

EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROSEMARY LOVE, *et al.*, :
 :
 Plaintiffs, :
 :
 v. : Civil Action No. 00-2502 (JR)
 :
 ANN VENEMAN, Secretary, U.S. :
 Department of Agriculture, :
 :
 Defendant. :

MEMORANDUM

Plaintiffs are farmers who claim that the United States Department of Agriculture discriminated against them on the basis of age, sex, marital status, race, color, national origin or religion, when it denied them credit and other benefits under farm programs.¹ Plaintiffs bring their claims under the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 et seq., the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq., and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 et seq. The government moves to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), arguing that the Court lacks jurisdiction over several claims and that plaintiffs have failed to allege a cognizable claim under any of the statutes they have invoked. For the reasons set forth below, that motion will be denied with respect to

¹ Plaintiffs also sue on behalf of others similarly situated and seek certification of a class of "not less than 3,000" farmers. The motion for class certification has been delayed pending resolution of this dispositive motion.

plaintiffs' claim for discrimination in lending decisions under ECOA, but granted on their other claims.²

Background

Plaintiffs allege that, from January 1, 1981, to December 31, 1999, the Farmers Home Administration and its successor, the Farm Service Agency, administered and maintained a credit program in a discriminatory fashion. More specifically, plaintiffs challenge the determinations of the USDA's credit agencies, which were authorized to make operating, farm ownership, and emergency loans to farmers who were otherwise unable to secure credit from commercial lenders.³ They also assert that the USDA acted arbitrarily in failing to investigate and resolve their discrimination complaints.

In 1998, responding to reports concerning the dismantling of USDA's civil rights enforcement program in the early 1980s, Congress extended the statute of limitations until October 21, 2000, for "eligible complaints" of discrimination alleged to have taken place at USDA between 1981 and 1996.

² This memorandum does not address the defendant's motions to strike the class allegations and to dismiss seven plaintiffs who are included in the first amended complaint as class members. Those issues will be addressed in connection with the pending class certification motion.

³ An operating loan aids in the maintenance of a farm. A farm ownership loan enables a farmer to buy, expand or improve a farm.

Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act, 1999, Pub. L. 105-277, § 741, 112 Stat. 2681-30 (codified at 7 U.S.C. § 2279 Note). The present case is one of a number of claims filed shortly before the new deadline.⁴

Analysis

I. Exhaustion Issues

USDA's first asserted ground for dismissal is lack of subject matter jurisdiction, Fed R. Civ. P. 12(b)(1), for plaintiffs' failure to exhaust administrative remedies with respect to their claims under the Equal Credit Opportunity Act. An exhaustion requirement generally applicable to claims against the USDA is found in the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, § 212, 108 Stat. 3718, 3210, and codified at 7 U.S.C. §

⁴ One of those suits, a class action filed on behalf of African American farmers, was settled by a consent decree allowing individual plaintiffs to present their claims for compensation. Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999), aff'd, 206 F.3d 1212 (D.C. Cir. 2000). Plaintiffs in the present suit maintain that many of the defendant's arguments have been resolved against the government in the Pigford litigation. Pigford focused solely on allegations of racial discrimination, however, and the Pigford consent decree contains no admission of engaging in discriminatory conduct. In any case, nonmutual offensive collateral estoppel is not available against the government. United States v. Mendoza, 464 U.S. 154, 160-63 (1984).

6912(e), along with other provisions defining the authority of the Secretary of Agriculture. It states:

Notwithstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction against-

- (1) the Secretary;
- (2) the Department; or
- (3) an agency, office, officer, or employee of the Department.

7 U.S.C. § 6912(e). Some courts have concluded that § 6912(e) is of jurisdictional significance, see, e.g., Gilmer-Glenville, Ltd. Partnership v. Farmers Home Admin., 102 F. Supp. 2d 791, 794 (N.D. Ohio 2000); Calhoun v. USDA Farm Service Agency, 920 F. Supp. 696, 701-02 (N.D. Miss. 1996), but that question has not been decided in the D.C. Circuit. See Deaf Smith County Grain Processors, Inc. v. Glickman, 162 F.3d 1206, 1214 (D.C. Cir. 1998) (dismissing an unexhausted claim without discussing whether § 6912(e) was jurisdictional).

