UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

GERALD N., et al.,

Plaintiffs,

v. Case No. 04-C-1093

MILWAUKEE COUNTY, et al.,

Defendants.

REPLY BRIEF IN SUPPORT OF MILWAUKEE COUNTY'S MOTION FOR JUDGMENT ON THE PLEADINGS

The defendants' legal arguments in support of the proposition that the plaintiffs' claims should be dismissed have been thoroughly presented in the briefs already filed, and no purpose would be served by recapitulating them in a reply brief. Some aspects of the plaintiffs' submissions in opposition to the defendants' motions do, however, call for a brief rejoinder.

I. The plaintiffs' quasi-evidentiary submissions.

The plaintiffs have filed affidavits along with their responsive brief. They disclaim any intention to convert the pending motions into summary judgment motions, maintaining that this material is provided for "illustrative" rather the "evidentiary" purposes. Presumably, these submissions are intended to lend plausibility to the unsupported conclusory allegations of the complaint, and to persuade the court that the defendants' alleged conduct could cause injury in fact to the plaintiffs that is actual and imminent, rather than merely conjectural or hypothetical, so as to meet the minimum requirements for standing.

The plaintiffs' illustrative submissions are not a sufficient substitute for factual allegations in the actual pleadings. For the reasons explained in the defendants' previous briefs, those allegations show no more than conjectural or hypothetical injuries to the plaintiffs. The illustrative submissions do, however, serve to illuminate the motives behind this lawsuit and to identify the real parties in interest. Certain high-cost residential providers want (or, if they are to be believed, need) to make more money from Family Care clients. Affiant Kallas threatened County Executive Walker with a federal class action lawsuit charging "discriminatory practices" and "reckless disregard" against *providers*, Exhibit I, Kallas Aff. Such a lawsuit, irrespective of its merits, would at least have been straightforward and less disingenuous than the present action. However, those providers took a different course. Affiant Burr precipitated a crisis with a view to manufacturing grounds for a lawsuit by threatening to evict Family Care clients after Family Care did not meet his demands for rate increases. Milwaukee County suggests that the court consider the business interests of these affiants as Family Care providers in assessing the value of their affidavits as illustrative support for the claims of the plaintiffs.

II. Intentional discrimination under the ADA and s. 504 of the Rehabilitation Act.

The plaintiffs argue that they have adequately pled claims of intentional discrimination and disparate treatment, actionable under by the ADA and s. 504 of the Rehabilitation Act, by alleging (1) that Milwaukee County pays lower rates to some CBRF's and other providers of residential services for disabled Family Care clients who are over the age of 60 than the County pays for disabled persons under the age of 60 who are served under the auspices of the Medicaid waiver programs, (2) that Milwaukee County pays lower rates to some CBRF's and other providers of residential services for disabled Family Care clients than other counties pay, and (3) that Family Care clients with "more significant disabilities" received inferior treatment in regard

to payment for residential services in comparison to FamilyCare clients with "less significant disabilities", Plaintiffs' Brief in Opposition, pp. 14-15.

Regardless of the viability of the claim that the Milwaukee County Family Care program pays lower rates than other counties pay for residential services for the disabled, it cannot reasonably be held to state a cause of action against Milwaukee County. Milwaukee County cannot be liable for a disparity in treatment between two classes, only one of which is treated by Milwaukee County.

With regard to the contention that Family Care rates unlawfully discriminates against FamilyCare clients with "more significant disabilities" in paying for residential services, that contention is purely an unsupported conclusion. There are no factual allegations in the Fourth Amended Complaint describing any differences in the level of disability among the named plaintiffs or between the named plaintiffs and anyone else. Moreover, in the absence of any allegation as to whether any of the named plaintiffs is more or less "significantly disabled" than any other persons whose residential care is funded by Milwaukee County, it is difficult to imagine how any of the plaintiffs have the standing to pursue a claim based on this alleged disparity, even assuming that it is both actual and actionable.

The case then devolves to a claim that the plaintiffs have a right under the ADA and the Rehabilitation Act to force a program such as Family Care to pay whatever certain residential providers demand so as to guarantee their perpetual placements in residential facilities operated by those providers. The plaintiffs have not cited any case which supports such an extraordinary claim.

The plaintiffs cite *Olmstead v. L.C.*, 527 U.S. 581 (1999), and *Henrietta D. v. Bloomberg*, 331 F.3d 261 (2nd Cir. 2003), for the proposition that courts recognize discrimination

claims under the ADA and the Rehabilitation Act based upon differential treatment within groups of individuals who all have disabilities. That proposition does find support in the *Olmstead* decision, 527 U.S. 581, 598, fn. 10. (in which the plurality opinion controverts the assertion of the dissenters that the Supreme Court had not previously interpreted "discrimination" to encompass disparate treatment among members of the same protected class). However, the *Olmstead* plaintiffs did not achieve their limited success solely on the basis of their assertion of disparate treatment. It was essential that the disparate treatment plainly operated to implicate an interest protected by the ADA. This is what the Supreme Court actually held: "Specifically, we confront the question whether the proscription of discrimination [in the ADA] may require placement of persons with mental disabilities in community settings rather than in institutions. The answer, we hold, is a qualified yes. . . . Unjustified isolation, we hold, is properly regarded as discrimination based on disability." 527 U.S. 581, 587 and 597. Thanks to the Family Care program, none of the plaintiffs is isolated in an institution. They are all in community settings. Nothing more than idle speculation supports the assertion that any of them faces the prospect of institutionalization as a consequence of alleged disparate treatment by the defendants. It is not alleged that, in the face of Affiant Burr's threat to evict four of the plaintiffs from his CBRF's, they would have been placed in institutions. On the contrary, suitable alternative CBRF placements were available. The histories of the plaintiffs, as recited in the Fourth Amended Complaint, show multiple moves between community placements, none of which resulted in nursing home or other institutional placements.

