The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PAMELA CENTENO, MARY HOFFMAN, SUSAN ROUTH and JANICE WILEN, on behalf of themselves and others similarly situated, Plaintiffs, v. KEVIN W. QUIGLEY, in his capacity as Secretary of the DEPARTMENT OF SOCIAL AND HEALTH SERVICES of the STATE OF WASHINGTON, Defendant.	NO. 2:14-cv-00200-MJP DEFENDANTS' PARTIAL MOTION TO DISMISS UNDER FRCP 12(b)(6) NOTED ON MOTION CALENDAR: May 23, 2014

The Defendant, KEVIN W. QUIGLEY, appearing by ROBERT W. FERGUSON, Attorney General, and ANDREW L. LOGERWELL and COURTLAN P. ERICKSON, Assistant Attorneys General, move the Court for dismissal of the claim related to the Federal Fair Labor Standards Act (FLSA), Plaintiffs' first cause of action, paragraph 6.1, in Plaintiff's First Amended Complaint for Money Damages and Declaratory and Injunctive Relief (Amended Complaint) and all relief related thereto pursuant to Federal Rule of Civil Procedure (FRCP) 12(b)(6).

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I. INTRODUCTION

In this case, Plaintiffs are asking this Court for an injunction requiring the Defendants to comply with FLSA. There is, however, no private right of action for either money damages or injunctive relief as to the Defendants so this claim must be dismissed.[1] The core principle of the Eleventh Amendment immunity is historically rooted in core notions of federalism. In a United States Supreme Court decision involving a lawsuit brought against a state in federal court under FLSA, Justice Thurgood Marshall wrote in his concurring opinion that, "[b]ecause of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of the federal judicial power has long been considered to be appropriate in a case such as this."[2] Defendants bring this motion to narrow the issues in this case going forward in no small part because Plaintiffs have brought two theories of relief pled in the alternative.

II. DEFENDANTS' MOTION

Defendants move, under FRCP 12(b)(6), for dismissal of the first cause of action in the Amended Complaint because the Plaintiffs have failed to allege a claim for which relief can be granted. That claim, contained in paragraph 6.1 of the Amended Complaint reads:

> 6.1 Failure to Pay Overtime Wages. The FLSA requires that an employee be paid at a rate not less that one and one-half times the standard rate of pay for any hours in excess of forty worked during one week. 29 U.S.C. § 207. The State has failed (and continues to fail) to compensate Plaintiffs at the required overtime rate for work performed in excess of 40 hours during particular workweeks.

[1] The second claim under the First and Fourteenth Amendment should be dismissed as well under the doctrine of qualified immunity. Given that there was binding Supreme Court precedent on point allowing required financial support of the SEIU for in home care providers, there can be no argument that a reasonable state official would believe that their conduct violated constitutional norms. That motion, however, will require support outside the four corners of the complaint and will be the subject of future motion practice.

[2] *Emp. of Dep't of Pub. Health & Welfare, Missouri v. Dep't of Pub. Health & Welfare, Missouri*, 411 U.S. 279, 294, 93 S. Ct. 1614, 1622–23, 36 L. Ed. 2d 251 (1973) (Marshall, J., concurring in result); *see also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S. Ct. 900, 907–08, L. Ed. 2d 67 (1984) (quoting Justice Marshall's statement).

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As outlined below, however, there is no private right of action for any relief under the FLSA. Defendants reserve the right to bring further dispositive motions, such as qualified immunity, based on the evidence produced in the discovery phase of the trial.

III. BACKGROUND

When Medicaid eligible Washingtonians need care in order to remain in their homes and out of institutions, they are evaluated in order to determine the level of supportive needs they require. *Rekhter v. Dep't of Soc. & Health Servs.*, No. 86822-1, 2014 WL 1321008 at 1 (slip opinion) (Wn., Apr. 3, 2014). That evaluation ends in an entitlement to a number of hours of in-home care in order to provide support services. The recipient of care then directs the care provider on which tasks to perform and for how many hours up to the amount they have been deemed entitled to. This is done pursuant to a waiver of the Medicaid restriction that the federal government will only pay for care in institutions.

In Washington the care is provided by two kinds of in-home care providers. One kind works for private agencies and are the employees of those agencies. They are known as 'agency providers' or 'APs' for short. The other care providers, including the Plaintiffs in this case, are those who work directly for the Medicaid recipients who are eligible for care. They contract with the Washington Department of Social and Health Services (DSHS) to provide care directly to the client and are, by statute, considered employees of the client, not employees of the state. RCW 74.39A.270(1); *Rekhter* No. 86822-1 at 23 (slip opinion) (Wn., Apr. 3, 2014).[3] These providers are known as 'Independent Providers' or 'IPs'. IPs work only in the homes of their clients, not in a state office building; submit their reimbursement requests monthly; and answer almost solely to their clients, the Medicaid eligible adults they serve.

