

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

NANCY GILL & MARCELLE LETOURNEAU,)	
et al.,)	
)	
Plaintiffs,)	Case No. 1:09-cv-10309 JLT
)	
v.)	
)	
OFFICE OF PERSONNEL MANAGEMENT,)	
et al.,)	
)	
Defendants.)	
)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS’ MOTION TO STAY
PROCEEDINGS ON PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

In response to defendants’ motion to dismiss, plaintiffs have filed a motion for summary judgment accompanied by fifteen declarations. Contrary to plaintiffs’ assertions, their motion for summary judgment and defendants’ motion to dismiss do not “turn on the same legal question,” and the two motions need not and should not “be decided together” (Doc. 28 at 11). Although each motion presents the same ultimate question – the constitutionality of the Defense of Marriage Act (“DOMA”) – the motions are foundationally distinct and present significantly different issues for decision leading up to that ultimate question. Defendants’ motion to dismiss presents entirely legal issues and can be resolved without reference to declarations or exhibits. Plaintiffs’ motion, in contrast, presents challenging subordinate issues that turn on evidence outside the pleadings, as demonstrated by plaintiffs’ submission of declarations from four “experts” (Doc. 28 at 23-26).

If the Court concludes that this action should be dismissed based on the legal issues in defendants’ motion to dismiss, addressing the more complex issues in plaintiffs’ motion for

summary judgment will be unnecessary. Additionally, defendants' motion presents a threshold issue regarding this Court's jurisdiction over one of plaintiffs' claims, which must be resolved before considering the merits of that claim. Thus, addressing defendants' motion to dismiss first would preserve the time and resources of the Court and the parties, and the Court should stay briefing and all other proceedings on the motion for summary judgment pending resolution of the motion to dismiss.

PROCEDURAL HISTORY

Defendants' motion to dismiss asserts that plaintiffs' First Amended and Supplemental Complaint fails to state a claim on which relief can be granted (Doc. 21). The motion argues that rational basis review governs plaintiffs' claims, in that there is no fundamental right to federal benefits based on marital status and that the First Circuit has held that sexual orientation is not a suspect classification. Defendants assert that Section 3 of DOMA is rationally related to the government's interests in maintaining the status quo pending further developments on the question of same-sex marriage in the States, and in preserving nationwide consistency, at the federal level, in the distribution of marriage-based federal benefits. Defendants' motion also argues that one of the plaintiffs – Dean Hara – lacks standing to raise his inability to enroll in the Federal Employees Health Benefits Program (“FEHB”) since only the United States Court of Appeals for the Federal Circuit has jurisdiction to determine that he meets one of the requirements for FEHB eligibility. Defendants' motion to dismiss is accompanied by a memorandum of twenty-six pages.

Arguing that First Circuit precedent does not require this Court to apply rational basis review, plaintiffs' motion for summary judgment asserts that DOMA should be subject to

“heightened scrutiny” because, among other arguments, it discriminates on the basis of sexual orientation (Doc. 28 at 22-23). Relying almost exclusively on facts and opinion testimony beyond the scope of their complaint, plaintiffs argue that sexual orientation is a suspect classification because (1) “gays and lesbians have experienced a history of discrimination,” (2) “sexual orientation is unrelated to the ability to contribute to society,” (3) “gays and lesbians . . . face significant obstacles to achieving protection from discrimination through the political process,” and (4) “sexual orientation is a defining characteristic of a person’s identity” (Doc. 28 at 24-26). Plaintiffs submit four declarations from alleged experts in support of these four elements of their “suspect classification” argument.¹ The expert declarations total 111 pages, and the exhibits to the declarations more than double that length (Docs. 39, 40, 42, 45). Plaintiffs’ motion is also accompanied by a memorandum of forty-seven pages, a declaration from each of the plaintiffs or plaintiff couples, and a declaration from counsel for the plaintiffs.

ARGUMENT

“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” Air Line Pilots Ass’n v. Miller, 523 U.S. 866, 879 n.6 (1998) (quoting Landis v. North Am. Co., 299 U.S. 248, 254 (1936)). A court may stay proceedings for a “reasonable” period after finding “good cause” and weighing any “competing equities.” See Marquis v. FDIC, 965 F.2d 1148, 1154-55 (1st Cir. 1992). The court’s power in this regard includes the power to stay proceedings on one motion pending the outcome of another motion in

¹ Although the submissions of plaintiffs’ experts are entitled “affidavits,” they actually constitute declarations under 28 U.S.C. § 1746. See, e.g., Berry v. United States, 86 Fed. Cl. 750, 754 n.10 (2009).

the same case. See Conservation Law Found., Inc. v. Department of Air Force, 864 F. Supp. 265, 273 (D.N.H. 1994) (noting that court had stayed plaintiffs’ motions for summary judgment pending disposition of defendant’s motion to dismiss); Glanz v. Vernick, 750 F. Supp. 39, 40-41 (D. Mass. 1990) (same).