Exhaustion statutes that create jurisdictional barriers to suit are written in "sweeping and direct" language that "is more than a codified requirement of administrative exhaustion." Weinberger v. Salfi, 422 U.S. 749, 757-58 (1975). The statute at issue in Salfi, for instance, barred review by any court except in accordance with the statutory scheme and provided that "[n]o action ... shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter." 42

U.S.C. § 405(h). Exhaustion statutes not considered jurisdictional, on the other hand, provide simply that actions not be initiated before available administrative remedies have been exhausted. Anderson v. Babbitt, 230 F.3d 1158, 1162 (9th Cir. 2000); Underwood v. Wilson, 151 F.3d 292, 294-95 (5th Cir. 1998). Section 6912(e) appears to be of the latter type and does not appear to support defendant's Rule 12(b)(1) motion to dismiss plaintiffs' ECOA claims on jurisdictional grounds. Farmers Alliance Mut. Ins. Co. v. Federal Crop Ins. Corp., No. 00-2347-JWL, 2001 WL 30443 at *2 (D. Kan. Jan. 3, 2001). It remains to be determined, however, whether failure to exhaust requires dismissal under Rule 12(b)(6).

Section 6912(e) requires exhaustion of "all administrative appeal procedures established by the Secretary or required by law." There are no administrative review procedures in ECOA itself, 15 U.S.C. §§ 1691 et seq. The administrative review process outlined in 7 C.F.R. Pt. 11 applies generally to appeals of adverse decisions through the USDA's National Appeals Division, however, and the administrative review processes outlined in 7 C.F.R. Pts. 15, 15a, 15b, 15d, 15e, and 15f apply to various types of discrimination claims filed before other parts of the Department. Part 15d (formerly Part 15, Subpart B), in particular, applies to the gender and age claims at issue in this suit.

Defendant's argument here is that the general appeals process found in 7 C.F.R. Pt. 11 is mandatory, and that plaintiffs' failure to follow it is fatal to their ECOA claims. That argument must be rejected. The language of Part 11 expressly excludes "persons whose claim(s) arise under ... [d]iscrimination complaints prosecutable under the nondiscrimination regulations at 7 CFR parts 15, 15a, 15b, [15d,] 15e, and 15f."⁵ 7 C.F.R. § 11.1 (2001). ECOA discrimination complaints are clearly "prosecutable" under Part 15d. Compare 15 U.S.C. § 1691(a)(1) (prohibiting discrimination in credit transactions "on the basis of race, color, religion, national origin, sex or marital status, or age") with 7 C.F.R. § 15d.2(a) (prohibiting discrimination in USDA programs and activities "on the ground of race, color, religion, sex, age, national origin, marital status, [or] familial status"). Moreover, the USDA abolished regulatory language in 1989 requiring its agencies generally to handle discrimination complaints "in accordance with the procedures established by law or regulation of the Department or any of its agencies for the handling of complaints or appeals ... which are not based on grounds of discrimination prohibited

⁵ At the time that 7 C.F.R. § 11.1 was issued, 64 Fed. Reg. 33,367 (June 30, 1999), the provisions now located in 7 C.F.R. Part 15d were located in Part 15, Subpart B. 64 Fed. Reg. 66,709 (Nov. 30, 1999).

by this subpart." 7 C.F.R. § 15.52 (1988); 54 Fed. Reg. 31,163, 31,164 (July 27, 1989).⁶

The Part 15d appeal process is not mandatory either, and defendant has conceded the point for purposes of this case. See Defendant's Memorandum in Support of Motion to Dismiss at 9; see also Plaintiff's Opposition App. 4 at 11-13 (Department of Justice memorandum, Jan. 29, 1998) (concluding that Part 15d exhaustion is not required by § 6912(e)).

⁶ The conclusion that § 6912(e) does not require Part 11 exhaustion is consistent with the way USDA has handled lending discrimination claims in the past. During the drafting of § 6912(e) and reforms of the National Appeals Division in 1994, USDA officials told Congress that they did not interpret the changes to require borrowers alleging discrimination to submit their claims to the Division. Instead, they indicated that discrimination complainants would continue to use Part 15 procedures, because those provided "a well-established and sufficient departmentwide appeal mechanism." H.R. Rep. No. 103-714 App. at 114, Questions Submitted by Congressman Stenholm re the National Appeals Division and USDA Answers (1994). Indeed, it appears that the USDA processed ECOA claims under its Part 15 procedures at least as recently as 1998. Plaintiff's Opposition App. 4 at 2 (Department of Justice memorandum, Jan. 29, 1998).

And when USDA officials made Part 15, Subpart B into the present Part 15d, they anticipated that ECOA claims would be processed under Part 15d. See, e.g., 63 Fed. Reg. 62,962, 62,963 (Nov. 10, 1998) ("Part 15d is not an ECOA administrative procedure Of course, the availability of 15d and ECOA often will be co-extensive, and it often will be the case that a 15d complaint will afford the Department an opportunity to provide relief to a complainant that may avoid an ECOA lawsuit. . . . There is no exhaustion of administrative [remedies] requirement to filing an ECOA lawsuit." (emphasis added)); id. (barring discrimination based on marital and familial status to match ECOA); 64 Fed. Reg. 66,709, 66,709 (Nov. 30, 1999) (barring discrimination based on participation in public assistance programs to match ECOA).

