UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JACQUELINE JONES,

Plaintiff,

vs. CASE NO. 3:09-CV-1170-J-34JRK

THOMAS ARNOLD, in his official Capacity as the Secretary of Florida Agency for Health Care Administration

DR. ANNA VIAMONTE ROSS, in her official capacity as Secretary, Florida Department of Health

Defendants.
_____/

DEFENDANTS' RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

The Defendants, THOMAS ARNOLD, in his official capacity as the Secretary of the Florida Agency for Health Care Administration, and DR. ANNA VIAMONTE ROSS, in her official capacity as Secretary, Florida Department of Health, by undersigned counsel, pursuant to Rule 23, Fed. R. Civ. P., and Rule 3.01(b), Local Rules, United States District Court, Middle District of Florida, submit this response and memorandum of law in opposition to Plaintiff's Motion for Class Certification. As grounds therefore, Defendants state as follows:

INTRODUCTION

Plaintiff brings this putative class action lawsuit pursuant to Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 (ADA), and Section 504 of the

Rehabilitation Act, 29 U.S.C. § 794(a) (Rehab Act). In the Amended Complaint, filed December 15, 2009, Plaintiff claims that she and the members of the putative class are Medicaid-eligible disabled Florida residents with a spinal cord injury who reside in the community, wish to continue to reside in the community, and are at risk of being institutionalized in a nursing facility if not provided community-based services through the Medicaid program. Plaintiff claims that Defendants' failure to provide in-home services through the Medicaid program constitutes unlawful discrimination under both the ADA and the Rehab Act.

On December 29, 2003, Defendants filed their Motion to Dismiss Plaintiff's Amended Complaint for lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, and because the claims are barred by issue or claim preclusion. In brief: (1) the named Plaintiff's case is moot as she is already in the process of being enrolled in the in the Traumatic Brain Injury / Spinal Cord Injury Medicaid Waiver Program (TBI/SCI Waiver Program); (2) the mooting of the named Plaintiff's claim prior to the filing of a motion to certify the class renders the entire action moot; (3) Plaintiff's claim for the provision of personal care services exceeds the scope of the ADA, because the applicable statute and implementing regulations do not require the provision of such services; (4) the requested class remedy would result in a fundamental alteration of the Florida Medicaid Program, which the ADA does not require; and (5) the claims are barred by issue or claim preclusion (or collateral estoppel).

On January 6, 2010, Plaintiff filed her Motion for Class Certification (Motion) and Memorandum of Law in Support of the Motion (Memorandum). Plaintiff Jones contends that a putative class exists which is described as:

> Florida disabled residents with a spinal cord injury who are Medicaid recipients; reside in the community; desire to continue to reside in the community instead of a nursing facility; could reside in the community with appropriate Medicaid-funded services; and are at risk, as determined by the recipient's treating physician or other treating health professional, of being forced to enter a nursing-home because Defendants do not provide adequate community-based services.

Motion ¶ 1.

Defendants oppose Plaintiff's Motion because Plaintiff has not met her burden of satisfying the requirements of Rule 23(a) and Rule 23(b)(2), Fed. R. Civ. P.

MEMORANDUM OF LAW

I. Plaintiff has failed to establish her burden of proving all the requisite elements under Rule 23(a), Fed. R. Civ. P.

In order for a class action to proceed, all four of the threshold conditions in Rule 23(a), Fed. R. Civ. P., must be met: (1) the class must be so numerous that joinder of all members is impracticable (numerosity); (2) there must be questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class (typicality); and (4) the representative parties must fairly and adequately protect the interests of the class (adequacy of representation). Prado-Steiman v. Bush, 221 F.3d 1266, 1278 (11th Cir. Fla. 2000); Fed. R. Civ. P. 23(a).

In addition, the class action must fall into one of the three categories set forth in Rule 23(b)(1), (2), and (3), Fed. R. Civ. P. Amchem Prods. v. Windsor, 521 U.S. 591 (U.S.

1997). Here, Plaintiff alleges that the Defendants have acted or refused to act on grounds generally applicable to the class, thereby making injunctive relief appropriate with respect to the class as a whole, and that the action satisfies thus Rule 23(b)(2), Fed. R. Civ. P.

The party seeking class certification has the burden of proof on the Rule 23, Fed. R. Civ. P., requirements. Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1187 (11th Cir. Fla. 2003); Rutstein v. Avis Rent-A-Car Sys., 211 F.3d 1228, 1233 (11th Cir. Fla. 2000). Furthermore, it is insufficient for the Plaintiff to rely on pleading allegations alone to satisfy her burden of proof. Walker v. Jim Dandy Co., 747 F.2d 1360, 1365 (11th Cir. Ala. 1984).

