

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1:00CV02445
)	Judge Robertson
ANN VENEMAN, Secretary of the United States)	
Department of Agriculture,)	
)	
Defendant.)	

**PLAINTIFFS' MOTION FOR CERTIFICATION OF ORDER FOR
INTERLOCUTORY REVIEW UNDER 28 U.S.C. § 1292(b)**

Pursuant to 28 U.S.C. § 1292(b), plaintiffs respectfully move that this Court certify for interlocutory review its March 20, 2002 Memorandum Order holding that the failure of the United States Department of Agriculture ("USDA") to investigate plaintiffs' discrimination complaints does not create a cause of action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, *et seq.*, Equal Credit Opportunity Act ("ECOA") 15 U.S.C. § 1691, *et seq.*, and therefore does not form a basis for establishing commonality under R. Civ. P. 23(a). This issue involves a controlling question of law, is the subject of substantial difference of opinion, and is of material importance to the advancement of this litigation. A memorandum of points and authorities is filed herewith in support of this motion.

Respectfully submitted,

/s/ Stephen S. Hill

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Date: September 24, 2004

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**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR
CERTIFICATION UNDER 28 U.S.C. § 1292(b)**

INTRODUCTION

In both its December 2, 2002 Memorandum Order¹ and September 10, 2004 Memorandum Order (“Order”), this Court denied Plaintiffs’ Motion for Class Certification. In so doing, the Court held that plaintiffs failed to demonstrate the commonality required to justify certification of a class under Rule 23(a). The Court based its finding of lack of commonality, in part, on its March 20, 2002 Memorandum Order in which the Court held that the failure of the United States Department of Agriculture (“USDA”) to investigate plaintiffs’ discrimination complaints does not create a cause of action under the Administrative Procedure Act (“APA”), 5 U.S.C. § 557, *et seq.*, and Equal Credit Opportunity Act (“ECOA”), 15 U.S.C. § 169 *et seq.* (2002). Accordingly, in Garcia I, the Court found that the USDA’s failure to investigate could

¹ Garcia v. Veneman, 211 F.R.D. 15, 19 (D.D.C.) (“Garcia I”).

not serve as the common issue of fact necessary to certify a class action under Rule 23(a). See Garcia I, 211 F.R.D. at 19.

Plaintiffs respectfully disagree with the Court's conclusions regarding the USDA's failure to investigate the civil rights complaints of Hispanic farmers arising out of their efforts to obtain USDA-sponsored farm credit. Indeed, recognizing the importance of its ruling to the viability of plaintiffs' class claims, the Court has invited plaintiffs to seek certification of that Order. See Order at 2-3. Consequently, plaintiffs seek to certify the issue of whether the USDA's failure to investigate such discrimination complaints creates a cause of action under either the APA or ECOA when, as in the instant case, USDA regulations authorize such complaints as a means of enforcing ECOA. This issue is critical to a Rule 23 commonality determination. The requested certification involves a controlling point of law, is the subject of substantial difference of opinion between this Court and prior rulings of and in this circuit in identical cases, and is of critical importance to the course of this litigation. Therefore, this issue is appropriate for certification for interlocutory review under 28 U.S.C. § 1292(b).

In addition to this motion, the plaintiffs have filed a Rule 23(f) petition with the United States Court of Appeals for the District of Columbia Circuit. This motion is being made in conjunction with the Rule 23(f) petition out of an abundance of caution and in response to the Court's Order to insure to the extent possible that the Court of Appeals consider the merits of this critical issue should it elect to grant the Rule 23(f) petition.

ARGUMENT

A district court may certify an issue to the Court of Appeals for interlocutory appeal under Section 1292(b), which provides in relevant part that:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b) (2000). Accordingly, the district court must consider (1) whether the order to be appealed involves a controlling question of law, (2) whether substantial contrary authority or other grounds for a difference of opinion exist, and (3) whether an immediate appeal would materially advance the disposition of the litigation. See Virtual Dev. and Def. Int'l, Inc. v. Republic of Moldova, 133 F. Supp. 2d 9, 22 (D.D.C. 2001); see also Trout v. Garrett, 891 F.2d 332, 335 n.5 (D.C. Cir. 1989). The Court has clearly recognized that the question of whether the systematic failure of the USDA to investigate plaintiffs' discrimination complaints constitutes a cause of action under ECOA and provides a basis for commonality satisfies the factors required for certification. See Order at 2-3 ("If asked to do so, I will . . . certify my Memorandum Order of March 20, 2002 pursuant to 28 U.S.C. § 1292(b).").