Plaintiffs argue that their motion for summary judgment and defendants’ motion to dismiss “should be decided together” because they “turn on the same legal question” – that is, “whether DOMA violates the Equal Protection guarantee of the Fifth Amendment as applied to Plaintiffs” (Doc. 28 at 11). Plaintiffs’ assertion is meaningless, however, because that “legal question” is simply the ultimate issue to be resolved in this action. What counts here, instead, is that defendants’ motion to dismiss and plaintiffs’ motion for summary judgment propose to resolve that ultimate issue in entirely different ways.

The key jurisprudential difference between defendants’ motion and plaintiffs’ motion lies in the level of scrutiny to be applied to the Defense of Marriage Act. Defendants assert that First Circuit precedent requires holding that sexual orientation does not constitute a suspect classification under the Fifth Amendment and that the Court must therefore employ rational basis review (Doc. 21 at 14-16).² Defendants’ motion presents entirely legal issues, and can be resolved without reference to any declarations or other such materials outside the pleadings.

² Other federal appellate courts have reached the same conclusion regarding sexual orientation. See, e.g., Price-Cornelison v. Brooks, 524 F.3d 1103, 1113 n.9 (10th Cir. 2008); Scarborough v. Morgan County Bd. of Educ., 470 F.3d 250, 261 (6th Cir. 2006); Citizens for Equal Protection v. Bruning, 455 F.3d 859, 866-67 (8th Cir. 2006); Johnson v. Johnson, 385 F.3d 503, 532 (5th Cir. 2004). But cf. In re Levenson, 560 F.3d 1145, 1149 (9th Cir. Jud. Council 2009) (Reinhardt, J.) (suggesting, but not deciding, that “some form of heightened constitutional scrutiny applies”).

In contrast, plaintiffs contend that First Circuit precedent does not mandate the level of scrutiny to be applied here (Doc. 28 at 23). Plaintiffs' motion proceeds, then, to argue that the Court should apply heightened scrutiny to DOMA because, among other arguments, the statute "discriminates on the basis of sexual orientation" and such discrimination requires heightened scrutiny (Doc. 28 at 22-26). Plaintiffs submit declarations from four alleged experts in attempting to establish that discrimination based on sexual orientation requires heightened scrutiny. Plaintiffs have asked this Court to decide issues on the basis of those declarations.

Furthermore, one of the arguments in defendants' motion to dismiss raises a jurisdictional issue – that is, the standing of plaintiff Dean Hara to challenge his inability to enroll in the Federal Employees Health Benefits Program (Doc. 21 at 23-25). Jurisdictional questions must always be resolved before reaching the merits of a claim. See Lance v. Coffman, 549 U.S. 437, 439 (2007) ("Federal courts must determine that they have jurisdiction before proceeding to the merits."). Nevertheless, by seeking summary judgment on all of their claims, plaintiffs seek judgment on the merits of this claim before the Court has settled its jurisdiction to hear it.

Obviously, therefore, deciding defendants' motion to dismiss before turning, if necessary, to plaintiffs' motion for summary judgment may save significant time and resources for the Court and the parties. If this Court concludes, based on defendants' motion to dismiss, that First Circuit precedent is binding and that DOMA satisfies rational basis review, there would be no need to reach plaintiffs' motion for summary judgment or to consider the evidence submitted by the plaintiffs, thus saving the Court and the parties considerable time, effort, and resources. This is the quintessential justification for staying proceedings on plaintiffs' motion for summary judgment. See Air Line Pilots Ass'n, 523 U.S. at 879 n.6 (referring to court's power to "control

the disposition of the causes on its docket with economy of time and effort”). Nor are there any “competing equities” that would counsel against a stay. See Marquis, 965 F.2d at 1154-55.

CONCLUSION

Accordingly, all proceedings on plaintiffs’ motion for summary judgment should be stayed pending resolution of defendants’ motion to dismiss.

Dated this 4th day of December, 2009.

Respectfully submitted,

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I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants, on December 4, 2009.

/s/ W. Scott Simpson

W. SCOTT SIMPSON