IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUADALUPE L. GARCIA, JR., et al.,	
Plaintiffs,	
v.	Case No. 1:00CV02445
CHARLES F. CONNER, Acting Secretary of Agriculture,	Judge: James Robertson
Defendant.	

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION TO AMEND NOVEMBER 30, 2007 ORDER TO CERTIFY THE AMENDED ORDER FOR INTERLOCUTORY REVIEW UNDER 28 U.S.C. 1292(b)

Plaintiffs in this case, and the persons who would have comprised the class they unsuccessfully sought to represent, are in the same situation as the plaintiffs in Love v. Connor, No. 00-25-2 (JR). Their claims of credit discrimination are about to turn 27 and, rather than actually litigate them, they would rather devote several more years to trying to find some basis other than the Equal Credit Opportunity Act ("ECOA") for certification of a class on those claims. Thus, these plaintiffs, like the Love plaintiffs, have asked the court to certify for appeal under 28 U.S.C. 1202(b), its November 30, 2007 Memorandum and Order dismissing their claims under the Administrative Procedure Act ("APA").

For the most part, plaintiffs in this case have made the same arguments in favor of their motion that the Love plaintiffs made in favor of theirs. Rather than repeat the opposing arguments we made in Love, we refer the Court to the Opposition we filed in that case for full explanation of our position. Nonetheless, some of the things plaintiffs have to say on the issue of substantial contrary authority merit the following brief response.

Plaintiffs appear to argue that the exclusion from APA review provided in 5 U.S.C. 704 applies only to special statutory procedures that already were in place at the time of the APA's enactment in 1937. Pl. Mem. at 7, quoting Bowen v. Massachusetts, 487 U.S. 879, 903 (1988). But the language plaintiffs quote from Bowen does not limit section 704 in that fashion. Instead, it simply explains the circumstances that existed at the time of the APA's enactment. Tellingly, plaintiffs cite no authority for their reading of Bowen, and the Court of Appeals for this Circuit takes a contrary view. See., e.g., National Wrestling Coaches Assoc. v. Dep't of Ed., 366 F.3d 930, 945 (D.C. Cir. 2004) (private cause of action for sex discrimination under Title IX against university triggers section 704).

Plaintiffs argue that there must be a substantial difference of opinion on the issue of section 704's application to plaintiffs' APA claims because this Court reached the same decision on that question on remand that it had reached when it initially denied those claims in 2002. In plaintiff's view the fact that the Court of Appeals remanded the question undermines entirely this Court's conclusion that its decision rests on an unbroken line of circuit court decisions. Pl. Mem. at 8-9. But nothing in the Court of Appeals decision suggests that this Court's original conclusion was flawed. To the contrary, that court simply observed that since virtually all of its, and the parties, efforts had been devoted to plaintiffs' appeal from this Court's denial of their motion for class certification, the question of the viability of plaintiffs' APA claim "will benefit from further development in the district court." Garcia v. Johanns, 444 F.3d 625, 637 (D.C. Cir. 2006). Two rounds of briefing and oral argument in this Court clearly are "the further development" the Court of Appeals had in mind. The fact that this Court reached the same conclusion on remand that it had reached earlier is not evidence of any contrary authority.

Plaintiffs contend that the Court's conclusion that this case is distinguishable from McKenna v. Weinberger, 729 F.2d 783 (D.C. Cir. 1984) provides grounds for a difference of opinion. Pl. Mem. at 9. This argument consists of plaintiffs' explanation of why they believe this Court's analysis was flawed. This sort of disagreement with the Court's analysis does not satisfy section 1292(b)'s requirements. See Judicial Watch, Inc v. National Energy Policy Development Group, 233 F. Supp.2d 16, 20 (D.D.C. 2002). And in any event, this Court's analysis of McKenna was correct. Whether McKenna was properly disciplined is an entirely different question from whether the government followed the proper procedure for imposing discipline. No such independence exists here; plaintiffs' administrative complaints of discrimination are identical to their ECOA claims. See 11/30/07 Mem. at 2 (section 741 applies to complaints filed with USDA).

Finally, plaintiffs contend that the Court erred when it concluded that the issue of whether defendant violated its regulations is beside the point given the availability of relief under ECOA. Plaintiffs argue that it is a basic tenet of administrative law that agencies must follow their own regulations. But this argument gets plaintiffs nowhere. Section 704 bars an APA action a plaintiff otherwise would have if the plaintiff has an other adequate remedy in a Court. This Court already has held that ECOA provides such a remedy, and that conclusion precludes any relief that might have been available to plaintiffs under the APA in the event that ECOA never had been enacted.

For these reasons, and for the reasons explained in our Opposition to the Love plaintiffs section 1292(b) motion, plaintiffs' motion should be denied.

Dated: December 28, 2007

Respectfully submitted,

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