[7]

1. Relevant Constitutional Standards

(a) First Amendment in the Context of Immigration Hearing Access

[7] Although Plaintiff's request for injunctive relief at Count Eight asks this Court to enjoin Defendants "from unlawfully excluding Plaintiff from Defendant Cassidy's courtroom", FAC ¶ 82, Defendants note that Plaintiff admits she has never been told she is banned from the Atlanta Immigration Court, Ex. L (134:8-10); that she has returned to the Atlanta Immigration Court since the events described in the FAC, *id*. (134:11-14); but that she has not tried to observe hearings before Immigration Judge Cassidy since the events described in the FAC, *id*. (137:13-15). SUMF ¶ 20.

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Circuit courts addressing the question of whether there exists a *per se* First Amendment right of access to immigration hearings have split in their findings. *Compare North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 201 (3d Cir. 2002) (finding no First Amendment right of access to removal hearings), *with Detroit Free Press v. Ashcroft*, 303 F.3d 681, 700 (6th Cir. 2003) (finding First Amendment right of access to removal hearings).[8]

(b) Equal Protection Clause

"[T]o properly plead an equal protection claim, a plaintiff need only allege that through state action, similarly situated persons have been treated disparately." *Thigpen v. Bibb Cnty., Ga., Sheriff's Dep't*, 223 F.3d 1231, 1237 (11th Cir. 2000), *abrogated on other grounds by Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 (2002) (citations omitted). The Supreme Court has recognized "class of one" equal protection claims. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). A plaintiff can establish a "class of one" claim by showing they were "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id*.

[8] To Defendants' knowledge, neither the Supreme Court nor the Eleventh Circuit has opined on this question.

(c) Procedural Due Process

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the [Due Process Clause's] protection of liberty and property." *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). Courts thus review a procedural due process claim by first determining whether the plaintiff had a protected liberty or property interest to which he was entitled that was infringed by government action. *Ross v. Clayton County, Ga.*, 173 F.3d 1305, 1307 (11th Cir. 1999) (analyzing procedural due process under the Fourteenth Amendment); *see Dusenbery v. United States*, 534 U.S. 161, 167 (2002) (stating that the Fourteenth and Fifth Amendment Due Process Clauses prohibit the same activity, with the Fifth simply applying to federal officials, rather than state). If the answer to that question is in the affirmative, the court then asks whether plaintiff received sufficient process regarding the deprivation. *Ross*, 173 F.3d at 1307. There is no due process violation where the government has made available a post-deprivation remedy sufficient to correct an alleged procedural deprivation. *Cotton v. Jackson*, 216 F.3d 1328, 1331 n.2 (11th Cir. 2000) (per curiam).

2. Regulations Authorized Closure of the October 7, 2009 Hearings[9]

The record shows that Immigration Judge Cassidy's afternoon docket on October 7, 2009, listed three matters scheduled before him.[10] SUMF ¶ 3, Ex. O – Oct. 7, 2009 Docket; Ex. N ¶ 5. Because one case was rescheduled, only two matters were heard that afternoon. SUMF ¶¶ 5, 6; Ex. N ¶ 6; Ex. P – Oct. 7, 2009 Rescheduling Order. The record shows that, in light of the issues addressed in both hearings, regulations authorized the hearings' closure to the entire public and Defendants therefore did not treat Plaintiff disparately.

As outlined above, the two circuits that have addressed whether there exists a *per se* First Amendment right of access to immigration proceedings have split on the issue. Acknowledging that this question is anything but settled, whatever public access to immigration hearings actually exists is not a right of *absolute* access – at least not in the Eleventh Circuit. Rather, there are recognized, legitimate exceptions to access. *North Jersey Media Group, Inc.*, 308 F.3d at 209-10 (providing examples of proceedings closed to the public). These exceptions are manifest in regulations discussed above. *See* 8 C.F.R. §§ 1003.27, 1240.10(b). Plaintiff recognizes and does not facially challenge these exceptions or the regulations. *See* FAC ¶ 47;

[9] In discussing the hearings on October 7, 2009, Defendants do not address Count Three, Plaintiff's procedural due process claim, because allegations in Count Three stem from Plaintiff's administrative complaint, which focused on later events that occurred on April 19, 2010.

[10] Defendants repeat previously outlined facts for ease of reference here.

SUMF ¶ 19. As such, the regulations and a review of the record guide this Court's determination of whether or not Defendants' closure of the afternoon hearings on October 7, 2009, as well as Plaintiff's resulting exclusion from the hearings, violated Plaintiff's First Amendment rights and her right to equal protection under the Fifth Amendment.

