

UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

KELLY BOWLIN on behalf of herself and all others similarly situated,)	Case No. 4:04-cv-03218
)	
)	
Plaintiffs,)	
)	
v.)	BRIEF IN SUPPORT OF MOTION
)	TO CERTIFY CLASS
NANCY MONTANEZ, as the Director of the Nebraska Department of Health and Human Services,)	(Class Action)
)	
)	
Defendant.)	

INTRODUCTION

Plaintiffs bring this action for declaratory and injunctive relief under 42 U.S.C. § 1983 on behalf of themselves and a class of needy Nebraska parents and other caretaker relatives, challenging the Defendant’s refusal to provide them with Transitional Medical Assistance (TMA) once they have become otherwise ineligible for Medicaid because of their earned income. Plaintiffs and the proposed class members allege that they are among those covered by the language of 42 U.S.C. § 1396u-1, a section of the Medicaid Act which requires certain people to be treated as recipients of Aid to Families with Dependant Children (AFDC), thereby making them eligible for TMA benefits under the provisions of 42 U.S.C. § 1396r-6 in the circumstances of this case.

Plaintiffs, through this motion, seek to have the class of Plaintiffs certified in this case pursuant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure. Plaintiffs meet all of the requirements for class certification including that: (1) the number of class members is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the Plaintiff class; (3) the claims of the named Plaintiffs are typical of the claims of

the Plaintiff class; (4) the named Plaintiffs will fairly and adequately protect the interests of the class; and (5) the Defendant's conduct was applicable to the class and final injunctive or corresponding declaratory relief is requested for the class as a whole.

ARGUMENT

The named Plaintiffs seek to represent a class consisting of:

All caretaker relatives in Nebraska with earned income: a) who have received Medicaid under the medically needy category without a spend down for at least three of the six months prior to having their Medicaid benefits terminated due to their earned income; b) who, but for their earned income would continue to receive Medicaid under the medically needy category without a spend down; and c) who have not been or will not be afforded the transitional Medicaid benefits provided for in 42 U.S.C. § 1396r-6.

Because the proposed class satisfies the requirements of Rule 23(a) and (b) and because class certification is essential to the fair and efficient adjudication of this controversy, Plaintiff's motion for class certification should be granted.

A. The Class Is So Numerous That Joinder of All Members Is Impracticable.

Rule 23(a)(1) of the Federal Rules of Civil Procedure requires that the class be "so numerous that joinder of all members is impracticable." Several factors are relevant to this inquiry, "the most obvious of which is, of course, the number of persons in the proposed class." *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 559 (8th Cir. 1982). "In addition to the size of the class, the court may also consider the nature of the action, the size of the individual claims, the inconvenience of trying individual suits, and any other factor relevant to the practicability of joining all the putative class members." *Id* at 559-560. "There are no arbitrary rules regarding the necessary size of classes," *Paxton*, 688 F.2d at 559, but "courts generally follow the rule of thumb that a class over forty persons is sufficiently 'numerous' for Rule 23 purposes." *Richter v. Bowen*, 669 F.Supp. 275, 281 (N.D. Iowa 1987); see, e.g., *Bradford v. Agco Corp.*, 187 F.R.D. 600 (W.D. Mo. 1999) (certifying a class of 120-160). Plaintiffs are not required to "specify an

exact number or prove the identity of each class member,” but must only “show a reasonable estimate of the number of class members.” *Morgan v. United Parcel Serv. of America, Inc.*, 169 F.R.D. 349, 355 (E.D. Mo. 1996). The Defendant has estimated that there are 764 caretakers that meet the class definition up to April 30, 2004. Exhibit 1, pg. 2. She also estimates that an average of 85 caretakers are added to the class each month. *Id.* This number clearly satisfies the numerosity requirement set forth by Rule 23(a)(1).

Plaintiffs and the class members are poor individuals. It would be impracticable for them to obtain legal services on an individual basis for their individual claims, and hence, their rights under the Medicaid Act are likely to go unvindicated without a class action. Class certification is appropriate because it would maximize the available legal resources and provide for uniform redress of the class members’ common grievances against the Defendant. Finally, Plaintiff seeks to represent a class of persons not all of whom yet have been identified. Thus, “joinder of unknown persons is impracticable.” *Ranschburg v. Toan*, 540 F.Supp. 745, 747 (W.D. Mo. 1982).

B. There Are Questions of Law And Fact Common To The Plaintiff Class.

Rule 23(a)(2) requires that there be questions of law or fact common to the class; however, not every question of law or fact needs to be common to all class members. The commonality requirement may be satisfied “where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated.” *Paxton*, 688 F.2d at 561, quoting *American Finance Sys., Inc. v. Harlow*, 65 F.R.D. 94, 107 (D. Md. 1974). In *Paxton*, the plaintiffs alleged employment discrimination based on race. Finding an abuse of discretion, the Eighth Circuit overturned the District Court’s refusal to certify a class of black persons denied promotions or given lesser promotions on

account of their race. Although discrimination “will affect individual employees in different ways because of their diverse qualifications and ambitions,” the court found those “factual variations are not sufficient to deny class treatment to the claims that have a common thread of discrimination.” 688 F.2d at 561.

