UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN J. DIERLAM,

Plaintiff,

v. Case No. 4:16-CV-00307

JOSEPH R. BIDEN JR., in his official capacity as President of the United States, *et al.*,

Defendants.

DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

NATURE AND STAGE OF THE PROCEEDING

In March 2023, Plaintiff John J. Dierlam filed a third amended complaint against Defendants, challenging their implementation of and the legality of several portions of the Patient Protection and Affordable Care Act (the ACA), Pub. L. No. 111-418, 124 Stat. 119 (2010). 3d Am. Compl. (3AC), ECF No. 124.

The Court granted Defendants' partial motion to dismiss the third amended complaint, ECF No. 126, dismissing Claims 1, 2, and 4 through 21 of the third amended complaint in their entirety and dismissing Claim 3 to the extent it sought prospective relief. Order, ECF No. 136. The Court had previously explained that the Religious Exemption Rule, which allows willing health insurance issuers to offer coverage without contraceptive services to individuals with sincere religious objections to coverage for those services, and the zeroing out of the shared responsibility payment in the Tax Cuts and Jobs Act (TCJA) of 2017, Pub. L. No. 115-97, 131 Stat. 2054, rendered most of Mr. Dierlam's claims moot. Clarifying Order, ECF No. 121.

Accordingly, the only remaining claim before this Court is the portion of Claim 3 seeking retrospective relief. Mr. Dierlam filed a motion for summary judgment on that claim, Pl.'s Mot. Summ. J. (Pl.'s MSJ), ECF No. 143, and Defendants now respond.

ISSUES PRESENTED

1. Should the Court grant Mr. Dierlam summary judgment on the retrospective portion of Claim 3 and award him a refund of $5626.22 for his past payments of the shared responsibility payment?

Legal standard: Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

2. Should the Court grant Mr. Dierlam any form of prospective relief on his sole remaining claim—the retrospective portion of Claim 3?

Legal standard: Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

SUMMARY OF THE ARGUMENT

When the Court dismissed nearly all of Mr. Dierlam's claims, it was explicit that it was dismissing "Claim 3 to the extent it seeks prospective relief." Order, ECF No. 136. Accordingly, the only claim remaining now is the *retrospective* portion of Claim 3. The retrospective portion of that claim relates to Mr. Dierlam's past payments of the shared responsibility payment, 26 U.S.C. § 5000A(b)-(e), from 2014 to 2017. 3AC ¶ 7. Mr. Dierlam sought to have these payments refunded to him pursuant to various tax refund provisions, 3AC ¶ 7, on the theory that requiring him to make the payments despite his religious objection to obtaining health insurance that includes contraceptive coverage violated the Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488. *See also* 3AC ¶¶ 128-31 (discussing how Mr. Dierlam believes the contraceptive coverage requirement and shared responsibility payments burdened his religious exercise in violation of RFRA), 3AC ¶ 294 ("If the court finds Claim 3 valid, then I will ask the court to award me the return of all payments of the IMP, currently $5626.22."). For the reasons explained below, under the unique circumstances of this case, Defendants do not oppose entry of summary judgment for Mr. Dierlam on this claim and a refund award of $5626.22.

Despite acknowledging that the Court has already dismissed all of his prospective claims, Pl.'s MSJ 1 (noting that the third amended complaint "was dismissed on 12/12/2022 except for the retrospective portion of an RFRA claim"), Mr. Dierlam also continues to press for prospective relief. The Court should deny any prospective relief. The Court's prior dismissal of Mr. Dierlam's claims for prospective relief, including the prospective portion of Claim 3, was correct, and any prospective relief would require Mr. Dierlam to show a prospective injury, which he cannot.

