
IN THE SUPREME COURT OF NEBRASKA

JENNIFER DAVIO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILIARLY SITUATED,

v.

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, KERRY
WINTERER, CHIEF EXECUTIVE OFFICER, TODD RECKLING, DIRECTOR OF
DIVISION OF CHILDREN AND FAMILY SERVICES, AND VIVIANNE
CHAUMONT, DIRECTOR OF DIVISION OF MEDICAID AND LONG-TERM CARE.

APPEAL FROM THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

Honorable Karen B. Flowers, District Judge

REPLY BRIEF TO ANSWER BRIEF ON CROSS-APPEAL

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BASIS FOR THE JURISDICTION OF THE SUPREME COURT

Cross-Appellant adopts the Basis for the Jurisdiction of the Court contained in the Cross-Appellant's brief.

STATEMENT OF THE CASE

Cross-Appellant adopts the Statement of the Case contained in the Appellee's brief.

PROPOSITIONS OF LAW

1. "A party has standing to invoke a court's jurisdiction if it has a legal or equitable right, title, or interest in the subject matter of the controversy." *Metro. Utils. Dist. v. Neb. PSC (In re Metro. Utils. Dist.)*, 270 Neb. 494, 498 (Neb.Sup.Ct. 2005).
2. Under the Age Discrimination in Employment Act (ADEA), it is not necessary "that every individual opt-in plaintiff file an administrative charge...it is sufficient for one or more plaintiffs to the action to have properly filed a charge." *Kloos v. Carter-Day Co.*, 799 F.2d 397, 400 (8th Cir. 1986).

STATEMENT OF FACTS

Cross-Appellant adopts the Statement of the Facts contained in the Appellee's brief.

SUMMARY OF ARGUMENT

The District Court erred when it did not allow class members to seek all the remedies available under Neb. Rev. Stat. § 84-917 because Neb. Rev. Stat. § 84-917 should be interpreted in the context of a class action. In this context, Neb. Rev. Stat. § 84-917 does not require the class representative and every class member to pursue an administrative appeal concerning a pure question of law. Instead, a person is part of a

class if the class representative has met all the elements of Neb. Rev. Stat. § 84-917 and class members have standing

ARGUMENT

- I. THE DISTRICT COURT ERRED WHEN IT DID NOT ALLOW THE CLASS MEMBERS TO SEEK ALL THE REMEDIES AVAILABLE UNDER NEB. REV. STAT. § 84-917.

In this case, the District Court erred when it failed to permit the class members to seek monetary reimbursement under the Administrative Procedure Act (APA) because Neb. Rev. Stat. § 84-917 should be interpreted in the context of a class action. In this context, Neb. Rev. Stat. § 84-917 does not require the class representative and every class member to pursue an administrative appeal concerning a pure question of law. Instead, a person is part of a class if the class representative has met all the elements of Neb. Rev. Stat. § 84-917 and class members have standing. *See* Brief on Cross-Appeal at 7-8.

- A. The class representative fulfilled all the jurisdictional elements of Neb. Rev. Stat. § 84-917.

In this case, there is subject matter jurisdiction over Cross-Appellant's claims pursuant to Neb. Rev. Stat. § 84-917 because she was aggrieved by a final decision in a contested case. *See* Brief on Cross-Appeal at 5. Cross-Appellees concede this. Brief of Appellants at 10. As a result, Cross-Appellant has met all the requirements of Neb. Rev. Stat. § 84-917 and jurisdiction is proper over her claims. Moreover, Cross-Appellant's claims are not moot. Cross-Appellant has always contested the constitutionality of the administrative regulations that caused her Medicaid removal. *See* Brief of Appellee at 16-17. In the alternative, even if mootness was an issue, this case would clearly fall under

the public interest exception to mootness outlined by this Court in *Chambers v. Lautenbaugh*, 263 Neb. 920 (Neb.Sup.Ct. 2002).

B. The class members have standing.

“A party has standing to invoke a court's jurisdiction if it has a legal or equitable right, title, or interest in the subject matter of the controversy.” *Metro. Utils. Dist. v. Neb. PSC (In re Metro. Utils. Dist.)*, 270 Neb. 494, 498 (Neb.Sup.Ct.2005). The removal of class members’ Medicaid benefits for an Employment First sanction clearly gives class members a legal right or interest in this controversy. Thus, class members that have been sanctioned have standing.