Thus, although § 6912(e) gave the Secretary of Agriculture authority to create mandatory administrative procedures for handling plaintiffs' complaints of discrimination, the Secretary has not done so. It follows that plaintiffs' claims need not be dismissed because of their failure to obtain final determinations by the Office of Civil Rights.⁷

II. Statute of Limitations

Defendant's second argument for dismissal is that most of the plaintiffs' ECOA claims are time-barred. This issue is properly resolved under the rubric of Rule 12(b)(1) because the statute of limitations in this case defines the scope of the U.S. government's waiver of sovereign immunity, and, thus, the Court's jurisdiction. See, e.g., United States v. Mottaz, 476 U.S. 834, 841 (1986); Warren v. United States, 234 F.3d 1331, 1335-38 (D.C. Cir. 2000).

⁷ This conclusion makes it unnecessary to consider whether Congress intended to trump exhaustion requirements when it extended the statute of limitations on certain discrimination complaints against the USDA. Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act, 1999, Pub. L. 105-277, § 741, 112 Stat. 2681-30 (codified at 7 U.S.C. § 2279 Note). It is interesting to note, however, that Congress passed § 741 specifically because the USDA "failed to make timely and adequate response to discrimination complaints and the statute of limitations has expired through no fault of the complainant." H.R. Rep. No. 105-593 at 2 (1998). That is tantamount to a legislative finding that, at USDA, resort to administrative remedies was futile. Cf. Weinberger v. Salfi, 422 U.S. 749, 766 (1975) (noting that congressionally mandated administrative exhaustion requirements "may not be dispensed with merely by a judicial conclusion of futility" (emphasis added)).

ECOA's general limitations period requires that a district court action be brought within two years of an alleged violation. 15 U.S.C. § 1691e(f). Plaintiffs brought this suit on October 19, 2000, so -- unless the special extension is applicable -- claims of discriminatory acts or practices occurring before October 19, 1998, would be time-barred. It is not clear from the face of the complaint whether any of the plaintiffs' claims fall within the general limitations period, although Barbara Odom's claims of discriminatory denial of loans and debt restructuring in 1998 may be timely if the alleged acts took place late in the year.

Plaintiffs apparently did not bother to specify how their claims fall within the general ECOA limitations period because they filed this action on the eve of the last day for filing under the extended limitations period established by Congress in 1998. Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act, 1999, Pub. L. 105-277, § 741, 112 Stat. 2681-30 (codified at 7 U.S.C. § 2279 Note). Defendants argue that the claims of several plaintiffs are time-barred even under the § 741 extension, however, because plaintiffs did not file "eligible complaints." An "eligible complaint" is defined as:

a nonemployment related complaint that was filed with the Department of Agriculture before July 1, 1997 and alleges discrimination at any time during the period

beginning on January 1, 1981 and ending December 31, 1996 --

(1) in violation of the Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.) in administering --

(A) a farm ownership, farm operating, or emergency loan funded from the Agricultural Credit Insurance Program Account; or

(B) a housing program established under title V of the Housing Act of 1949; or

(2) in the administration of a commodity program or a disaster assistance program.

7 U.S.C. § 2279 Note. In defendant's submission, only written discrimination complaints filed with the Office of Civil Rights as required by Part 15d (or, presumably, another set of discrimination regulations where applicable) are "eligible" under this definition. That interpretation of the statutory definition, if accepted, would re-inject a limitations period into the case, because Part 15d rejects complaints not filed with the Office of Civil Rights within 180 days of discovery of the alleged discrimination. Only one of the plaintiffs in this case would unquestionably clear that hurdle.

Defendant's argument is problematic in part because the regulations now found at Part 15d have only applied since 1989; before that time, discrimination complaints had to be filed within 90 days but could be submitted directly to each agency or in certain circumstances to the Secretary of Agriculture. 7 C.F.R. § 15.52 (1988); 54 Fed. Reg. 31,163, 31,164 (July 27, 1989). Regardless of which version of the regulations would

apply to which claims, however, Congress's extension of the statute of limitations for complaints of discrimination in the administration of USDA loan programs "at any time" between 1981 and 1996 was a waiver of sovereign immunity. Courts must neither enlarge such waivers beyond what the statutory language requires, Library of Congress v. Shaw, 478 U.S. 310, 318 (1986), nor narrow them by unduly restrictive interpretation, Bowen v. City of New York, 476 U.S. 467, 479 (1986). Fortunately, the language of § 741 is plain. It does not support defendant's interpretation. It does not require "written" complaints (although the reference to "filing" them strongly suggests Congress' expectation that complaints would be made formally and in writing). It does not mention the Office of Civil Rights (in view of the legislative accord that gave rise to § 741, the omission may have been deliberate, see supra n. 7). And it makes no mention of Part 15d or its predecessor regulation.