ARGUMENT

I. Mr. Dierlam's Request for $5626.22.

Mr. Dierlam's request for a refund of his shared responsibility payments for 2014, 2015, 2016, and 2017, in the amount of $5626.22, has a lengthy and convoluted litigation history. In prior briefing in this case, Defendants have changed position on several issues and made a number of concessions with respect to Mr. Dierlam's refund claim. *See, e.g.*, Defs.' Resp. Mag. J.'s R. & R. 8-12, ECF No. 73 (describing Defendants' change in position regarding whether the contraceptive coverage requirement imposed a substantial burden on Mr. Dierlam's religious exercise); Brief for Appellees 48, *Dierlam v. Trump*, No. 18-20440 (5th Cir. Feb. 25, 2019), Doc. 514849636 (asserting that Mr. Dierlam "has validly alleged the existence of a substantial burden on his free exercise of religion under RFRA" (cleaned up)); *id*. at 51-52 (describing Defendants' change in position regarding whether Mr. Dierlam could satisfy the jurisdictional prerequisites for seeking a refund of his shared responsibility payments). In addition, since this case was filed, Defendants promulgated the Religious Exemption Rule, which allows willing health insurance issuers to offer a separate benefit plan to individuals, like Mr. Dierlam, who objects to coverage for contraceptive services based on sincerely held religious beliefs.

Given the unique history of this case, Defendants' changes of position and past concessions, and Mr. Dierlam's specific circumstances, Defendants do not oppose the Court

granting summary judgment to Mr. Dierlam on the retrospective portion of Claim 3 and awarding him a refund of $5626.22 for his past payments of the shared responsibility payment. This is the amount that Mr. Dierlam alleges he paid in shared responsibility payments between 2014 and 2017, and the amount he alleges he has sought to receive through the IRS refund process. 3AC ¶ 7; *see also* 3AC ¶ 7 (citing "28 U.S.C. § 1346(a)(l), 26 U.S.C. §§ 6532(a)(l) and 7422" as "provid[ing] a District Court with jurisdiction" to hear claims for refunds of taxes paid). This is also the relief sought in the third amended complaint for the retrospective portion of Claim 3. *See* 3AC ¶ 294 ("If the court finds Claim 3 valid, then I will ask the court to award me the return of all payments of the IMP, currently $5626.22."). And this is the monetary relief sought by Mr. Dierlam now. *E.g.*, Proposed Order, ECF No. 143. As discussed further below, however, Mr. Dierlam is not entitled to any other relief on the retrospective portion of Claim 3 or any prospective relief.

II. Mr. Dierlam Is Not Entitled to Prospective Relief or Any Additional Relief.

In addition to seeking the return of $5626.22 in shared responsibility payments, Mr. Dierlam's motion for summary judgment also requests several forms of prospective relief. *See* Pl.'s MSJ 6 ("I request a permanent injunction forbidding the government to ever impose the IM or an IMP against myself."); Pl.'s MSJ 6 ("I would request a permanent injunction against the defendants from including in 'minimum essential coverage' or similar coverage Mandate any coverage or requirement in violation of traditional Catholic faith, such as the new HHS Rules."); *see also* Proposed Order. However, the Court has already (correctly) dismissed the prospective portion of Claim 3, and dismissed all other claims in their entirety, Order, ECF No. 136, and accordingly there is no basis for the Court to award prospective relief.

There is also no reason for the Court to reconsider its dismissal of the prospective portion of Claim 3. Mr. Dierlam cites a case for the proposition that "RFRA applies retrospectively and prospectively," Pl.'s MSJ 2, but he offers no explanation of why the retrospective and prospective

portions of a claim involving RFRA cannot be adjudicated separately. And such a conclusion would contradict the Supreme Court's instruction that "a plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). The Court's dismissal of Mr. Dierlam's prospective RFRA claim was not based on a theory that RFRA does not permit prospective relief; it was instead based on mootness. The Religious Exemption Rule and the TCJA mooted any claim for prospective relief. Under the Religious Exemption Rule, health insurance issuers are free to offer separate health insurance coverage to individuals with religious objections to paying for the coverage of some or all contraceptives, and, under the TCJA, Mr. Dierlam will not face any enforcement action if he chooses to go without insurance altogether. Thus, Mr. Dierlam does not suffer any ongoing harm from the minimum essential coverage provision, the shared responsibility payment provision, or the contraceptive coverage requirement. And to the extent that Mr. Dierlam raises issues relating to market forces that do not result from Defendants' requirements, those are not redressable by relief against Defendants. *See generally* Defs.' Partial Mot. Dismiss 3AC, ECF No. 126.