C. Individuals that have not had an administrative hearing are part of the class because the class representative fulfilled all the requirements of Neb. Rev. Stat. § 84-917.

In the context of a class action, Neb. Rev. Stat. § 84-917 does not require the class representative and every class member to pursue an administrative appeal concerning a pure question of law. Instead, a person is part of a class if the class representative has met all the elements of Neb. Rev. Stat. § 84-917 and class members have standing. This permits an individual to enter a class without having an administrative hearing. Such an interpretation is sensible because it promotes the purposes of class actions: judicial efficiency and preventing unnecessary litigation.

At the same time, this reading is compatible with Neb. Rev. Stat. § 84-917’s requirements because the class representative has been aggrieved by a final decision in a contested case. Here, the class representative raised a question of law at the administrative level which the Department has no expertise to review. *See* Brief on

Cross-Appeal at 8. Likewise, the class representative sought to invalidate regulations, relief the Department could not grant. (T21). Neb. Rev. Stat. § 84-917 does not compel or require each class member to also seek a hearing to review the same legal question which the Department could not answer or to seek the same relief the Department could not grant. Indeed, the implications of a contrary interpretation are alarming: each and every person would have an incentive to seek an administrative hearing, despite the futility, to preserve their ability to be a class member. It is hard to imagine a greater inefficiency. Neb. Rev. Stat. § 84-917 does not compel such a wasteful result.

Furthermore, an interpretation that class members can “piggyback” their claims onto the claims of a class representative that has fulfilled all jurisdictional prerequisites has been upheld in other contexts. For example, under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34, individuals must file an administrative charge of discrimination as a prerequisite to bringing a civil action. *Kloos v. Carter-Day Co.*, 799 F.2d 397 (8th Cir. 1986). In *Kloos*, the plaintiff filed a charge of discrimination alleging violations of the ADEA and also sought class certification. Thirteen plaintiffs opted into the class, however, only one out of thirteen class members filed a charge of discrimination, a prerequisite to filing a civil action. *Kloos*, 799 F.2d at 399. The District Court dismissed the claims of those individuals that did not file a charge for lack of subject matter jurisdiction. *Id.* 399. Yet, on appeal, the Eighth Circuit found that it was not necessary “that every individual opt-in plaintiff file an administrative charge...it is sufficient for one or more plaintiffs to the action to have properly filed a charge.” *Id.* at 400. See also *Howlett v. Holiday Inns*, 49 F.3d 189, 196 (6th Cir. 1995); *Tolliver v. Xerox*

Corp., 918 F.2d 1052, 1060 (2d Cir. 1990); *Bean v. Crocker Nat'l Bank*, 600 F.2d 754 (9th Cir. 1979).

Similar to the reasoning in *Kloos*, it should not be necessary for every class member to file and pursue an administrative appeal where the class representative fulfilled all the statutory prerequisites to filing suit under Neb. Rev. Stat. § 84-917. Such an interpretation comports with APA requirements and also fulfills the purposes of class actions. Therefore, since the class representative has met all the elements of Neb. Rev. Stat. § 84-917, and since class members have standing, class members should have been permitted to seek all the remedies available under Neb. Rev. Stat. § 84-917.

CONCLUSION

For the foregoing reasons, the District Court erred when it determined class members could not seek all the remedies available under Neb. Rev. Stat. § 84-917. The Cross-Appellant, therefore, respectfully requests reversal of the District Court's decision to limit the class members to injunctive relief only.

Date: April 22, 2010

Jennifer Davio, Appellee, Cross-Appellant

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2010, the Reply Brief to Answer Brief on Cross-Appeal was filed with the Clerk of the Nebraska Supreme Court, and that a true and accurate copy of this Reply Brief to Answer Brief on Cross-Appeal was served on the Appellants via United States First Class Mail to the Appellants' counsel Jon Bruning, Attorney General, 2115 State Capitol, Lincoln, NE 68509, and Matthew Dunning, Legal Counsel for the Department, 301 Centennial Mall South, P.O. Box 95026, Lincoln, NE. 68509.

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