

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FIFTH DIVISION

ANGELIA FRAZIER HENSON and KATHERINE HENSON
MARKETT HUMPRHIES and DIANNA CHRISTY
ALLAN RAY COX
PLAINTIFFS

VS. NO. 60CV-15-569

LARRY WALTHER, Director of the Arkansas Department
of Finance and Administration (in his official capacity), and
Successors in Office;
NATHANIEL SMITH, MD, MPH, Director of the Arkansas
Department of Health (in his official capacity), and his
Successors in Office:
CAROLYN W. COLVIN, Acting Commissioner of the
Social Security Administration (in her official capacity),
and her Successors in Office:
ASA HUTHCHINSON, Governor of the State of Arkansas
(in his official capacity); and
LESLIE RUTLEDGE, Attorney General of the State of
Arkansas (in her official capacity) DEFENDANTS

ORDER REGARDING MOTION TO DISMISS

This litigation was filed February 13, 2015. Plaintiffs Angelia Frazier Henson, Katherine Henson, Markett Humphries, and Dianna Christy, originally brought suit against Defendants Walther, Smith, Colvin, and Hutchinson alleging that the defendants violated their rights to due process of law and equal protection of the laws as guaranteed by the Constitutions of Arkansas and the United States. On March 2, 2015, the complaint was amended to add Allen W. Cox as a plaintiff. On April 1, 2015, Defendants

collectively moved that the complaint be dismissed for failure to state a claim for which relief can be granted pursuant to Rule 12(b)(6) of the Arkansas Rules of Civil Procedure.

On April 17, 2015, Plaintiffs filed a motion to transfer their lawsuit from Twelfth Division (to which it was originally assigned by the clerk's office) to Second Division based on the contention that their lawsuit is related to the decision rendered in *Wright et al. v. Smith et al.*, Pulaski Circuit No. 60CV-13-2662 in which Judge Christopher C. Piazza (presiding over Second Division) adjudicated challenges that Amendment 83 to the Arkansas Constitution and Ark. Code Ann. §§ 9-11-077, 9-11-109, and 9-11-208 violated provisions of the Arkansas Constitution and the United States Constitution. After Judge Alice S. Gray (presiding over Twelfth Division) recused by order entered May 22, 2015, the clerk's office reassigned this lawsuit to Fifth Division.

The parties have filed briefs concerning Defendants' motion to dismiss. The Court has read the briefs and analyzed the dismissal motion in light of Arkansas law pertaining to a motion for dismissal for failure to state a claim.

Rule 12 of the Arkansas Rules of Civil Procedure provides that every defense to a claim for relief in any pleading, whether a claim, counterclaim,

cross-claim or third party claim, must be asserted in the responsive pleading to that pleading except that certain defenses may, at the option of the pleader, be made by motion. Among the defenses that may be asserted by motion is failure to state facts upon which relief can be granted. The law in Arkansas has long been settled that a motion to dismiss operates to challenge the legal sufficiency of a claim, that pleadings are to be liberally construed, and that pleadings are sufficient if they advise a party of its obligations and allege a breach of them. *Bethel Bapt. Church v. Church Mut. Ins. Co.*, 54 Ark. App. 262, 924 S.W.2d 494 (1996). It is also settled law that Rule 12(b)(6) must be read in conjunction with Rule 8 of the Arkansas Rules of Civil Procedure which sets out the requirements for a complaint. *Spires v. Members of Election Comm'n*, 302 Ark. 407, 790 S.W.2d 167 (1990).

Rule 8, and specifically sub-sections (a) and (f), is quite clear. Rule 8(a) requires that a complaint (or any other pleading that sets forth a claim for relief such as a counterclaim, cross claim, or third party claim) contain two essential features. First, the pleading must contain a "statement in ordinary and concise language of facts showing that the court has jurisdiction of the claim and is the proper venue and that the pleader is entitled to relief." Ark. R. Civ. P. 8(a). Secondly, the pleading must include

a demand for the relief for which the pleader considers itself entitled. Rule 8(f) provides that “[a]ll pleadings shall be liberally construed so as to do substantial justice.”

