

FILED

MAY 10 2021

22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
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STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

**MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)**

MARK BOLES, individually)
and on behalf of all others)
similarly situated, et al.,)

Plaintiffs,)

No. 2122-CC00713

vs.)

Division No. 19

CITY OF ST. LOUIS,)
MISSOURI, et al.,)

Defendants.)

ORDER

Plaintiffs Mark Boles, Nicholas Oar, Kos Semonski, Christian Edward Stein III, individually and on behalf of all others similarly situated, ("Plaintiffs")'s Motion for Temporary Restraining Order and Preliminary Injunction and for Immediate Declaratory Judgment was called, heard, and submitted. The Court now rules as follows.

In their First Amended Petition, Plaintiffs allege, in the alternative, a claim for refund under § 139.031 RSMo (Count I), a claim for substantive due process damages under the Fourteenth Amendment for refusal to pay refunds (Count II), a claim for substantive due process damages under the Fourteenth Amendment for instructing employers to violate the law (Count III), a claim for preliminary and permanent injunctive relief (Count IV), a claim regarding unreasonable search and seizure under the Fourth Amendment (Count V), a claim for equal protection damages under the Fourteenth Amendment (Count VI), a claim for preliminary and

injunctive relief under the Fourteenth Amendment Equal Protection Clause (Count VII), and a claim for declaratory judgment under the Hancock Amendment (Count VIII) against Defendants City of St. Louis, Missouri and Gregory F.X. Daly, in his official capacity, as Collector of Revenue for the City of St. Louis ("Collector") (collectively "Defendants"). For their damages claims, Plaintiffs seek class action status. Class 1 includes those who have already submitted claim forms including teleworking days to the Collector. Class 2 includes those who have not yet submitted claim forms including teleworking days.

Plaintiffs argue that historically employers based in the City and/or with locations in the City have withheld the 1% earnings tax from the total wages paid to nonresidents assigned to work in locations in the City. Then each tax season, nonresidents who spent time working outside the City during the prior tax year applied for and received a refund for a pro-rated amount of their withholdings based on the number of days they worked outside the City. Plaintiffs argue the custom and practice of issuing these refunds follows the plain language of the earnings tax ordinance. Plaintiffs argue now for Tax Year 2020, without any changes to the law, Defendants changed the policy by changing their forms such that employees and employers are directed not to certify teleworking days. Teleworking is defined as days working from a location outside the City for a City-based employer, but not while traveling for that employer for a business purpose. Plaintiffs argue that Defendants have sent rejection letters to those taxpayers who applied for refunds including those days spent teleworking. Plaintiffs argue some nonresidents have not filed for refunds for teleworking days precisely because the forms direct them and their employees not to.

In their Motion, Plaintiffs move for a temporary restraining order against Defendants preventing them from directly or indirectly:

- A. Publicizing information through any means, including the providing of sample forms such as Defendant Collector's 2020 E-1R and E-1RV (as they exist now), stating in any manner that nonresidents may not apply for refunds of earnings tax for days in which the taxpayer was teleworking or otherwise not physically present in the City for such days, regardless of the reason.
- B. Requiring the submission of the 2020 version of Form E-1R and new Form E-1RV (as they exist now), as a precondition for nonresidents to seek a refund of earnings taxes withheld from their pay for days they spent working outside the City.

Plaintiffs also seek preliminary injunctive relief asking the Court to order Defendants to:

- C. Immediately promulgate a new Form E-1R for tax year 2020 matching in substance and language the Forms E-1R promulgated by the Collector for tax years 2015-2019, and
- D. Immediately publicize on the collector's website instructions consistent therewith.

Plaintiffs ask the Court to order no bond, or minimal bond in the amount of \$100. Plaintiffs also seek "immediate declaratory relief" asking the Court to declare the new policy and forms unlawful under the Hancock Amendment because the City has imposed a new or expanded tax base without a vote of the people.

I. Request for Temporary Restraining Order and Injunctive Relief.

Plaintiffs argue they have demonstrated irreparable harm because the time to file the forms requesting a refund is passing,

as they are currently due on May 17, 2021. Plaintiffs argue if the Court does not change the forms now, there will be too little time for members of Class 2 to file for refunds. Plaintiffs argue Plaintiff Stein, and other similarly situated, cannot file the refund request form because the form says he cannot claim teleworking days. Plaintiffs also argue they will be successful on the merits. They argue under § 139.031.4 RSMo, the Court has the power to make such orders as may be just and equitable. Plaintiffs acknowledge that § 139.031 RSMo requires a protest when taxes are paid, but argue there was nothing to protest when the taxes were paid because at the time the Collector had not yet refused to pay the refund for teleworking days pursuant to its then status quo procedures. Plaintiffs argue the first notice received by taxpayers was when they began sending in their forms and received rejection letters. Plaintiffs argue it would be absurd to require a protest in such circumstances. Plaintiffs argue if the Court finds a protest is required, Plaintiffs still have a remedy under 42 U.S.C. § 1983. Plaintiffs also argue they will succeed on their substantive due process and equal protection claims.

Plaintiffs argue they are not asking for final resolution of case, but are only seeking change of the forms. Plaintiffs argue the Court should define the status quo as not when the case was filed, but instead the status quo for Tax Year 2019. Plaintiffs argue if the Court disagrees, the Plaintiffs can demonstrate the higher test for disrupting the status quo.