The Plaintiff has failed to meet her burden of proof as to the class certification. First and foremost, the class action should not be certified because the one named plaintiff has no justiciable claim. In the Amended Complaint, Plaintiff alleges that Defendants have failed to assess properly the services and supports that would enable Plaintiffs to remain in the community and to ensure that Plaintiff has access to Medicaid-covered services that will meet her needs in the community. But the Defendants are currently in the process of assessing Plaintiff Jones' needs and the services and supports that would meet those needs in order to ensure that she receives the Medicaid-covered services for which she is eligible. See December 18, 2009, Affidavit of Kristen Russell (Docket number 24). The Defendants are already doing what Plaintiff Jones is asking this Court to order them to do. As such, her claims are moot.

Furthermore, because the provision of personal care services is not required under the ADA, and because the Plaintiff's requested relief would require a fundamental alteration

of the Florida Medicaid Program, Plaintiff fails to state a claim upon which relief can be granted. A named plaintiff who fails to state a claim on his or her own behalf cannot maintain a class action on behalf of others. See Cramer v. Florida, 117 F.3d 1258, 1264 (11th Cir. Fla. 1997).

Lacking a valid plaintiff representative, the Court cannot make a determination that the requirements in Rule 23(a), Fed. R. Civ. P., have been met. Given the Plaintiff's vague definition of the class, the Court cannot determine whether the numerosity requirement is met without a plaintiff representative to serve as an example of, among other things, what it means to be "at risk' of being forced into a nursing home. Without a plaintiff representative, the commonality and typicality requirements cannot be established. Obviously, where there is no valid plaintiff representative, there is no showing of adequacy of representation.

. As shown below, the facts alleged in Plaintiff's Amended Complaint and Motion for Class Certification do not sufficiently demonstrate that the requirements of Rule 23(a) and Rule 23(b)(2), Fed. R. Civ. P., are met, and the Motion for Class Certification should therefore be denied.

A. Plaintiff has failed to demonstrate that the class is so numerous that joinder of all members is impracticable

Plaintiff alleges that the putative class is so numerous that joinder of all its members is impracticable. To support this, Plaintiff alleges in the Motion and Memorandum that a recent report shows that were "434 people with spinal cord injuries" on the wait list for Florida's Traumatic Brain Injury / Spinal Cord Injury Medicaid Waiver Program (TBI/SCI Waiver Program) in FY 2008. Motion ¶ 5; Memorandum p 2. Plaintiff further alleges in

the Motion and Memorandum that a document prepared by the Florida Medicaid Program shows that the "waiting list for persons with spinal cord injuries had increased to 554 people." Id. These documents do not support this allegation of numerosity.

The mere fact that someone is on the waiting list for the TBI/SCI Waiver Program does not demonstrate that such person falls into the putative class. First, the mere fact that someone is on the waiting list does not mean that person has a spinal cord injury. A person who suffered a traumatic brain injury that did not damage his or her spinal cord could still be eligible for the TBI/SCI Waiver Program. See Affidavit of Kristen Russell, attached as Exhibit A.

Second, the mere fact that someone is on the waiting list for the TBI/SCI Waiver Program does not mean that such person currently resides in the community. Not everyone on the waiting list currently resides in the community. See Id.

Finally, the mere fact that someone is on the waiting list for the TBI/SCI Waiver Program does not show that such person is at risk of being forced to enter a nursing home. This element of the class definition, which is essential for the class members to even have standing, is not sufficiently described. What does it mean to be "at risk, as determined by the recipients' treating physician or other treating health professional, of being forced to enter a nursing home"? What standards do the treating professionals use? How imminent must the risk be?

Plaintiff Jones is a prime example. A person must be at least 18 years old to qualify for the TBI/SCI Waiver Program. Had Ms. Jones applied and been placed on the waiting list at age 18, would she have been considered "at risk" of being forced to enter a nursing

home? If so, then such "risk" is devoid of meaning, as Ms. Jones as managed to remain in the community for an additional 17 years after age 18 without receiving any services from the TBI/SCI Waiver Program. If Ms. Jones would not have been considered "at risk" of being forced to enter a nursing home at age 18, this clearly demonstrates that simply being on the TBI/SCI Waiver Program waiting list does not show that a person is part of the putative class.

B. Plaintiff has failed to show that there are question of law or fact common to the class

Plaintiff alleges that there "are questions of law and fact that are common to all named Plaintiff (sic), as well as to all putative class members." Motion ¶ 6. However, given that the Court no longer has a justiciable controversy before it with respect to the named Plaintiff, and this was the case even prior to the filing of the Motion, there are no questions of law or fact before the Court at all. See Tucker v. Phyfer, 819 F.2d 1030, 1033 (11th Cir. Ala. 1987) ("In a class action, the claim of the named plaintiff, who seeks to represent the class, must be live both at the time he brings suit and when the district court determines whether to certify the putative class. If the plaintiff's claim is not live, the court lacks a justiciable controversy and must dismiss the claim as moot"). How can the Court conclude that there is an entire class with common issues of law or fact when there is not even a valid Plaintiff representative before the Court? See Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 158 (U.S. 1982) (commonality requirement tends to merge with typicality and adequacy of representation).