The amended complaint in this case is clearly sufficient to surmount the Rule 12(b)(6) challenge as to Defendants Walther and Colvin. As to those defendants, Plaintiffs have alleged specific facts concerning jurisdiction and venue. Plaintiffs have also made specific allegations of conduct or omissions by Defendants Walther and Colvin that violates the due process and equal protection guarantees contained in the Constitution of Arkansas and the Constitution of the United States.

Plaintiffs Angelia Frazier-Henson and Katherine Henson allege that Defendant Walther, in his official capacity as Director of the Arkansas Department of Finance and Administration, “has directed that all same-sex couples must file as single individuals” and that doing so denied them “the financial benefit of filing jointly only because they are a same-sex couple [in] ... violation of said Plaintiffs’ Equal Protection and Due Process rights under the Arkansas and United States Constitutions.” (First Amend. Compl. ¶¶ 37 and 39).

Plaintiffs Markett Humphries and Dianna Cristy allege that Defendant Walther “has refused to permit Dianna Cristy’s enrollment on her spouse’s

health insurance plan” and that Walther has “directed that all same-sex married couples must file [for purposes of Arkansas State Income Taxes] as single individuals.” In both instances, these plaintiffs allege that Walter’s actions violate their equal protection and due process rights under the state and federal constitutions. (First Amend. Compl. ¶¶ 46, 47, 48, and 50).

As to Defendant Colvin, Plaintiff Allan Cox alleges that he and his deceased spouse, Steven Hall Thomas, were married on May 12, 2014, and that Colvin, as Acting Commissioner of the Social Security Administration, refused to permit Cox to take the name of his spouse (Cox) in marriage as is commonly allowed for spouses in heterosexual marriages. Cox alleges that he applied for death and survivor benefits from the Social Security Administration following the death of Thomas, and that Colvin denied those benefits. As with the other plaintiffs, Cox alleges that Colvin’s conduct violated his constitutional rights. (First Amend. Compl. ¶¶ 57, 58, and 59)

Plaintiffs seek a judgment declaring Amendment 83 to the Arkansas Constitution, and Ark. Code Ann. §§9-22-107, 9-22-109, and 9-22-208 unconstitutional. They seek preliminary and permanent injunctive relief.

Plainly, Plaintiffs have lodged factual allegations against Defendants Walther and Colvin. Plaintiffs have asserted the required allegations

pertaining to jurisdiction and venue. Plaintiffs have stated the relief they seek. Arkansas law does not require anything more to survive a motion to dismiss based on Rule 12(b)(6). Thus, the motion to dismiss as to Defendants Walther and Colvin is denied.

However, the amended complaint contains no factual allegations about anything Defendants Smith, Hutchinson, and Rutledge have done or failed to do concerning any of the plaintiffs. Smith, Hutchinson, and Rutledge are merely sued in their official capacities based solely on the fact that they hold their respective offices of Director of the Arkansas Department of Health (Smith), Governor (Hutchinson), and Attorney General (Rutledge). The amended complaint fails to allege what, if anything, any of these defendants did or failed to do that constitutes any harm, wrong, or breach of duty toward any of the plaintiffs.

More than a century ago the Supreme Court of the United States held in *Ex Parte Young*, 209 U.S. 123 (1908) that political officeholders may not be sued to test the constitutionality of a law where they have no enforcement authority concerning the challenged law. Because the amended complaint contains no allegations about anything Defendants Smith, Hutchinson, and Rutledge did or failed to do, whether separately or

otherwise, so as to violate Plaintiffs rights, the motion to dismiss as to those defendants should be, and hereby is, denied without prejudice.

CONCLUSION

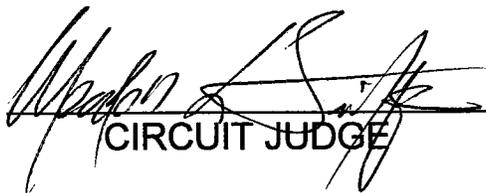
The motion to dismiss as to Defendants Walther and Colvin is DENIED.

The motion to dismiss as to Defendants Smith, Huthchinson, and Rutledge is GRANTED WITHOUT PREJUDICE.

Defendants Walther and Colvin are ordered to answer or otherwise respond to the amended complaint not later than five (5) days from the date of this order.

Counsel are directed to contact the Trial Court Assistant to schedule a hearing on Plaintiffs' demand for preliminary injunctive relief.

ORDERED this 29th day of May, 2015.


CIRCUIT JUDGE