Thus, a complaint filed anywhere in the USDA before July 1, 1997, would qualify for § 741's extended statute of limitations if it charged discrimination in the administration of loan programs with the USDA. Plaintiffs James Murnion, Rosemary Love, and Gail Lennon meet that standard.

It is not clear from the face of the complaint whether plaintiff Lind Marie Bara-Weaver can also satisfy § 741's requirements. She filed formal complaints in 1988 with the

Richmond Farmers Home Administration office and with the USDA Office of Inspector General in Washington D.C., but the amended complaint does not state explicitly whether she alleged discrimination. Nor, as noted supra, is it clear from the face of the complaint that the acts of which Barbara Odom complains occurred after October 19, 1998, so that her claims are timely under ECOA's normal statute of limitations. In deciding Rule 12(b)(1) motions, however, courts must generously construe allegations of a complaint in the plaintiff's favor. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683 (1974), overturned on other grounds, Harlow v. Fitzgerald, 457 U.S. 800 (1982); Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 440 n.3 (D.C. Cir. 1990). The "generous construction" rule and the interests of justice counsel denial of the motion to dismiss the claims of Ms. Bara-Weaver and Ms. Odom.⁸

III. Non-Lending Claims

Plaintiffs' allegations of discrimination in the administration of USDA's disaster benefit programs must be dismissed because a disaster benefit decision is not a "credit

⁸ Dismissal with leave to replead would only create more paper if Ms. Bara-Weaver and Ms. Odom can bring themselves within the § 741 extension. If they cannot, their claims will be dismissed later.

transaction" within the meaning of ECOA. 15 U.S.C. § 1691(a). Neither, of course, is a failure to investigate a complaint.

Plaintiffs also attempt bring their disaster benefit and failure to investigate claims under the Administrative Procedure Act, but they do not fit. The only plaintiff who alleged the unlawful denial of disaster benefits, Ms. Odom, was successful on her administrative appeal. And the allegation of failure to investigate plaintiffs' civil rights complaints fails to state a claim upon which relief can be granted under the APA.

APA review is available only for a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Even if USDA's repeated and systematic failures to investigate and decide civil rights complaints were "final agency actions," see Sierra Club v. Thomas, 828 F.2d 783, 792-96 (D.C. Cir. 1987), Circuit precedent requires the rejection of APA claims for agency failure to investigate allegations of discrimination where Congress has provided an adequate alternative remedy. See, e.g., Women's Equity Action League v. Cavazos, 906 F.2d 742, 750-51 (D.C. Cir. 1990); Council of & for the Blind of Delaware County Valley, Inc. v. Regan, 709 F.2d 1521, 1531-33 (D.C. Cir. 1983) (en banc). Those cases might be distinguished on the ground that they involved private causes of action against third parties, but their central point is that APA review is not available for agency action "for which there is ...

[some] other adequate remedy in a court." Here the Equal Credit Opportunity Act provides such a remedy. Indeed, the steps Congress took to preserve that remedy by extending the statute of limitations were taken precisely because of USDA's failures to investigate.

Moreover, to the extent that plaintiffs are seeking monetary relief, the U.S. government has not waived its immunity against suits for damages under the APA. 5 U.S.C. § 702; Transohio Savs. Bank v. Director, Office of Thrift Supervision, 967 F.2d 598, 607-08 (D.C. Cir. 1992).

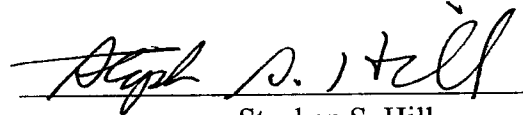
An appropriate order accompanies this memorandum.

JAMES ROBERTSON
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of May, 2005, I have caused copies of the foregoing Appellants' Opposition to Defendant's Motion to Consolidate Appeals to be served by first-class United States mail, postage prepaid, upon the following:

Peter D. Keisler, Esq.
Assistant Attorney General
Kenneth Wainstein, Esq.
United States Attorney
Robert M. Loeb, Esq.
Charles W. Searborough, Esq.
Attorneys, Appellate Staff
Civil Division
Department of Justice
950 Pennsylvania Avenue, N.W.
Room 7244
Washington, D.C. 20530-3001



Stephen S. Hill