C. Plaintiff has failed to demonstrate that her claims are typical of the claims of the class

To maintain a class action, the Plaintiff must demonstrate that her claims are typical of the claims of the class. Rule 23(a)(3), Fed. R. Civ. P. This elements requires that the named plaintiff be a proper member of the class. Taliaferro v. State Council of Higher Education, 372 F. Supp. 1378, 1387 (E.D. Va. 1974). In the instant case, the named Plaintiff has no justiciable claims. The Defendants are in the process of assessing her needs in order to enroll her in the TBI/SCI Waiver Program pending a determination of her eligibility. See December 18, 2009, Affidavit of Kristen Russell (Docket number 24). This is precisely what the Defendants would have to do if the Court were to issue an order in accordance with Plaintiff's requests in the Amended Complaint. As such, her claims are moot and she is not a member of the putative class. The Plaintiff has thus failed to meet her burden of proof in showing that the typicality requirement has been fulfilled.

Even if the Court were to determine that Plaintiff Jones case is not moot, she has still failed to show that her claims are typical of the claims of the class because of the numerous possible variations associated with determinations by treating physicians or other treating health professionals of the risk "of being forced to enter a nursing home." Motion ¶ 1. There is any number of reasons that a person may enter a nursing home, and not all of them are based on medical indications. Plaintiff Jones is a good example. Her alleged "risk" of being forced to enter a nursing home is not based on any change in her medical condition, but rather upon changes in her overall life circumstances; namely, the abilities of her parents to care for her in the home.

D. Plaintiff has failed to demonstrate that she is an adequate representative of the class

Plaintiff is required to show that she will fairly and adequately protect the interests of the putative class. Rule 23(a)(4), Fed. R. Civ. P. As set forth above, Plaintiff has failed to establish that the putative class exists, and thus has also failed to establish that she will represent that class adequately. Even if the Court were to determine that the putative class exists, Plaintiff still fails to show that she will fairly and adequately protect its interests. Since Plaintiff Jones is herself already in the process of being enrolled in the TBI/SCI Waiver Program, she has no personal stake in seeing that the program is opened up to other members of the putative class. See Docket number 24. As such, Plaintiff is not "interested enough to be a forceful advocate" on behalf of the putative class. Shulman v. Ritzenberg, 47 F.R.D. 202, 207 (D.D.C. 1969). Put another way, Plaintiff's interests are not "sufficient to induce vigorous advocacy" on behalf of the class. Wyandotte Nation v. City of Kansas City, 214 F.R.D. 656, 661 (D. Kan. 2003). Plaintiff has failed to show that she is an adequate representative of the class.

II. Plaintiff has failed to establish her burden under Rule 23(b), Fed. R. Civ. P.

In her Motion, Plaintiff alleges that Defendants have acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief appropriate with respect to the class as a whole under Rule 23(b)(2), Fed. R. Civ. P. Motion ¶ 9. Plaintiff has failed to meet her burden to demonstrate that a class action may be maintained pursuant to Rule 23(b), Fed. R. Civ. P.

It is especially important for courts to ensure that the named Plaintiff is a member of the putative class in Rule 23(b)(2), Fed. R. Civ. P., cases because of the necessity of "cohesiveness" in such cases. Mays v. Scranton City Police Dep't, 87 F.R.D. 310, 314 (M.D. Pa. 1979). Here, the named Plaintiff is not a member of the putative class. Plaintiff Jones is already in the process of being enrolled in the TBI/SCI Waiver Program. See Docket number 24. There is no action or inaction of the Defendants on grounds applicable to even the named Plaintiff, much less to an entire putative class.

CONCLUSION

For the reasons stated above, this Court should deny the Motion for Class Certification.

Respectfully submitted this 20th day of January, 2010.

AGENCY FOR HEALTH CARE ADMINISTRATION

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by the Notice of Electronic Filing, and was electronically filed with the Clerk of the Court via the CM/ECF system, which generates a notice of the filing to the following: Stephen F. Gold, 1709 Benjamin Franklin Parkway, Second Floor, Philadelphia, PA 19103, and Jay M. Howanitz, SPOHRER & DODD, P.L., 701 West Adams Street, Suite 2, Jacksonville, Florida 32204 this 20th day of January, 2010.

/s/ Andrew T. Sheeran
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ATTORNEY