

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, JR., <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:00CV02445
)	
MICHAEL JOHANNNS, Secretary of)	Judge: James Robertson
Agriculture,)	
)	
Defendant.)	
_____)	

DEFENDANT’S PARTIAL OPPOSITION TO PLAINTIFFS’ EMERGENCY MOTION TO CONTINUE ORDER STAYING PROCEEDING OR, IN THE ALTERNATIVE, TO ISSUE A NEW STAY OF PROCEEDINGS *NUNC PRO TUNC* TO NOVEMBER 30, 2007 UNTIL FURTHER ORDER OF THE COURT

Unwilling to accept the Court’s ruling, for the second time, that they cannot pursue their failure-to-investigate and non-credit discrimination claims under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, plaintiffs have persisted in their efforts to prolong this litigation unnecessarily by filing an emergency motion to continue the order staying proceedings or, in the alternative, to issue a new stay *nunc pro tunc* to November 30, 2007. Plaintiffs’ motion, which the Court granted on December 4, 2007 prior to receiving the government’s opposition, sought an indefinite stay. For the reasons set forth below, such an indefinite stay is inappropriate in this case.

As this Court recognized in its November 30, 2007 decision, the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 *et seq.*, not the APA, provides the basis for plaintiffs’ discrimination claims. Congress extended the limitations period for filing claims under ECOA precisely to address the problems plaintiffs continue to insist give rise to an APA

claim. Nearly a decade after Congress authorized farmers to pursue ECOA claims that would otherwise have been barred by the statute of limitations, the time has come for plaintiffs to litigate those claims rather than continuing their efforts to manufacture an APA claim in a futile effort to create a common issue that they believe could provide a predicate for class certification. Indeed, unspecified further delays in this litigation would materially prejudice the named plaintiffs' ability (and rights) to pursue their individual claims of discrimination under ECOA.

Plaintiffs contended that an indefinite further stay of proceedings in this case is warranted primarily because, if the statute of limitations is permitted to run before appellate review of the Court's recent dismissal order, "the valid claims of untold thousands of Hispanic farmers will be extinguished without their ever having received notice of the pending lawsuit or an opportunity to protect their rights." Memorandum of Points and Authorities in Support of Plaintiffs' Emergency Motion to Stay Proceedings *Nunc Pro Tunc* to November 30, 2007 Pending Resolution of Plaintiffs' Appeal of the Court's November 30, 2007 Order ("Pls.' Memo.") at 4. Plaintiffs, however, have been on notice ever since the Court of Appeals affirmed the denial of class certification in this case, *see Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006), that any unnamed plaintiffs would have to file their own claims or risk dismissal on statute of limitations grounds. The government consented to an extension of the limitations period pending this Court's consideration of the APA issue remanded by the Court of Appeals, but an *indefinite* further extension of the already-extended ECOA limitations period is no longer warranted. Nonetheless, recognizing the unique posture of this case, the government proposes that the tolling period be extended for 60 days from the Court's November 30, 2007 decision to give potential plaintiffs sufficient time to file suit. Such an extension will provide ample opportunity

for any additional farmers to file individual claims of discrimination without unduly prejudicing the claims of the plaintiffs already in this case.

An indefinite stay as requested by plaintiffs is not necessary to allow them time to consider whether to appeal this Court's dismissal of their putative APA claim, Pls.' Memo at 5. That ruling is not a final decision appealable as of right, and no basis exists for allowing yet another interlocutory appeal in this case.

Although plaintiffs have not yet asked this Court to certify its ruling for interlocutory appeal, we note that the Court's ruling does not satisfy the stringent criteria for appeal pursuant to 28 U.S.C. 1292(b). See Walsh v. Ford Motor Co., 807 F.2d 1000, 1002 n.2 (D.C. Cir. 1986). (noting that interlocutory appeal may be warranted where (1) the order to be appealed from involves a controlling issue of law; (2) the order provides a substantial basis for a difference of opinion; and (3) an immediate appeal would materially advance an ultimate conclusion to the litigation). Because plaintiffs remain free to litigate their individual claims of discrimination under ECOA – claims that this Court has recognized subsume the injury alleged under their putative failure-to-investigate claim under the APA – this Court's dismissal of the APA claim does not involve a controlling question of law. APCC Serv., Inc. v. AT&T Corp., 297 F. Sup. 2d 101, 105 (D.D.C. 2003). Even more importantly, because the APA claim attempts to redress the same injuries that Congress sought to remedy with its extension of the ECOA limitations period, allowing an interlocutory appeal from the most recent dismissal of the APA claim would not “materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b). To the contrary, such an appeal would plainly delay (yet again) the adjudication of plaintiffs' individual ECOA claims on the merits.

In less than a month some potential plaintiffs' claims could be 27 years old and none has been the subject of any merits discovery. Continuing to delay the litigation of these claims indefinitely will only enhance the extraordinary discovery and proof problems cases this old pose for the parties and the Court. And it raises the question whether plaintiffs actually are interested in litigating their claims.¹

Conclusion

For the foregoing reasons, plaintiffs' emergency motion for an indefinite stay should be denied, and the Court should enter a stay of no more than 60 days to allow potential plaintiffs to initiate their lawsuits.

Dated: December 5, 2007

Respectfully submitted,

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¹ Plaintiffs assert that the Court "summarily dismissed plaintiffs' non-credit benefit claims." Pls.' Memo. at 6. In fact, however, the Court's November 30, 2007 Order only dismissed plaintiffs' APA cause of action with respect to "claims for failure to investigate discrimination," and therefore did not encompass plaintiff Gloria Moralez's claim for the alleged denial of disaster benefit payments, see March 20, 2002 Memorandum Order at 4.

Counsel for Defendant