I. THE REQUESTED CERTIFICATION ADDRESSES A CONTROLLING ISSUE OF LAW.

There can be no dispute that the subject question is a controlling issue of law. A question constitutes a "controlling issue of law" if resolution of the question could determine the outcome or future course of the litigation. See Judicial Watch, Inc. v. National Energy Policy Dev. Group, 233 F. Supp. 2d 16, 19 (D.D.C. 2002) (citing In re Vitamins Antitrust Litig., No. 99-197, 2000 U.S. Dist. LEXIS 11405, at *2 (D.D.C. Jan. 27, 2000) and Johnson v. Burken, 930 F.2d

1202, 1206 (7th Cir. 1991)), stay denied, No. 02-5355, U.S. Dist. LEXIS 22884 (D.C. Cir. Sept. 30, 2003).

Should this Court's ruling on the subject issue stand, and no other basis for commonality be found, the right of the putative plaintiffs to move forward as a class would end. Consequently, the practical impact would be to make their ability to pursue their requests for definitive remedial relief and their claims for damages exponentially more difficult, time consuming and expensive, if not impossible. Not surprisingly, then, courts have repeatedly treated class certification issues as controlling questions of law proper for certification for interlocutory appeal. See, e.g., Fellows v. Universal Restaurants, Inc., 701 F.2d 447, 447-48 (5th Cir. 1983) (dismissal of class action aspects of discrimination suit reviewed under 1292(b)); Hewitt v. Joyce Beverages of Wisconsin, Inc., 721 F.2d 625, 626 (7th Cir. 1983) (decertification of class reviewed); Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 721 (11th Cir. 1987) (denial of class certification reviewed); Chateau de Ville Prods. v. Tams-Witmark Music, 586 F.2d 962, 964 (2d Cir. 1978) (certification of class reviewed); see also 19 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 203.31[2] (3d ed. 1997) (issue of whether action may be properly brought as a class action appropriate for appeal as controlling question of law).

II. THE QUESTION FOR WHICH CERTIFICATION IS SOUGHT PROVIDES SUBSTANTIAL GROUNDS FOR DIFFERENCE OF OPINION.

The issue of commonality among plaintiffs based on the USDA's failure to investigate their discrimination complaints provides substantial grounds for difference of opinion. For example, plaintiffs have consistently maintained, and provided authority for, the position that the USDA's failure constitutes a violation of both the APA and ECOA and a basis for a finding of

commonality pursuant to Rule 23. The USDA's own regulations authorize such complaints as a means of enforcing ECOA. In addition, Regulation B expressly defines a "credit transaction" subject to ECOA as "every aspect of an applicant's dealing with a creditor" 12 C.F.R. § 202.2(m). Clearly, the defendant has presented a conflicting view.² This Court has now confirmed its belief that plaintiffs' position is erroneous and that failure to investigate does not constitute an APA or ECOA violation and, therefore, cannot be the basis of commonality.

The existence of contrary, inconsistent, or unclear authority constitutes the grounds for difference of opinion required by 1292(b). See Johnson v. Washington Metro. Area Transit Auth., 773 F. Supp. 459, 460 (D.D.C. 1991) (intra-circuit split justified 1292(b) certification); see also Virtual Dev., 133 F. Supp. 2d at 22 (no 1292(b) certification where no "disputed question of law"); Tesfaye v. Carr Park, Inc., 85 F. Supp. 2d 37, 37 (D.D.C. 2000) (this Court certified issue for appeal to ensure "correct application" of controlling case). At a minimum, courts have a "duty . . . to analyze the strength of the arguments in opposition to the challenged ruling when deciding whether the issue for appeal is truly one on which there is a substantial ground for dispute." See In re Vitamins Antitrust Litig., No. 99-197, 2000 U.S. Dist. LEXIS 17412, at *20-21 (D.C. Cir. Nov. 22, 2000).

Substantial differences of opinion exist regarding the subject question even within this circuit. On the basis of complaints that are virtually identical to the complaint in this case, two judges of this Court have held that "[i]t is clear that the [USDA's] systematic failure to process complaints of discrimination is the unifying characteristic of the class and raises common questions of fact and law." See Keepseagle v. Veneman, No. 99-03119, 2001 U.S. Dist. LEXIS

² Believing there is no question as to the existence of a disagreement between the parties as to the proper resolution of the subject issue and that those positions have been fully briefed, plaintiffs have not burdened the Court with a full restatement of the parties' briefing.