Mr. Dierlam clearly disagrees with the Court's dismissal of his prospective claims. *See, e.g.*, Pl.'s MSJ 3 ("It is the contention of the court and the defendants I have no prospective injuries. . . . The current contention requires a denial of reality of a similar order of magnitude as overwhelming evidence even to the present day exists contrary to it."). But a motion for summary judgment on Mr. Dierlam's only remaining claim, which is the retrospective portion of Claim 3, is not the place to relitigate that disagreement.

Even if the Court had not already dismissed the prospective portion of Claim 3, prospective relief would not be appropriate here. It is a blackletter principle that prospective relief is only

appropriate where plaintiff shows a *prospective* injury. *See, e.g.*, *Ghedi v. Mayorkas*, 16 F.4th 456, 464 (5th Cir. 2021) (to obtain prospective relief, a plaintiff must "show that there is a real and immediate threat of repeated injury" (internal citations and quotation marks omitted)); *see also, e.g.*, *Wion v. Martin*, 24 F.3d 236 (5th Cir. 1994) (holding that "[plaintiff's] claim praying for an injunction relieving him of conditions of a special penalty cell restriction is moot because he is no longer subject to such restriction") (per curiam); *Carter v. Orleans Par. Pub. Schs.*, 725 F.2d 261, 263 (5th Cir. 1984) (holding that a claim for injunctive relief was "moot" where "none of [plaintiff's] children remained in" the classes he objected to). Mr. Dierlam cannot show a real and immediate threat of repeated injury for the same reasons this Court determined his prospective claims are moot—the Religious Exemption Rule and TCJA negate any threat of future harm.

Mr. Dierlam attempts to identify a purported prospective injury based on a notice of proposed rulemaking issued by HHS. *See* Pl.'s MSJ 4 & n.1 (citing Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47,824 (Aug. 4, 2022)). Any alleged injury caused by the notice of proposed rulemaking cannot relate to the lone claim at issue here: the retrospective portion of Claim 3. Claim 3 addresses the alleged burden on Mr. Dierlam of the contraceptive coverage requirement, not this notice of proposed rulemaking, which did not exist when the third amended complaint was filed. 3AC ¶¶ 128-29; *see also* 3AC ¶ 294. In any event, there is no injury caused by the notice of *proposed* rulemaking because it is only a set of proposals for public comment; it does not impose any requirements.

Finally, Mr. Dierlam "request[s] the defendants pay all legal costs associated with this litigation." Pl.'s MSJ 7. However, "[u]nder the traditional 'American Rule,' each side bears the costs of its own attorney, unless a statute or contract provides otherwise." *Reagan v. U.S. Bank, Nat'l Ass'n*, No. CIV.A. H-13-43, 2013 WL 3323185, at *3 (S.D. Tex. July 1, 2013) (collecting

cases); *see also Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121 (2015). Mr. Dierlam identifies no statute or other source of law that would shift costs or fees here, nor has he substantiated any costs he may have incurred.

CONCLUSION

For the foregoing reasons, Plaintiff's motion should be denied to the extent that it seeks any relief other than $5626.22.

Dated: June 22, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2023, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system. Because Plaintiff is not registered on the CM/ECF system, I also served Plaintiff with a copy of the foregoing document by electronic mail.

Executed on June 22, 2023, in Washington, D.C.

/s/ Rebecca Kopplin
REBECCA KOPPLIN