

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JACK BEAM and RENEE BEAM,

Plaintiffs,

v.

MATTHEW S. PETERSEN, FEDERAL
ELECTION COMMISSION CHAIRMAN,

Defendant.

Civil No. 07cv1227

Judge Rebecca R. Pallmeyer

Magistrate Judge Cole

DEFENDANT'S MEMORANDUM
IN SUPPORT OF MOTION TO STRIKE
JURY DEMAND

**DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION
TO STRIKE PLAINTIFFS' JURY DEMAND**

The Federal Election Commission ("Commission" or "FEC") moves this Court to strike the jury demand in the plaintiffs' second amended complaint because the plaintiffs have no constitutional or statutory right to a jury trial on their claim that the Commission violated the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422 ("RFPA"). *See* Fed. R. Civ. P. 39(a)(2) (no jury trial when a court, "on motion or on its own," finds "no federal right to a jury trial"). Waivers of sovereign immunity are strictly construed, and "[i]t is clear that the federal government . . . is not subject to trial by jury unless it specifically consents." *Marcella v. Brandywine Hosp.*, 47 F.3d 618, 621 (3d Cir. 1995) (citing *Lehman v. Nakshian*, 453 U.S. 156, 160-61 (1981)). Because the RFPA does not affirmatively and unambiguously grant the plaintiffs a right to a trial by jury in this case against a federal agency, the Court should strike the plaintiffs' demand for a jury trial.

**THE PLAINTIFFS HAVE NO RIGHT TO A JURY TRIAL
ON THEIR FINANCIAL PRIVACY ACT CLAIM**

The plaintiffs allege that the Commission obtained their financial records from the Department of Justice without the certification that the RFPA requires for intra-governmental transfers of certain kinds of financial information. *See* 12 U.S.C. § 3412(a); *Beam v. Mukasey*, No. 07 C 1227, 2008 WL 4614324 (N.D. Ill. Oct. 15, 2008) (dismissing all counts except the RFPA claim). The plaintiffs' second amended complaint includes a jury demand on this claim. (Docket No. 91.) However, neither the Seventh Amendment to the United States Constitution nor any federal statute grants the plaintiffs a right to a jury trial on their claim. *See* Fed. R. Civ. P. 38(a) (citing those sources as the foundation for a demand for a jury trial); *Rachal v. Ingram Corp.*, 795 F.2d 1210, 1215 (5th Cir. 1986) (Rule 39(a), entitled "When a Demand Is Made," does not grant litigants any new or independent right to a jury trial).

The Seventh Amendment right to trial by jury does not apply in civil actions against the federal government, the "sovereign" for purposes of the sovereign immunity doctrine. *Lehman*, 453 U.S. at 160. *Accord, e.g., Osborn v. Haley*, 549 U.S. 225, 252 (2007); *Holmes v. Potter*, 384 F.3d 356, 362 (7th Cir. 2004); *Statland v. United States*, 178 F.3d 465, 472 (7th Cir. 1999). Sovereign immunity shields not only the federal government as a whole, but also its agencies, such as the FEC, and, as a general rule, their officers acting in their official capacities. *Normandy Apts., Ltd. v. U.S. Dep't of HUD*, 554 F.3d 1290, 1295 (10th Cir. 2009); *see also Whittle v. United States*, 7 F.3d 1259, 1262 (6th Cir. 1993) (agencies immune absent a showing of a waiver of sovereign immunity); *Dawson v. Merit Systems Protection Bd.*, 712 F.2d 264, 267-68 (7th Cir. 1983) (same in context of award of attorney's fees against agency). In this case, the plaintiffs "sued the FEC through its chairman," *Beam v. Petersen*, 2010 WL 476018, at *1 (N.D. Ill. Feb. 4, 2010), so the Seventh Amendment grants these plaintiffs no right to a jury trial.

Moreover, no statute provides a basis for a jury trial in this case. The analysis proceeds in two steps. First, because a federal agency can only be sued if Congress has consented to the action, *Baker v. Runyon*, 114 F.3d 668, 671 (7th Cir. 1997), an applicable statute must waive the government's sovereign immunity. The plaintiffs cite 28 U.S.C. § 1331, the federal-question jurisdictional statute. Section 1331 does not, however, waive sovereign immunity. *Whittle*, 7 F.3d at 1262. They also invoke the RFPA's remedies provision, 12 U.S.C. § 3417, which permits recovery of damages and attorney's fees. That provision, along with the RFPA's jurisdictional provision, 12 U.S.C. § 3416,¹ and its definitional provision, 12 U.S.C. § 3401,² together do constitute a limited waiver of the sovereign immunity in a suit by a financial institution customer alleging that a federal agency improperly "obtain[ed] or disclos[ed]" the customer's financial records. *See Raikos v. Bloomfield State Bank*, 703 F. Supp. 1365, 1367 (S.D. Ind. 1989) ("By allowing recovery . . . from the government agency to whom disclosure is made, the [Right to Financial Privacy] Act operates as a limited waiver of sovereign immunity."); Richard Cordero, Annotation, *Construction and application of Right to Financial Privacy Act of 1978*, at § 19[b], 112 A.L.R. Fed 295 (1993). This limited waiver of sovereign immunity, however, is only the first step of the relevant inquiry and does not create a right to a jury trial in an action against a federal agency.

The second step is to examine the precise scope of the RFPA's waiver of sovereign immunity. The Supreme Court has repeatedly explained that, in construing the conditions of the government's waiver of immunity, the federal courts may not extend the waiver beyond what the

¹ Section 3416 states: "An action to enforce any provision of this chapter may be brought in any appropriate United States district court without regard to the amount in controversy within three years from the date on which the violation occurs or the date of discovery of such violation, whichever is later."

