

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ADAM MUSHERO,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil No. 90-0143 P
)	
H. ROLLIN IVES, in his official)	
capacity as Commissioner, Maine)	
Department of Human Services,)	
)	
Defendant)	

**RECOMMENDED DECISION ON MOTION FOR
CERTIFICATION OF PLAINTIFF CLASS**

In this declaratory judgment and injunctive relief action, the plaintiff challenges certain methods employed by the Commissioner of the Maine Department of Human Services to collect debts owed to the state under the Aid to Families with Dependent Children ("AFDC") program.¹ The plaintiff alleges that the Commissioner illegally utilizes a federal tax offset provision, which is designed to collect child-support arrearages,² to collect AFDC debts. The plaintiff asserts that this practice violates federal law and raises a claim under 42 U.S.C. § 1983. The plaintiff seeks, in part, (1) a declaration that the Commissioner's use of the federal tax offset program to collect AFDC debts violates federal law, (2) an order enjoining the Commissioner from using the federal offset program to collect such debts and (3) an order directing the Commissioner to refund to the plaintiff any money

¹ Such debts accrue against absent parents for payments made to their children before child-support orders are established. 19 M.R.S.A. § 495.

² 42 U.S.C. § 664.

collected illegally under the federal tax offset program. *See* Complaint ' VIII. Before the court now is the plaintiff's motion for certification of the following class:

[A]ll parents in the State of Maine who have or will have their federal income tax refunds offset under 42 U.S.C. ' 664 in order [to] pay the State of Maine debt for Aid to Families with Dependent Children that accrued pursuant to 19 M.R.S.A. ' 495 and that was or will be established pursuant to 19 M.R.S.A. ' 498.

Motion for Certification of Plaintiff Class (Docket Item 8).

In a motion for class certification, the plaintiff must show that the four prerequisites of Fed. R. Civ. P. 23(a) have been satisfied³ and that one of the three criteria of Rule 23(b) has been met. *Griffin v. Burns*, 570 F.2d 1065, 1072 (1st Cir. 1978); *Lessard v. Metropolitan Life Ins. Co.*, 103 F.R.D. 608, 610, 612 (D. Me. 1984). ``In general, Rule 23(a) should be liberally construed in order not to undermine the policies underlying the class action rule." *Lessard*, 103 F.R.D. at 610.

The Commissioner has conceded that he ``has acted on grounds generally applicable to the claims of the class," thus satisfying Rule 23(b)(2). *See* defendant's Memorandum in Partial Opposition to Plaintiff's Motion for Class Certification (``Opposition Memorandum") at 1. The Commissioner has also conceded that the numerosity and adequate representation requirements of Rule 23(a) have been met and offers no objection to the common questions of law or fact requirement. Opposition Memorandum at 1. The Commissioner's sole objection is that the plaintiff's claim is not typical of the claims of the class. The Commissioner seems to argue that the plaintiff's potential relief may differ from that of the proposed class members. He states that the plaintiff may have a proper avenue of relief if he sought timely review of his claim under Maine's Administrative Procedures Act, but that

³The four prerequisites are (1) numerosity, (2) common questions of law or fact, (3) typicality and (4) adequate representation.

some individuals in the proposed class would most likely not have pursued the same timely review. Consequently, the Commissioner argues, the potential claimants could only seek retroactive relief in violation of the Eleventh Amendment's sovereign immunity clause. The Commissioner's argument fails on three counts.

As an initial matter, it is settled law that exhaustion of a state's administrative remedies is not a prerequisite to a ' 1983 action. *Patsy v. Board of Regents*, 457 U.S. 496, 500-01, 516 (1982); *Miller v. Town of Hull*, 878 F.2d 523, 530 (1st Cir.), *cert. denied*, 110 S. Ct. 501 (1989). Because this action raises a ' 1983 claim, the plaintiff is free to seek appropriate relief in this court.

Second, the Commissioner has misconstrued the typicality requirement of Rule 23(a). This requirement states only that the claims of the representative party must be typical of the claims of the class. In the instant case, the plaintiff's claim and those of the proposed class arise from the same legal theory and the same practice or course of conduct, to wit, the Commissioner's allegedly improper use of the federal tax offset provision to collect AFDC debts. Whether or not the plaintiff is successful in his claim and the scope of any relief resulting therefrom is not yet at issue. Therefore, I find that the typicality requirement has been met. *See Wilcox v. Petit*, 117 F.R.D. 314, 318 (D. Me. 1987).

Finally, the court is not required to address the Eleventh Amendment immunity issue at this stage of the litigation. In *Wilcox*, a class certification case where the defendants asserted the sovereign immunity defense against the plaintiffs' claim for retroactive relief, this court found that

[r]egardless of the merits of Defendants' argument, the Court cannot and will not reach the question of sovereign immunity in this motion for class certification. There is ``nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."

Wilcox v. Petit, 117 F.R.D. at 319 (quoting *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177 (1974)).

As noted above, the Commissioner has conceded that his actions are generally applicable to the claims of the proposed class pursuant to Rule 23(b)(2). `` If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief had been requested, the action usually should be allowed to proceed under [Rule 23](b)(2)." 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, ' 1775 at 470 (1986).'

' The Advisory Committee note regarding Rule 23(b)(2) instructs that

[t]his subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. . . . The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Fed. R. Civ. P. 23, Supplementary Note of Advisory Committee at 65 (1990).

The plaintiff and proposed class members here do not seek only monetary relief or relief related solely to past violations of federal law.⁵ They seek primarily prospective declaratory and injunctive relief against an allegedly continuing violation of federal law, and may also be entitled to notice relief pending the outcome of the action. If, upon consideration of the merits of this case, the court finds that an additional request for retrospective monetary relief is impermissible, it will not be awarded. This Eleventh Amendment concern should not and does not prevent certification of the proposed class.

For the foregoing reasons, I recommend that the plaintiff's motion for certification of the defined class be GRANTED and that plaintiff's counsel be DIRECTED to submit a proposed order confirming the class as defined in his motion.

⁵ Such relief has been found to offend the Eleventh Amendment. *See, e.g., Green v. Mansour*, 474 U.S. 64, 73-74 (1985); *Edelman v. Jordan*, 415 U.S. 651, 677 (1974).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 8th day of January, 1991.

*David M. Cohen
United States Magistrate Judge*