In 2001, the IPs in Washington were granted the right to collectively bargain via voter initiative, initiative 775. That initiative, and the resulting statute (RCW 74.39A.270), contain important language written by the initiative drafters and accepted by the voting public of

[3] The opinion is available at http://www.courts.wa.gov/opinions/pdf/868221.pdf

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Washington: while the IPs are considered employees of the State of Washington for purposes of collectively bargaining their wages, hours and working conditions, they are not employees for any other purpose.

The statute also created the requirement that even those IPs who do not want to be union members still have to pay a fee that is their proportional share of the costs the Union bears in negotiating and administering the contract. RCW 41.80.100(1). Unlike full members, who also support the Union's political and outreach activities, the fee paying members pay a lesser amount but still retain the benefits of the representation. Whether or not that arrangement violates the Constitution of the United States is the central issue in a recently argued Supreme Court case, *Harris v. Quinn*. The outcome of *Harris* (expected within the next two months) could very well be dispositive of the Plaintiffs' second cause of action. *See* Plaintiffs' Amended Complaint, paragraph 6.2.

IV. SUMMARY OF ARGUMENT

Defendants' motion must be granted because the State of Washington is immune from suit under FLSA when those claims are brought by individuals, regardless of the relief sought. Furthermore, only the secretary of labor has the authority to bring injunctive relief requests, not private citizens. There simply is no private right of action under the Act when the State is the defendant. Plaintiffs' first claim for relief, paragraph 6.1 of the Amended Complaint, therefore, must be dismissed as a matter of law.

V. ARGUMENT

A. Standard Of Review

The standard that applies to Rule 12(b)(6) motions is well-established: dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir. 1990). A complaint must allege facts to state a claim for relief that is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed.

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2d 868 (2009). A claim has "facial plausibility" when the party seeking relief "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id., Clavette v. Skamania Cty. Sheriff,* No. 12-6027, 2013 WL 6328828, at *1 (Dec. 5, 2013).

Plaintiffs cannot establish that there are legally cognizable theories of liability to support the claims alleged in paragraph 6.1 of the Amended Complaint. In the words of Rule 12, Plaintiffs have failed to state any claim for which relief can be granted with respect to their first cause of action.

B. In This Case, There Is No Private Right Of Action Under The Fair Labor Standards Act Regardless Of The Nature Of The Relief Sought

Plaintiffs' first claim for relief is contained in paragraph 6.1 of the Amended Complaint and is titled, "Failure to Pay Overtime Wages." The claim alleges that the State has failed to pay overtime under FLSA, 29 USC Sec. 207. Under the "Relief Requested" section of the Amended Complaint, Plaintiffs seek an injunction declaring that they are employees of the state of Washington and that the State must comply with the FLSA. *See* Amended Complaint, Section VII. This claim, however, is not actionable.[4]

The Supreme Court of the United States has held in *Alden v. Maine* that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject non-consenting States to private suits under FLSA in state or federal court. *Alden v. Maine,* 527 U.S. 706, 712, 119 S. Ct. 2240, 2246, 144 L. Ed. 2d 636 (U.S. Me., 1999); s*ee also Gonzalez v. Mayberg,* 398 Fed.Appx. 318, 2010 WL 3937909, (C.A. 9, 2010). Therefore, this Court lacks subject matter jurisdiction over the Plaintiffs' claim under the FLSA and lacks personal jurisdiction over the Defendants. *See Alden v. Maine*, 527 U.S. 706.

[4] Plaintiffs have also sought attorney's fees under a two state statutes, Revised Code of Washington Sections 49.48.030 and 49.52.070. *See* Amended Complaint, paragraph 7.2. Those sections, however, relate solely to claims that have been dropped from this complaint.

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In *Alden*, state probation officers brought an action against the state of Maine for the alleged violation of FLSA. In that case, the Plaintiffs first filed in federal court. The trial court properly dismissed the claim under the Eleventh Amendment. The Plaintiffs refiled in state court. Again, citing the Eleventh Amendment sovereign immunity, the Maine courts dismissed the case. The decision in *Alden* includes a lengthy discussion of the history and background of the immunity the states enjoy in both federal court and the courts of their own state to be free from private rights of action under FLSA. Writing for the majority, Justice Kennedy noted:

> The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

Alden v. Maine 527 U.S. at 706, 713.

