UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CARL OLSEN,

Plaintiff,

v.

MARK FILIP, Acting Attorney General, MICHELE LEONHART, Acting Administrator, United States Drug Enforcement Administration, and HILLARY CLINTON, United States Secretary of State[1]

Defendants.

Civil No. 4:08-cv-00370 (RWP/RAW)

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

Plaintiff has filed for a Temporary Restraining Order, seeking the same relief he seeks in his complaint and in his previously-filed motion for a preliminary injunction. Plaintiff's newest motion and request for relief are based on two things: (1) the Drug Enforcement Administration's ("DEA") letter in response to his administrative petition; and (2) the Defendants' characterization of his claim as a rescheduling claim, rather than a claim to remove marijuana from Schedule I of the Controlled Substances Act ("CSA"). See Pl.'s Mot. at 3. Neither ground entitles Plaintiff to any relief at all, let alone expedited relief.

In order to receive a temporary restraining order, Plaintiff must show: (1) the movant's probability of success on the merits; (2) the threat or irreparable harm to the movant absent the injunction; (3) the balance between the harm to the movant and the harm that the injunction

[1] Mark Filip, Acting Attorney General replaces former Attorney General Michael B. Mukasey and Hillary Clinton replaces Condoleeza Rice as Secretary of State pursuant to Federal R. Civ. P. 25(d).

would inflict on other parties; and (4) the public interest. Wachovia Securities, L.L.C. v. Stanton, 571 F. Supp. 2d 1014, 1032 (N.D. Iowa 2008), citing Dataphase Sys. Inc. v. CL Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981). Plaintiff does not even attempt to meet these factors. Rather, Plaintiff's motion simply re-argues for the ultimate relief sought in this action.

The two reasons for Plaintiff's motion for a temporary restraining order are unavailing. First, Plaintiff is not entitled to receive a temporary restraining order simply because the DEA has issued a decision on his petition. Plaintiff's lawsuit challenges the listing of marijuana as a Scheduled I controlled substance under the CSA – a claim that he raised with the DEA, as well. In a previous case, this Court recognized that it lacks jurisdiction over a claim to remove marijuana from Schedule I of the CSA because "the CSA provides an administrative remedy for any interested party to request that a substance be deleted entirely from the CSA or be transferred to a less restrictive schedule." Olsen v. Gonzales, No. 07-cv-23 (S.D. Iowa), July 16, 2007 Order at 17 (Ex. 1 to Defs.' Opp. to Pl.'s Mot. for Prelim. Inj.), aff'd sub nom. Olsen v. Mukasey, 541 F.3d 827 (8th Cir. 2008). In this action, Defendants argued that Plaintiff could not pursue his claim in any judicial forum because he first had to exhaust his administrative remedies with the DEA.

During the pendency of this lawsuit, the DEA issued a decision on Plaintiff's request to remove marijuana from Schedule I of the CSA. Therefore, Defendants' argument that there is no federal court jurisdiction over Plaintiff's claim has been overtaken by events, as Plaintiff is now allowed to seek review of the DEA's decision. Such review is appropriately brought under the Administrative Procedure Act, 5 U.S.C. § 704, which permits judicial review of agency actions that are either "made reviewable by a statute [or] final agency action for which there is no other

adequate remedy in a court." Jurisdiction over DEA's decision, however, is limited to the courts of appeals. See 21 U.S.C. § 877.

Plaintiff currently argues that he is not seeking to challenge the DEA's letter decision regarding removing marijuana from Schedule I of the CSA. Pl.'s Mot. at 1. However, if Plaintiff is not seeking review of the DEA letter decision, no court has jurisdiction over his claim because he has failed in the requirement of petitioning the agency for relief in the first instance. See United States v. Burton, 894 F.2d 188, 192 (6th Cir. 1990) ("it has repeatedly been determined, and correctly so, that reclassification is clearly a task for the legislature and the attorney general and not a judicial one"); United States v. Middleton, 690 F.2d 820, 823 (11th Cir. 1982) ("The determination of whether new evidence regarding either the medical use of marijuana or the drug's potential for abuse should result in a reclassification of marijuana is a matter for legislative or administrative, not judicial, judgment."). Moreover, Plaintiff's argument that he is not challenging the DEA letter decision ignores the APA requirement that a litigant challenge "final agency action," and that if there is no final agency action, the Court lacks jurisdiction over the dispute. See Doe v. Gonzalez [sic], No. 06-966, 2006 WL 1805685 at *23 (D.D.C. June 29, 2006), aff'd sub nom. Doe v. Drug Enforcement Admin., 484 F.3d 561 (D.C. Cir. 2007).[2]

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[2] Some courts have allowed claims under the CSA to proceed in district court, notwithstanding 21 U.S.C. § 877. See Monson v. Drug Enforcement Admin., 522 F. Supp. 2d 1188, 1194-95 (D.N.D. 2007) (maintaining jurisdiction over claim seeking declaratory judgment that growing of industrial hemp was not covered by the CSA); PDK Labs, Inc. v. Reno, 134 F. Supp. 2d 24, 29 (D.D.C. 2001) (finding that letter sent to private party did not constitute final agency action and retaining jurisdiction over case). Defendants proffer that the reasoning of Doe v. Gonzalez [sic] offers the most persuasive reasoning on this issue, as it did a lengthy analysis of the interplay between the CSA, final agency action and jurisdiction. See Doe, 2006 WL at *18-23. There, the court concluded that, "if the DEA's . . . determination was not 'final agency

Nor is relief warranted due to Plaintiff's second argument in support of a temporary restraining order, that Defendants erroneously characterize his claim as a "reclassification" claim. Plaintiff seeks to remove marijuana from Schedule I of the CSA. Such an occurrence would necessarily involve reclassification of marijuana (whether to another schedule or by removing it from the schedules), as it would no longer be a Schedule I substance. Characterizing Plaintiff's claim as one of reclassification or one of removal of marijuana from the controlled substances list altogether is a distinction without a difference, as the semantics of Plaintiff's claim do nothing to change the legal arguments raised by Defendants against the claim.

Finally, Plaintiff seeks as alternative relief, a stay or waiver of time limits of any right to judicial review under 21 U.S.C. § 877. Pl.'s Mot. at 3. Such relief is unnecessary, as Plaintiff has already filed a petition in the Eighth Circuit challenging the DEA's December 19, 2008 letter. See Doc. No. 28.

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action' for the purposes of the APA, federal jurisdiction and judicial review are inappropriate. If the DEA's . . . denial was 'final agency action' for purposes of the APA, the explicit language of 21 U.S.C. § 877 and other considerations support a finding that federal jurisdiction vests," but only in the courts of appeals. Id. at *23. In affirming this decision, the D.C. Circuit rejected the reasoning of district courts that have exercised jurisdiction over disputes under the CSA. Doe, 484 F.3d at 568-69.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for a temporary restraining order should be denied.

Dated: January 26, 2009

Respectfully submitted,

MICHAEL F. HERTZ
Acting Assistant Attorney General

MATTHEW WHITAKER
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__/s/ Tamara Ulrich___________
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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2009, a true and accurate copy of the foregoing document, Defendants' Opposition to Plaintiff's Motion for a Temporary Restraining Order was filed electronically with the Clerk of Court through ECF and that ECF will send a Notice of Electronic Filing to the following: Carl Olsen, Pro Se.

Dated: January 26, 2009

/s/ Tamara Ulrich_______
TAMARA ULRICH