

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 15-1732 PA (JCx)	Date	August 3, 2015
Title	Hugh Held, et al. v. Carolyn Colvin		

Present: The Honorable PERCY ANDERSON, UNITED STATES DISTRICT JUDGE

Patricia Gomez

Not Reported

N/A

Deputy Clerk

Court Reporter

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

None

None

Proceedings: IN CHAMBERS – COURT ORDER

Before the Court is a Motion to Dismiss filed by defendant Carolyn Colvin, the acting Commissioner of Social Security (“Defendant”) (Docket No. 30). Also before the Court are a Motion to Certify Class (Docket No. 26) and a Motion for Preliminary Injunction (Docket No. 29) filed by plaintiffs Hugh Held (“Held”) and Kelly Richardson-Wright (“Richardson-Wright”) (collectively “Plaintiffs”). Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that these matters are appropriate for decision without oral argument. The hearings calendared for August 3, 2015, are vacated, and the matters taken off calendar.

Plaintiffs Hugh Held and Kelley Richardson-Wright (collectively “Plaintiffs”) receive Supplemental Security Income (“SSI”) benefits administered by the Social Security Administration (“SSA”). Both Plaintiffs are married to spouses of the same sex. Prior to the Supreme Court’s decision in United States v. Windsor, 133 S. Ct. 2675 (2013), Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, prevented SSA from recognizing Plaintiffs’ same sex marriages. As a result, until Windsor was issued on June 23, 2013, and for some time thereafter until SSA implemented policies recognizing Windsor and began acknowledging same sex marriages, SSA provided SSI benefits to Plaintiffs and others married to spouses of the same sex at the higher benefit levels for single individuals rather than at the lower rates for married benefit recipients.

According to the Complaint, it was not until the summer of 2014 that SSA began sending notices to some SSI recipients with same sex spouses that SSA would be calculating their benefits as married couples rather than as single individuals. As a result of these recalculations, SSA determined that recipients in same sex marriages who had been receiving benefits as if they were single individuals had received overpayments. In September 2014, SSA notified Held that he had received an overpayment of \$6,205. Richardson-Wright received a Notice of Overpayment from SSA in December 2014 indicating that she had received \$4,129.88 more than she was entitled to receive.

Plaintiffs commenced this action of March 10, 2015. Plaintiffs seek to represent a class consisting of: “All persons who were married to a person of the same sex and who received or will receive notice of SSI overpayment as a result of SSA’s delay in implementation of the Windsor decision.” (Compl. ¶ 20.) The Complaint includes claims for: (1) deprivation of equal protection on the

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basis of sexual orientation; (2) deprivation of procedural due process; and (3) declaratory and injunctive relief from recoupment. The Complaint seeks to enjoin SSA from collecting overpayments resulting from SSA’s delay in recognizing the marriages of Plaintiffs and the putative class. In their pending Motion for Preliminary Injunction, Plaintiffs request, among other relief, to enjoin SSA from issuing Notices of Overpayment or taking any other steps to recover overpayments from class members.

After Plaintiffs filed this action, SSA determined in April 2015 that it would waive the overpayments made to Held and Richardson-Wright. The Social Security Act allows SSA to waive overpayments to a beneficiary “who was without fault in connection with the overpayment” when recovering the overpayment would “be against equity and good conscience.” 42 U.S.C. § 1383(b)(1)(B). SSA has informed both Held and Richardson-Wright that their overpayments have been waived and that neither owes any money to SSA. In her Motion to Dismiss, Defendant contends that this Court lacks subject matter jurisdiction because SSA’s waiver of Plaintiffs’ overpayments moots their claims and eliminates a live case or controversy.

Defendant additionally asserts that Plaintiffs claims, and those of the putative class, must be dismissed because Plaintiffs and the class members have not exhausted their administrative remedies. The Social Security Act limits judicial review to “final decisions” of the SSA. See 42 U.S.C. § 405(g); 42 U.S.C. § 405(h) (“No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided.”). Section 405(h)’s requirement for administrative exhaustion, and its limit on judicial review when a claim is not exhausted, “is sweeping and direct.” Weinberger v. Salfi, 422 U.S. 749, 757, 95 S. Ct. 2457, 2463, 45 L. Ed. 2d 522 (1975). “A final decision has two elements: (1) presentment of the claim to the Commissioner, and (2) complete exhaustion of administrative remedies.” Kildare v. Saenz, 325 F.3d 1078, 1082 (9th Cir. 2003).

Here, Plaintiffs do not dispute that they and the members of the putative class have not exhausted their administrative remedies. Instead, Plaintiffs seek to have the Court waive the exhaustion requirement. The Ninth Circuit applies a three-part test “to determine whether a particular case merits judicial waiver of the exhaustion requirement.” Johnson v. Shalala, 2 F.3d 918, 921 (9th Cir. 1993) (quoting Briggs v. Sullivan, 886 F.2d 1132, 1139 (9th Cir. 1989)). To qualify for judicial waiver of the exhaustion requirement, the claim “must be (1) collateral to the substantive claim of entitlement (collaterality), (2) colorable in its showing that denial of relief will cause irreparable harm (irreparability), and (3) one whose resolution would not serve the purposes of exhaustion (futility).” Id.