There is no exception to the immunity the state enjoys for suits brought solely seeking injunctive relief. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S. Ct. 900, 908, 79 L. Ed. 2d 67 (1984) ("This jurisdictional bar applies regardless of the nature of the relief sought."); *id.* at 101–02 ("[W]hen the State itself is named as the defendant, . . . a suit against [it] is barred regardless of whether it seeks damages or injunctive relief."). The goal of constitutional framework as a whole was to allow the state to retain a "residuary and inviolable sovereignty". *Id.* at 715. The framers, in their design and adoption of our unique federal system, considered immunity from private suits *of any kind* central to sovereign dignity. *Id*. This is reflected in the actual text of the Eleventh Amendment:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

United States Constitution, Eleventh Amendment. "The Eleventh Amendment confirmed, rather than established, sovereign immunity as a constitutional principle; it follows that the

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scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design." *Alden v. Maine*, 527 U.S. at 706, 729. That immunity is often described in sweeping terms, without reference to whether the suit was prosecuted in state or federal court, and without reference to the nature of the suit.[5]

Historically, there is an exception in certain cases wherein sovereign immunity does not bar "certain suits seeking declaratory and injunctive relief *against state officers*." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269, 117 S. Ct. 2028, 2034, 138 L. Ed. 2d 438 (1997) (emphasis added) (citing *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908)).[6] The *Ex parte Young* exception strikes the proper balance between the supremacy of federal law and the separate sovereignty of the States by allowing prospective relief for ongoing violations of federal law but not retroactive relief for past violations. *See Pennhurst State Sch. & Hosp.*, 465 U.S. at 105–06.

However, in enacting the FLSA, Congress granted to the United States Secretary of Labor the exclusive authority to seek injunctive relief for violations of the overtime and wage provisions of the FLSA. *See* 29 U.S.C. §§ 211, 216(b), 217; *Howard v. City of Springfield*, 274 F.3d 1141, 1145 (7th Cir.2001).[7] A private suit seeking an injunction under the FLSA is invalid whether brought against a state or a state official. Therefore, exception to the state's immunity for injunctive suits based on *Ex Parte Young* does not apply to this case.

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[5] *See, e.g., Briscoe v. Bank of Kentucky*, 36 U.S. 257, 11 Pet. 257, 321–22, 9 L. Ed. 709, 9 L. Ed. 928 (1837) ("No sovereign state is liable to be sued without her consent"); *Bd. of Liquidation v. McComb*, 92 U.S. 531, 541, 23 L. Ed. 623 (1875) ("A State, without its consent, cannot be sued by an individual"); *In re* Ayers, 123 U.S. 443, 506, 8 S. Ct. 164, 31 L. Ed. 216 (1887); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 51, 64 S. Ct. 873, 88 L. Ed. 1121 (1944) ("The inherent nature of sovereignty prevents actions against a state by its own citizens without its consent").

[6] *See also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996); *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974); *In re Ayers*, 123 U.S. 443.

[7] *See also United Food & Comm'l Workers Union, Local 1564 of New Mexico v. Albertson's, Inc.*, 207 F.3d 1193, 1197–98 (10th Cir.2000); *Powell v. Florida*, 132 F.3d 677, 678 (11th Cir.1998); *Balgowan v. State of New Jersey*,115 F.3d 214, 218; *Barrentine v. Arkansas–Best Freight Sys., Inc.*, 750 F.2d 47, 51 (8th Cir.1984); *Henley v. Simpson*, 2012 U.S. Dist. LEXIS 101646, * 10–* 11 (S.D.Miss. July 23, 2012); *Gordon v. Rite Aid Corp.*, 2012 U.S. Dist. LEXIS 54071, *51 (S.D.N.Y. Mar. 9, 2012); *Colson v. Avnet, Inc.*, 687 F. Supp. 2d 914, 922 (D.Ariz.2010); *Abbe v. City of San Diego*, 2007 U.S. Dist. LEXIS 87501, *71, 2007 WL 4146696 (S.D.Cal. Nov. 9, 2007); *Keenan v. Allan*, 889 F. Supp. 1320, 1382 (E.D.Wash.1995).

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The Court should dismiss the appellants' claim under FLSA because the defendants are immune under the Eleventh Amendment. Additionally, the Court should dismiss the claim because Plaintiffs are not authorized under the FLSA to bring an action for injunctive relief.

VI. CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the Court grant Defendant's Rule 12(b)(6) Motion and dismiss Plaintiffs' first cause of action with prejudice.

DATED this 30th day of April, 2014.

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PROOF OF SERVICE

I hereby certify that on April 30, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following: JEFFREY I. TILDEN, Counsel for the Plaintiffs PAMELA CENTENO, MARY HOFFMAN, SUSAN ROUTH and JANICE WILEN.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 30th day of April, 2014, Olympia, WA.

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