The record shows that the particular immigrant respondent's circumstances – and regulations applicable to those circumstances – justified closure of the first of the two afternoon hearings held on October 7, 2009 before Immigration Judge Cassidy. Respondent's counsel requested closure, and the hearing involved a respondent who previously had been convicted of sexual battery of a minor. SUMF ¶¶ 7-8; Ex. Q – Oct. 7, 2009 Hearing #1 Trnsc. at p. 4 lns. 5-8 (2:00); Ex. N ¶ 7. The digital audio recording plainly reveals the fact of the respondent's sexual battery conviction. SUMF ¶¶ 7-8; Ex. Q at p. 4 lns. 5-8 (2:00); Ex. N ¶¶ 7-8. Given the nature of the respondent's conviction, there can be no genuine dispute that revelation of this conviction beyond the courtroom is a result about which respondent's counsel and Immigration Judge Cassidy were concerned. *Id*. Immigration Judge Cassidy therefore acted lawfully to protect the respondent by invoking his discretion and the exception at subsection (b) of section 1003.27 to close the hearing. *See id*.; 8 C.F.R. § 1003.27(b); *see also* 8 C.F.R. § 1240.10(b).

Contrary to Plaintiff's allegations, the purpose of closing the hearing was to adhere to counsel's request and to protect the respondent, SUMF ¶ 8; Ex. N ¶ 8, rather than abridgment of Plaintiff's First Amendment rights, FAC ¶ 67. Moreover, pursuant to regulations and the record, the closure applied to the *entire* public. *See* 8 C.F.R. §§ 1003.27(b), 8 C.F.R. § 1240.10(b); Ex. N ¶ 14. Plaintiff was not a party, family member, or attorney for the respondent, SUMF ¶ 4; Ex. L (61:23-25; 62:1-7; 69:23-25; 70:1-8); she was an ordinary member of the public attempting to view immigration proceedings that day. As such, and given the record showing that the closure basis related *to the immigrant respondent*, rather than *to Plaintiff*, Immigration Judge Cassidy treated Plaintiff no differently than *any other member of the public* that afternoon in closing the respondent's hearing from the *entire* public, and the closure was justified.

Closure also was warranted for the second of the two afternoon matters Immigration Judge Cassidy heard on October 7, 2009, because the record shows the hearing involved a respondent claiming asylum who specifically requested closure of his hearing from the public. SUMF ¶ 9; Ex. R-1 – Oct. 7, 2009 Hearing #2 First Trnsc. at p. 5 lns. 21-22 through p. 6 lns. 1-6 (Disk 1 Trk 2 at :30 - :50); Ex. N ¶¶ 9-10. The digital audio recording conveys the respondent's claim to asylum. SUMF ¶ 9; Ex. R-1 at p. 8 lns. 3-4 (Disk 1 Trk 2 at 2:40); Ex. R-2 - Oct. 7, 2009 Hearing #2

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Second Trnsc at p.4 ln. 14 (Disk 2 Trk 1 at 3:58); Ex. N ¶ 9. With the digital audio recording in mind, there can be no genuine dispute that Immigration Judge Cassidy closed this hearing pursuant to 8 C.F.R. § 1208.6 specifically because of the respondent's asylum claim. SUMF ¶¶ 9-10; Ex. N ¶¶ 9-10.

As with the other October 7 afternoon hearing, this one likewise involved a regulatory exception to the presumption of open immigration hearings – with this particular closure *mandated* by the regulation because of the asylum claim at issue. *See* 8 C.F.R. § 1208.6. As such, and acknowledging that Plaintiff does not challenge the facial validity of the regulations allowing hearing closure under specified exceptions, FAC ¶ 47; SUMF ¶ 19; Ex. L (45:6-8), there can be no question that Immigration Judge Cassidy justifiably closed the second hearing on October 7, 2009. Rather than an effort to abridge Plaintiff's First Amendment rights, the decision to close the hearing to the *entire* public was a required result in light of the regulations and their application to respondent's closure request and asylum claim, SUMF ¶¶ 9-10; Ex. N ¶¶ 9-10, 14. Plaintiff can cite to nothing in the record showing that, while other members of the public remained in Immigration Judge Cassidy's courtroom to view this hearing, Plaintiff was treated differently and identified alone for exclusion from the hearing. On the contrary, the record shows "the public" was excluded not just Plaintiff. SUMF ¶ 18; Ex. N ¶ 9.