For purposes of the “collaterality” analysis, a plaintiff’s claim “is collateral if it is not essentially a claim for benefits.” Id. Although Plaintiffs in their Opposition to the Motion to Dismiss characterize their action as one challenging the propriety of SSA’s issuance of Notice of Overpayment without first acknowledging SSA’s “fault” in failing to recognize same sex marriages sooner and to adjust benefit payments to avoid overpayments, the Complaint is “essentially” asking the Court to determine the benefits that each member of the class should be allowed to retain despite the overpayments. Moreover, Plaintiffs’ focus on SSA’s “fault” in not recognizing same sex marriages more quickly and recalculating

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benefits based on the beneficiaries' marital status to avoid overpayments, ignores that a recipient being "without fault" is only half of the analysis required by 42 U.S.C. § 1383(b)(1)(B). Even if the overpayments are SSA's "fault," SSA must still assess if recovering the overpayment would "be against equity and good conscience." *Id.* In construing the Social Security Act's "without fault" and "equity and good conscience" standards, the Ninth Circuit has stated:

We emphasize that our interpretation of the equity and good conscience standard does not mean that whenever an individual is found to be without fault, it necessarily follows that waiver is appropriate. This approach would render superfluous the "without fault" provision, a threshold requirement of the statute. Instead, we believe courts must apply cautiously the equity and good conscience standard to the circumstances of each case.

Quinlan v. Sullivan, 916 F.2d 524, 527 (9th Cir. 1990). Plaintiffs' narrow focus on SSA's "fault" does not turn their disagreement with SSA's initial overpayment collection efforts into a general policy dispute collateral to a claim for benefits. See Kildare, 325 F.3d at 1082-83.

To satisfy the "irreparability" requirement for judicial waiver of the exhaustion requirement, plaintiffs "must raise 'at least a colorable claim that exhaustion will cause them irreparable injury.'" Johnson, 2 F.3d at 922. A "'colorable' showing of irreparable injury is one that is not 'wholly insubstantial, immaterial, or frivolous.'" *Id.* (quoting Briggs, 886 F.2d at 1140). Although Defendant does not make any argument concerning irreparability, Plaintiffs have made only a very weak showing of irreparable injury. Because this action involves the potential collection of overpayments, Plaintiffs and the class they seek to represent have not been deprived of benefits to which they are entitled and therefore have not suffered the type of economic injury that typically satisfies the irreparability requirement. See *id.* ("Back payments cannot 'erase the experience or the entire effect of several months without food, shelter or other necessities.'" (quoting Briggs, 886 F.2d at 1140)). If the potential emotional distress caused by receiving Notices of Overpayment that Plaintiffs identify as irreparable harm could justify judicial waiver of the exhaustion requirement, SSA could never issue a Notice of Overpayment without triggering a possible premature judicial challenge and the Social Security Act's exhaustion requirement would be far less "sweeping and direct" than described by the Supreme Court. Salfi, 422 U.S. at 757, 95 S. Ct. at 2463, 45 L. Ed. 2d 522.

As SSA's waivers of Plaintiffs' overpayments indicate, Plaintiffs cannot establish that exhaustion of their administrative remedies would be futile. Again, Plaintiffs' focus on SSA's "fault" does not establish futility. Instead, consideration of all the facts and circumstances that might cause SSA to determine that recovering overpayments from members of the putative class would be against "equity and good conscience" is precisely the type of decision-making process that would benefit from administrative review. See Johnson, 2 F.3d at 922 ("In most cases, the exhaustion requirement allows the agency to compile a detailed factual record and apply agency expertise in administering its own regulations. The requirement also conserves judicial resources. The agency will correct its own errors

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through administrative review.”). Particularly here, where SSA’s treatment of SSI benefits involving same sex marriages is part of a new legal landscape, and it is understandable that it might take time for agencies to alter their policies and respond to unanticipated consequences, exhaustion of administrative remedies will allow SSA apply its expertise to address the issues raised by Plaintiffs without unnecessary judicial intervention.

The Court therefore concludes that Plaintiffs have failed to meet their burden to justify judicial waiver of the Social Security Act’s administrative exhaustion requirements. Because the Court concludes that it lacks jurisdiction over the unexhausted claims of Plaintiffs and the putative class, the Court declines to address Defendant’s mootness argument.

In their Opposition, Plaintiffs contend that the Complaint should not be dismissed because they have invoked the Court’s mandamus jurisdiction and SSA’s attempts to collect overpayments violates the Social Security Act’s “clear mandate” that SSA “refrain from penalizing overpaid recipients who are without fault and where seeking repayment would contravene equity and good conscience.” (Opp’n to Mot. to Dismiss 24:20-25:2.) “Mandamus jurisdiction exists when a plaintiff has a clear right to relief, a defendant has a clear duty to act and no other adequate remedy is available.” Piledrivers’ Local Union No. 2375 v. Smith, 695 F.2d 390, 392 (9th Cir. 1982). “This duty must be ‘ministerial and so plainly prescribed as to be free from doubt.’” Id. (quoting Jarrett v. Resor, 426 F.2d 213, 216 (9th Cir. 1970)). Because Plaintiffs and the putative class have administrative review procedures that “could correct the individual errors” alleged by Plaintiffs, there is an adequate alternative remedy. Kildare, 325 F.3d at 1085. Moreover, as explained above, the “equity and good conscience” standard is not a clear mandate, but as described by the Ninth Circuit, must be applied “cautiously . . . to the circumstances of each case.” Quinlan, 916 F.2d at 527. As a result, the Court does not possess mandamus jurisdiction over Plaintiffs’ claims.

For all of the foregoing reasons, Plaintiffs and the class they seek to represent have not exhausted their administrative remedies. The Court therefore lacks jurisdiction over this action. Plaintiffs’ Complaint is dismissed without leave to amend, and the action is dismissed without prejudice. Plaintiffs’ Motions for Preliminary Injunction and Class Certification are denied as moot. The Court will issue a Judgment consistent with this Order.

IT IS SO ORDERED.