² *See especially* 12 U.S.C. § 3401(3): "'Government authority' means any agency or department of the United States, or any officer, employee, or agent thereof."

statutory language requires. *E.g.*, *Lane v. Pena*, 518 U.S. 187, 192 (1996); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992). “[T]he government has the power to attach conditions to its consent to be sued,” *Kuznitsky v. United States*, 17 F.3d 1029, 1031 (7th Cir. 1994), and “‘a plaintiff has a right to a jury trial only where that right is one of the terms of the [government’s] consent to be sued.’” *Holmes v. Potter*, 384 F.3d at 362 (internal citation omitted); *see also, e.g.*, *Lehman*, 453 U.S. at 160; *In re Young*, 869 F.2d 158, 159 (2d Cir. 1989). *Cf. Baker v. Runyan*, 114 F.3d at 671 (“That Congress has waived the Postal Service’s sovereign immunity does not answer the question of whether plaintiff is entitled to punitive damages under [Title VII of the Civil Rights Act of 1964, as amended.]”); *Beneficial Consumer Discount Co. v. Poltonowicz*, 47 F.3d 91 (3d Cir. 1995) (holding that the RFPA’s waiver of sovereign immunity did not encompass allowing suit against the IRS by a financial institution that had given customer information to the IRS).

In *Lehman*, the leading case on sovereign immunity and the right to a jury trial, the Supreme Court held that a federal employee suing under the Age Discrimination in Employment Act (“ADEA”) had no right to a jury trial. 453 U.S. at 168-69. The Court noted that “[w]hen Congress has waived the sovereign immunity of the United States, it has almost always conditioned that waiver upon a plaintiff’s relinquishing any claim to a jury trial.” *Id.* at 161.³ But the Court’s decision ultimately rested on an examination of the ADEA’s language: “[T]he plaintiff in an action against the United States has a right to trial by jury only where Congress has affirmatively and unambiguously granted that right by statute.” *Id.* at 168. Because the ADEA did not affirmatively grant a right to jury trial to federal employees, “it is unnecessary to go beyond the language of the statute itself to conclude that Congress did not intend to confer a

³ *See also* 28 U.S.C. § 2402 (stating the general rule that any action against the United States (under 28 U.S.C. § 1346) “shall be tried by the court without a jury”).

right to trial by jury.” *Id.* at 165. *Accord, e.g., Lumpkin v. Brown*, 898 F. Supp. 1263, 1271 n.5 (N.D. Ill. 1995). *See also Lehman*, 453 U.S. at 165 (“Rule 38(a) requires an affirmative statutory grant of the right where, as in this case, the Seventh Amendment does not apply.”).

“*Lehman’s* holding is not limited to cases under the [ADEA].” *KLK, Inc. v. United States Dep’t of Interior*, 35 F.3d 454, 456 n.3 (9th Cir. 1994). The Supreme Court “discussed the right to a jury trial in a broad, general sense, and its analysis has been applied in a wide variety of contexts.” *Id.* Thus, the lower federal courts have found no right to a jury trial in other actions against the federal government when Congress has permitted a limited waiver of the government’s sovereign immunity but has not expressly and unambiguously provided for a jury trial. *See, e.g., In re Young*, 869 F.2d at 159 (Postal Service employee not entitled to a jury trial on claim of wrongful discharge where federal statute did not contain language granting a jury trial); *Steinhardt v. Potter*, 326 F. Supp. 2d 449, 451-52 (S.D.N.Y. 2004) (government employees not entitled to jury trial under the Family and Medical Leave Act); *Miller v. Runyon*, 88 F. Supp. 2d 461, 473-74 (M.D.N.C. 2000) (no right to jury trial under section 504 of the Rehabilitation Act); *Nyman v. FDIC*, 967 F. Supp. 1562, 1573-1575 (D.D.C. 1997) (FDIC employee not entitled to jury trial on her Equal Pay Act claim).

The RFPFA includes no provision for a jury trial against an agency of the United States. The statute’s jurisdictional provision, 12 U.S.C. § 3416, states only that an action to enforce any provision of the RFPFA may be brought in any appropriate United States district court. And the statute’s exclusive remedies provision also does not mention a right to a jury trial. 12 U.S.C. § 3417. Under *Lehman* and other precedents, the lack of an express grant of that right is fatal to the plaintiffs’ jury demand here. A court “is not concerned with language *prohibiting* a jury trial, but instead looks for language *granting* the right to a trial by jury.” *Berman v. American Nat. Red*

Cross, 834 F. Supp. 286, 290 (N.D. Ind. 1993) (emphasis in original). Congress included no such language in the RFPA.

CONCLUSION

“[A]ccepted principles of sovereign immunity require that a jury trial right be clearly provided in the legislation creating the cause of action.” *Lehman*, 453 U.S. at 162 n.9.

Because the Right to Financial Privacy Act does not provide that right, the Federal Election Commission respectfully requests that the Court strike the plaintiffs’ demand for a jury trial.

Respectfully submitted,

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March 29, 2010

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The Federal Election Commission ("Commission" or "FEC") and its chairman move this Court to strike the plaintiffs' demand for a jury trial in their second amended complaint (Docket No. 91) on their claim that the Commission violated the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422 ("RFPA"). The Court should strike the demand because the plaintiffs have no constitutional or statutory right to a jury trial on their RFPA claim: The Seventh Amendment does not apply in civil actions against the federal government and the RFPA does not provide a right to a jury trial. Counsel for plaintiffs opposes this motion.

PLEASE TAKE NOTICE that Defendant's Motion to Strike Plaintiffs' Jury Demand will be presented to the Honorable Rebecca R. Pallmeyer on Tuesday, April 6, 2010, at 9 a.m., or as soon thereafter as counsel may be heard.

Respectfully submitted,

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