In challenging Defendants' position that regulations authorized closure of the October 7, 2009 afternoon hearings, the FAC cites materials provided in EOIR's FOIA response, as well as what Plaintiff claims are conflicting justifications from EOIR personnel regarding the hearings, to argue that Defendants violated her alleged right to observe immigration hearings. FAC ¶¶ 27, 28, 34-36, 39, 40. Even if Defendants were to concede, however, as Plaintiff argues, that EOIR previously provided varied explanations regarding the nature of the afternoon hearings before Immigration Judge Cassidy on October 7 and their closure,[11] whatever variations may have existed at the time Plaintiff filed her FAC are no longer genuinely disputed. We know this because the digital audio recordings provide an unvarnished record of exactly what were the circumstances of each of the two immigrant respondents before Immigration Judge Cassidy on the afternoon of October 7, 2009 – one respondent's circumstances raised sensitive issues of a sexual nature, *see* SUMF ¶¶ 7-8; Ex. Q at p. 4 lns. 5-8 (2:00); Ex. N ¶ 7, while the other respondent's circumstances raised fears of persecution leading to the respondent's asylum claim, *see* SUMF ¶ 9; Ex. R-1 at p. 8 lns. 3-4 (Disk 1 Trk 2 at 2:40); Ex. R-2 at p.4 ln. 14 (Disk 2 Trk 1 at 3:58); Ex. N ¶ 9.

[11] Examples include whether Immigration Judge Cassidy discussed closure of the October 7 hearings with the respondents *in* Plaintiff's presence or *out of* her presence, as Plaintiff contends, FAC ¶¶ 33, 34; whether there were three cases listed on Immigration Judge Cassidy's October 7 afternoon docket or a different amount, *id*. ¶¶ 35, 36.

Any dispute by Plaintiff concerning closure details of the two afternoon hearings held before Immigration Judge Cassidy on October 7, 2009 is simply not genuine in light of the digital audio recordings and the record before the Court. There are no genuine issues of material fact as to the (i) number of hearings held by Immigration Judge Cassidy on the afternoon of October 7, 2009; (ii) what those hearings entailed; and (iii) the basis for their closure to the public. Plaintiff's claims as to the events of this afternoon constitute disagreement or dissatisfaction with the decision to close the hearings, which is an insufficient basis to counter Defendants' justification for the hearing closures. Defendants did not abridge Plaintiff's First Amendment rights or Fifth Amendment right to equal protection. Accordingly, as to Plaintiff's claims for declaratory and injunctive relief based on the actions she alleges concerning closure of Immigration Judge Cassidy's afternoon hearings on October 7, 2009, summary judgment for Defendants is appropriate.

3. Regulations Authorized Closure of the April 19, 2010 Hearing, and Defendants Adequately Investigated Plaintiff's Subsequent Administrative Complaint

Immigration Judge Cassidy's afternoon docket on April 19, 2010 scheduled one matter for hearing. SUMF ¶¶ 13-14; Ex. S - April 19, 2010 Docket; Ex. N ¶¶ 11, 13. The record demonstrates this hearing was closed to the entire public due to information confidential to the respondent, and thus regulations authorized the

hearing's closure. The record also demonstrates that Defendants adequately investigated the closure and confirmed the closure was justified.

The digital audio recording of the hearing shows that the *pro se* respondent requested the hearing be closed to the public. SUMF ¶¶ 14-15; Ex. T – April 19, 2010 Hearing Trnsc. at p. 3 lns. 20-22 through p. 5 ln. 1 (Trk 1 at 2:30); Ex. N ¶ 11. The record also demonstrates that, in order for Immigration Judge Cassidy to frankly and directly engage the *pro se* respondent to accurately assess the respondent's circumstances, Immigration Judge Cassidy had to ensure that all members of the public exited the courtroom *before* beginning his discussion with the respondent. SUMF ¶ 17; Ex. N ¶ 13; Ex. M; Ex. C (48:7-25; 49:1-10). The judge did so by asking Plaintiff to leave his courtroom, SUMF ¶ 17; Ex. K (81:9-11; 84:5-14; 88:9-11); Ex. H, rather than ordering her to leave the building housing the Atlanta Immigration Court or ordering others to effect Plaintiff's removal from the building, SUMF ¶ 33; Ex. L (81:9-11); Ex. H.

The basis for respondent's closure request became clearer as the hearing progressed, when the respondent revealed that he "social[ized] with some gay – gay people" and had safety concerns with returning to his home country given his "social life." SUMF ¶ 16; Ex. N ¶ 12; Ex. T at p. 12 lns. 12-13 (Trk 3 at 1:09). The record also shows the respondent applied for protection under the Convention Against

Torture. SUMF ¶¶ 16; Ex. T at p. 3 lns. 6-7 (Track 1 at :25); p. 6 lns. 18-19 (4:21); Ex. N ¶ 13. Given these concerns, Immigration Judge Cassidy closed the hearing for the respondent's protection pursuant to 8 C.F.R. § 1003.27(b). SUMF ¶¶ 15-17; Ex. N ¶ 13; Ex. M; Ex. C (48:7-25; 49:1-10).