25220, at *28 (D.D.C. Dec. 12, 2001) (USDA failed to investigate discrimination claims by Native American farmers), accord Pigford v. Glickman, 182 F.R.D. 341, 348-49 (D.D.C. 1998), aff'd, 206 F.3d 1212 (D.C. Cir. 2000) (Black farmers' discrimination complaints not investigated by USDA).

Notably, the Court of Appeals in In re Veneman declined the government's Rule 23(f) petition to review the Keepsake decision, holding that the USDA's failure to investigate was a proper basis for a finding of commonality and typicality. In re Veneman, 309 F.3d 789, 794 (D.C. Cir. 2002). At the very least, the existing decisions in very similar cases demonstrate that there is strong support in this circuit for plaintiffs' argument that commonality between the putative class members exists based on the USDA's failure to investigate their discrimination claims. The presence of such conflicting rulings within this circuit and the strength of plaintiffs' position provide the proper basis for this Court to certify the issue for appeal.

III. CERTIFICATION UNDER 1292(B) WOULD MATERIALLY ADVANCE THE DISPOSITION OF THE LITIGATION.

An immediate appeal, moreover, would materially advance the disposition of the litigation. The practical impact of a prompt resolution of the subject issue is substantial. Should the Court of Appeals agree with this Court on the question presented, and find no other basis for commonality, this action would end as a class action. Such a result could well bring an end to this litigation for hundreds, if not thousands, of Hispanic farmers and ranchers. The Hispanic farmers and ranchers who comprise the putative class represent an oppressed minority who are confronting a powerful governmental agency that has systematically stripped them of their land and, in some instances, their ability even to subsist as farmers and ranchers. They are

confronting an agency which the record shows reflects animus not just at the local level but at high levels within the bureaucracy. See Declaration of Lou Anne Kling (Ex. 3 to Plaintiffs' Emergency Motion to Stay Proceedings, filed December 9, 2002). It is an agency which, according to a former Director of the Office of Civil Rights, destroys documents and intimidates those who would complain about discrimination. See Declaration of Rosalind Gray ¶ 20 (Ex. 7 to Plaintiffs' Supplemental Memorandum in Support of Plaintiffs' Motion for Class Certification). Clearly, such subsistence farmers would find it infinitely more difficult, if not impossible, to pursue individual claims, as this Court apparently recognized. See Order at 2-3 & n.1.

A resolution of this issue would guide the parties as to the manner in which to proceed, including inter alia the scope of discovery yet to be conducted. In addition, any settlement possibilities are inhibited by the existing uncertainty. Given the fact that this issue has arisen in other cases, uncertainty itself about what the appellate result might be will pose an obstacle as this and other cases progress. See Washington Metro., 773 F. Supp. at 460 (clarification of law and conflicting authority would circumvent appeal and remand on issue, possibly saving additional cost and delay).

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request this Court to certify its March 20, 2002 Memorandum Order and the following questions for interlocutory review under 28 U.S.C. § 1292(b):

(1) Whether USDA's failure to investigate discrimination claims arising out of attempts by Hispanic farmers to obtain farm credit constitutes a cause of action under either the APA or ECOA?

(2) Assuming arguendo that the USDA's failure to investigate such discrimination complaints does not constitute a cause of action under either the APA or ECOA, can such claims constitute a common issue of fact sufficient to satisfy the commonality requirement of Fed. R. Civ. P. 23(a)?

Respectfully submitted,

/s/ Stephen S. Hill

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Date: September 24, 2004

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ORDER

Upon consideration of Plaintiffs’ Motion for Certification of Order for Interlocutory Review Under 28 U.S.C. § 1292(b) and defendant’s opposition thereto, it is hereby

ORDERED, that this Court’s Memorandum Order of March 20, 2002 is CERTIFIED for interlocutory review pursuant 28 U.S.C. § 1292(b).

FURTHER ORDERED that the following questions be certified for interlocutory review:

1. Whether the failure of the United States Department of Agriculture to investigate discrimination claims arising out of attempts by Hispanic farmers to obtain farm credit constitutes a cause of action under either the Administrative Procedure Act (“APA”) 5 U.S.C. § 551 et seq., or the Equal Credit Opportunity Act (“ECOA”) 15 U.S.C. § 1591 et seq.?
2. Assuming arguendo that USDA’s failure to investigate such claims does constitute a cause of action under either the APA or ECOA, can such

claims constitute a common issue of fact sufficient to satisfy the commonality requirement of Fed. R. Civ. P. 23(a)?

SO ORDERED this _____ day of _____ 2004.

James Robertson
United States District Judge