Similarly, in *Nemnich v. Stangler*, 1992 WL 178963 (W.D. MO. 1992), the plaintiffs challenged changes to Missouri’s Medicaid dental coverage. The court certified a class of Medicaid recipients aged 21 years or over whose treatments no longer met the criteria for dental coverage, “who have been or will be eligible for Medicaid and whose physicians or dentists have or will in the future prescribe their treatment as medically necessary dental services.” 1992 WL 178963 at *6. Because legal questions surrounding the defendant’s conduct were common to the class, the court found it of no import that “the class members may suffer different degrees of harm.” 1992 WL 178963 at *5.

The claims of the Plaintiffs in this case are far more linked than those of the plaintiffs in *Paxton*, where the alleged bad acts took place at different times and in different ways. This case involves only a question of law, whether they fall within the ambit of 42 U.S.C. § 1396u-1, and the relevant facts of each class member are identical. Each class member is a caretaker relative who has received Medicaid in at least three of the six months prior to losing their Medicaid coverage. Also, each class member has had their Medicaid benefits terminated by the Defendant due to their earned income. Moreover, each class member in this case has been or will be unlawfully denied TMA by the Defendant and has an interest in the declaratory and injunctive relief sought by the named Plaintiff. For these reasons, the requirements of Rule 23(a)(2) are met in this case.

C. The Claims Of The Named Plaintiff Are Typical Of The Claims Of The Plaintiff Class.

Rule 23(a)(3) requires that the claims of the class representative be typical of the class claims. This requirement is satisfied “if the claims or defenses of the representatives and the members of the class stem from a single event or are based on the same legal or remedial theory.” *Paxton*, 688 F.2d at 561-2, citing, Wright & Miller, Federal Practice and Procedures, § 1764, n.21.1 (Supp. 1982). Plaintiff must demonstrate “that there are other members of the class who have the same or similar grievances.” 688 F.2d at 562. This burden is “fairly easily met so long as other class members have claims similar to the named plaintiff.” *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995).

In this case, the claims of the named Plaintiff and the class arise from the same conduct by the Defendant. All class members have had their Medicaid coverage terminated due to their earned income and the Defendant has refused to provide the class members the TMA that they are entitled to under the Medicaid Act. The legal is identical for the named Plaintiff and each member of the class, i.e., whether he or she falls within the ambit of 42 U.S.C. § 1396u-1. The declaratory and injunctive remedies sought are identical and appropriate for the named Plaintiff and each member of the class.

D. The Named Plaintiffs Will Fairly And Adequately Protect The Interests Of the Class.

Rule 23(a)(4) allows a class action to be maintained if the named Plaintiff will fairly and adequately protect the interests of the class. There is a two-pronged test for satisfying this rule: (1) the class representative must have “common interests with the members of the class” and (2) the class representative must “vigorously prosecute the interests of the class through qualified counsel.” *Paxton*, 688 F.2d at 562-3. The named Plaintiff meets both elements.

The interest of the named Plaintiff and the class members are entirely co-extensive. They all seek declaratory and injunctive relief to assure that the Defendant's actions comply with identical statutory rights. The named Plaintiff knows of no conflicts of interest among the members of the class.

“In the absence of proof to the contrary, courts presume that class counsel is competent and sufficiently experienced to vigorously prosecute the class action.” *Morgan*, 169 F.R.D. at 357. Plaintiff's counsel, the Nebraska Appleseed Center for Law in the Public Interest, has litigated several class actions in state court and federal court concerning public benefits programs in Nebraska. Accordingly, the named Plaintiff will fairly and adequately protect the interests of the class in this action.

E. This Action Meets The Requirements of Rule 23(b)(2).

The proposed class meets the criteria of Fed. R. Civ. P. Rule 23(b)(2). First, the Defendant's conduct or failure to act is “generally applicable to the class,” and second, final injunctive or corresponding declaratory relief is requested for the class as a whole. When the Rule 23(a) requirements “have been met and injunctive or declaratory relief [is] requested, the action usually should be allowed to proceed under subdivision (b)(2).” *DeBoer*, 64 F.3d at 1175.

In this case, the Defendant has refused to provide TMA to all members of the class as required by § 1396u-1. Plaintiff seeks class wide preliminary and final declaratory and injunctive relief to force the Defendant to provide TMA to all eligible class members and to notify each class member of his or her right to TMA. Any order entered by this Court would, by its terms, inure to the benefit of all members of the Plaintiff class. Class certification is therefore appropriate under subsection (b)(2) of Rule 23.

CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that her Motion for class certification be granted.

Dated: July 20, 2004.

KELLY BOWLIN, on behalf of
herself and all others similarly
situated, Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2004 the foregoing Brief in Support of Plaintiffs Motion for Class Certification was filed with the Clerk of the United States District Court for the District of Nebraska using the CM/ECF system which will send notification of such filing to Royce N. Harper and Jaime Placek.

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