As with the closed hearings on October 7, 2009, Plaintiff challenges Defendants' closure of the afternoon hearing on April 19, 2010 by citing her doubts on whether the hearing qualified for closure because "[a]t no time did Immigration Judge Cassidy indicate to Plaintiff that he had asked the respondent if the respondent desired a closed hearing; nor did Immigration Judge Cassidy state to Plaintiff that the case was an asylum case." FAC ¶ 48. Significantly, the regulations do not require an Immigration Judge who closes a hearing to inform the public of the closure basis, *see* 8 C.F.R. §§ 1003.27(b), 1240.10(b), and testimony explains that requiring an Immigration Judge to do so would be unworkable, Ex. C (49:7-10; 87:20). Further, even if Defendants were to concede past confusion regarding the circumstances of the closed hearing on April 19, 2010,[12] the record described above resolves any such confusion – demonstrating that closure focused on the

[12] Examples include the explanation Plaintiff alleges she received on April 19, 2010, regarding the closed hearing, FAC ¶¶ 47-49, as compared to that she later received through FOIA, *id*. at ¶¶ 43, 44, 55; Plaintiff's own alleged experience at the Immigration Court on April 19, 2010, *id*. at ¶¶ 54, 62, as compared to the results of EOIR's investigation of Plaintiff's allegations, *id*. at ¶¶ 59-61.

respondent's protection rather than on infringement of any First Amendment right of access to the hearing.

Additionally, the record also demonstrates Plaintiff was not treated differently than any other member of the public and that Defendants adequately investigated her administrative complaint. Immigration Judge Cassidy closed the hearing on April 19, 2010 to the *entire* public. SUMF ¶¶ 17-18; Ex. N ¶ 14. He therefore did not violate Plaintiff's right to equal protection by treating her disparately as compared to any other member of the public that may have been present that day, *see Thigpen*, 223 F.3d at 1237, and there is nothing in the record that supports such an argument.

Further, as discussed at length in the immunity sections above, Defendants adequately investigated the administrative complaint Plaintiff filed in response to the events of April 19, 2010.[13] SUMF ¶¶ 26-31; Ex. C (45:2-7, 17-22; 47:19-11, 22-25; 48:1; 50:15; 53:12-17; 62:5-6, 7-11, 22-25; 107:6-11); Exs. H, I, J, K. At most, Plaintiff can point to one document that potentially provides any support for her argument that Defendant Immigration Judge Cassidy ordered her removal from the building, *see* Ex. U – Megacenter Dialogue; but this document is equivocal at best

[13] Plaintiff arguably cannot have suffered an actionable due process violation given the existence of EOIR's procedure for filing complaints against Immigration Judges. *Cotton v. Jackson*, 216 F.3d 1328, 1331 n. 2 (11th Cir. 2000) (per curiam) (finding there is no due process violation where the government has made available a post-deprivation remedy sufficient to correct an alleged procedural deprivation).

concerning from whom any possible removal order might have derived, and it creates no genuine issue of dispute. Defendants' investigation, on the other hand, unequivocally showed that Plaintiff's administrative complaint lacked merit. Again as discussed at length in the immunity sections above, Defendants' investigation of the administrative complaint supports Defendants' final determination that closure of the April 19, 2010 hearing was justified and that Immigration Judge Cassidy did not order Plaintiff's removal from the building housing the Atlanta Immigration Court.

As to Plaintiff's claims based on the actions she alleges on April 19, 2010, the record shows there no longer exists a genuine issue of material fact concerning the immigrant respondent's closure request and the reason for the closure. At base, as with the hearings on the afternoon of October 7, 2009, Plaintiff's claims regarding the events of April 19, 2010 constitute not actionable legal claims but mere dissatisfaction with the results Plaintiff obtained in her efforts to observe immigration hearings. Moreover, Defendants adequately investigated Plaintiff's claims related to the closure. Summary judgment for Defendants therefore is appropriate on all remaining claims.

VI. CONCLUSION

For the foregoing reasons, Defendants request that this Court apply quasi-judicial immunity to shield the remaining *Bivens* Defendants from individual liability. Should the Court decline to apply absolute quasi-judicial immunity, Defendants alternatively seek the application of qualified immunity to the individual Defendants. Finally, Defendants request that this Court grant summary judgment for Defendants as to all claims against the government for declaratory and injunctive relief.

Dated: October 15, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the documents to which this certificate is attached have been prepared with one of the font and point selections approved by the Court in Local Rule 5.1C for documents prepared by computer.

Dated: October 15, 2014 By: /s/ *Christopher W. Hollis*
CHRISTOPHER W. HOLLIS
U.S. Department of Justice

CERTIFICATE OF SERVICE

This is to certify that I have this day filed electronically via the Court's CM/ECF system the attached Federal Defendants' Memorandum of Law Supporting Their Renewed Motion for Summary Judgment, including serving a copy upon the following counsel via the Court's CM/ECF system:

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Dated: October 15, 2014 By: /s/ *Christopher W. Hollis*
CHRISTOPHER W. HOLLIS
U.S. Department of Justice