Defendants argue in opposition that Plaintiffs are trying to argue the merits of their case in the present motion. Defendants argue all Plaintiffs clearly have an adequate remedy at law under § 139.031 RSMo. The statute allows taxpayers to obtain a refund of earnings tax paid under protest. Therefore, equitable relief

should not be granted. Defendants argue there is a very open question of law as to the interpretation of § 92.111 RSMo. The statute says services rendered in the City, not just performed in the City. In addition, Defendants argue the case law is clear that there is no such thing as a class action refund case under § 139.031 RSMo. Defendants also argue there is no irreparable harm shown here. Defendants argue three Plaintiffs have done what Plaintiff Stein says he cannot do, request a refund even with the new form for Tax Year 2020. Defendants argue there has been zero evidence provided showing that Plaintiff Stein or anyone in the public is confused on this issue. The form used during the refund process in no way infringes on any taxpayers' right to protest the payment of the earnings tax, which will be resolved by the courts. Defendants contend Plaintiffs can still protest for Tax Year 2020. Defendants also argue the remaining factors support denying the injunctive relief sought.

A trial court is authorized to issue three types of orders granting relief in an injunction proceeding: (1) a temporary restraining order, (2) a preliminary injunction, and (3) a permanent injunction. St. Louis Concessions, Inc. v. City of St. Louis, 926 S.W.2d 495, 497 (Mo. App. E.D. 1996). The purpose of the first two is to preserve the status quo until the trial court adjudicates the merits of the claim for a permanent injunction. St. Louis County v. Village of Peerless Park, 726 S.W.2d 405, 410 (Mo. App. E.D. 1987). Injunctive relief is discretionary. Burney v. McLaughlin, 63 S.W.3d 223, 234 (Mo. App. S.D. 2001). "An injunction will not be awarded where there is an adequate remedy at law." Eberle v. State, 779 S.W.2d 302, 304 (Mo. App. W.D. 1989.)

Rule 92.02(a) states that the Court shall not grant a temporary restraining order unless "the party seeking relief

demonstrates that immediate and irreparable injury, loss, or damage will result in the absence of relief." Temporary restraining orders are emergency measures. Furniture Mfg. Corp. v. Joseph, 900 S.W.2d 642, 646 (Mo. App. W.D. 1995). In determining whether a restraining order or a preliminary injunction should issue, the Court must weigh and determine four factors: (a) the threat of irreparable harm that a plaintiff would face absent an injunction; (b) the balance between this harm and the injury that an injunction's issuance could inflict on other interested parties; (c) the plaintiff's probability of ultimately being successful on the merits of the case; and (d) the public interest in granting an injunction. See State ex rel. Director of Revenue v. Gabbert, 925 S.W.2d 838, 839 (Mo. banc 1996).

Here, the Court finds that Plaintiffs have an adequate remedy at law under § 139.031 RSMo, such that injunctive relief is unavailable.

"Section 139.031 establishes a mechanism for a taxpayer to protest taxes assessed against the taxpayer." Metts v. City of Pine Lawn, 84 S.W.3d 106, 109 (Mo. App. E.D. 2002). "The procedure for a taxpayer to protest taxes assessed against him or her established by section 139.031 applies to taxes challenged as violations of the Hancock Amendment." Blankenship v. Franklin County Collector, 619 S.W.3d 491 (Mo. App. E.D. 2021). The Missouri Supreme Court has "consistently held that taxes, once paid, can only be recovered through proper statutory proceedings, and that the statutes must be adhered to." Lett v. City of St. Louis, 948 S.W.2d 614, 620 (Mo. App. E.D. 1996) (internal quotations omitted). "Section 139.031 provides the taxpayer with an exclusive remedy, and therefore, failure to strictly comply with this section bars

recovery of the controverted taxes.” Pac-One, Inc. v. Daly, 37 S.W.3d 278, 281 (Mo. App. E.D. 2000).

The injunctive relief sought in Plaintiffs’ Motion pertains to the forms currently used by the Collector for refunds of the earnings tax. No evidence has been presented showing that anything on the forms prevent Plaintiffs or other taxpayers from following the procedure set out in § 139.031 RSMo. Indeed, the forms used by the Collector for Tax Year 2020 **seem to put taxpayers on notice that the Collector is not considering telework days for a refund.**

The Court also finds that Plaintiffs have not demonstrated a threat of irreparable harm absent injunctive relief. Whether the refund request forms are ordered changed by the Court or not, the remedies under § 139.031 RSMo remain available to all taxpayers. Nothing prevented Class 2 Plaintiffs from doing what the Class 1 Plaintiffs have already done, submitting a form requesting a refund for teleworking days. Further, the Court finds that maintaining the status quo would be to maintain the use of the current refund request forms for Tax Year 2020, not to change them as Plaintiffs ask the Court to do.

In addition, the Court finds Plaintiffs have not demonstrated their probability of ultimately being successful on the merits of the case.

Accordingly, the Court finds that a temporary restraining order and/or preliminary injunction should not be issued.

II. Request for Immediate Declaratory Judgment.

At the hearing on the Motion, Plaintiffs conceded that the request for declaratory judgment at this stage in the litigation is premature.

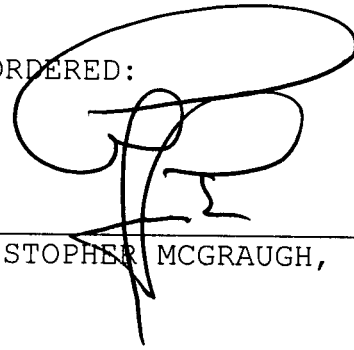
The Court agrees it cannot consider the merits of the claim for declaratory judgment upon the present motion. Defendants have

not even had opportunity to file a responsive pleading to Plaintiffs' First Amended Petition.

ORDER

THEREFORE, it is Ordered and Decreed that Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and for Immediate Declaratory Judgment is hereby DENIED.

SO ORDERED:

A handwritten signature in black ink, appearing to be 'C. McGraugh', written over a horizontal line. The signature is stylized and somewhat cursive.

CHRISTOPHER MCGRAUGH, Judge

Dated: May 10, 2021