III. Effective access to public services under the ADA and s. 504 of the Rehabilitation Act.

The plaintiffs cite *Henrietta D. v. Bloomberg*, 331 F.3d 261 (2nd Cir. 2003), for the principle that a plaintiff can prevail by showing either discrimination or the denial of benefits or

public services by reason of the plaintiffs disabilities. However, *Henrietta D.* is inapposite to this case.

The plaintiffs in *Henrietta D.* suffered from disabilities resulting from HIV-AIDS and related diseases. They were the intended beneficiaries of a program designed to assist them in obtaining various welfare benefits and public services to which they were entitled but which, by reason of the debilitating conditions peculiar to their disease, they were often physically unable to avail themselves of. Those plaintiffs were able to show that this program was so incompetently administered and ineffectual that they could not, by reason of their disabilities, obtain the benefits and services to which they were entitled and which other persons were able to access.

In this case, the plaintiffs are all enjoying the benefits of the Family Care program. There is nothing in the allegations of the Fourth Amended Complaint to suggest that there is any welfare benefit or public service to which they are entitled that they are not receiving. The plaintiffs point to the Par. 148 of the Fourth Amended Complaint, in which it is alleged that discrimination on the part of the defendants "prevent[s] [plaintiffs] from obtaining the same result, gaining the same benefit or reaching the same level of achievement in the most integrated setting appropriate to their needs and have the purpose of effect of defeating or substantially impairing accomplishment of the objectives of the Family Care and Medicaid programs." Those allegations are pure legal conclusions which find no support in the factual allegations of the complaint. So far as those factual allegations disclose, all the plaintiffs are in community settings (presumably, the most integrated settings appropriate to their needs) and receiving such other benefits as may flow from their eligibility for Family Care and Medicaid. Again, all that can be discerned from the allegations of the Fourth Amended Complaint with regard to impact of

defendants' alleged disparate treatment of the plaintiffs is that it might result in a move from one community placement to another because Affiants Kallas and Burr demand higher CBRF rates than Family Care is able to pay. That is a far cry from the desperate situation of the indigent AIDS victims in *Henrietta D.* who, due to their disabilities, were unable obtain food stamps and other basic public assistance benefits to which they were entitled.

IV. The integration requirement of the ADA and s. 504 of the Rehabilitation Act.

It bears repeating that "[t]he purpose of the [integration mandate] regulation is not to constitute the federal courts the supervisors of the care and treatment of disabled persons. It is to prevent the isolation or segregation of the disabled." *Bruggeman v. Blagojevich,* 324 F.3d 906, 911 (7th Cir. 2003). None of the plaintiffs is isolated or segregated. They are all in community placements and there is nothing in the Fourth Amended Complaint, apart from sheer speculation, to suggest that they will not remain in community placements so long as such placements are commensurate with their individual needs.

The situation of the plaintiffs in this case differs significantly from that of the plaintiffs in *Fisher v. Oklahoma Health Care Authority,* 335 F.3d 1175 (10th Cir. 2003). In that case, the plaintiffs, who were supported in community placements as beneficiaries of Medicaid waiver programs comparable to the defendants' COP programs, challenged a policy of the state Medicaid program which severely limited prescription drug coverage for beneficiaries of the community based services program while providing more comprehensive coverage for nursing home residents. The plaintiffs were able to make a factual showing that this policy placed them at imminent risk of avoidable nursing home placement sufficient to create a genuine issue of fact as to whether the policy violated the integration mandate.

V. Reasonable accommodation.

The plaintiffs have thoughtfully directed the court's (and this writer's) attention to the recent decision of the Seventh Circuit Court of Appeals in *Wisconsin Communtiy Service v. City of Milwaukee,* ___ F.3d. ___, 2005 WL 1523215 (7th Cir., June 29, 2005). That decision indicates that, in a case under Title II of the ADA and the Rehabilitation Act, a demand for "reasonable accommodation" does not give rise to a freestanding claim but rather comes into play only if and when a plaintiff can establish a case of actionable discrimination under some other theory, such as intentional discrimination or disparate impact. Milwaukee County agrees with the plaintiffs that the ultimate resolution of that issue is not critical to the disposition of the pending motions in this case. Milwaukee County respectfully submits that the plaintiffs have not made out a case of actionable discrimination under the ADA and the Rehabilitation Act, but that, even if they had, the court could not order the accommodation they demand because it is not reasonable. It would fundamentally alter the nature of the Family Care program and would impose undue financial and administrative burdens on the defendants.

The plaintiffs in this action, functioning as straw men for a couple of high-cost residential care providers, are attempting to hold the Family Care program hostage until the demands of those providers for higher rates are satisfied. As the defendants have argued at length in the briefs previously filed, if those providers are permitted to succeed, the financial burden on the program is self evident, as is the fact that the nature of the program would be altered beyond recognition.

VI. Medicaid Act claims.

The arguments for and against the recognition of a private cause of action for Medicaid beneficiaries under 42 U.S.C. s. 1396a(a)(30)(a) have been thoroughly discussed in the briefs

already filed. However, even if the court decides that such a private right exists, the plaintiffs' submissions do not establish that the defendants have violated it.

The court should require more than hand-wringing and threats to sustain a claim under s. (30)(a). All that plaintiffs have alleged is dire predictions of the loss of residential providers because Family Care rates are too low, now supported by illustrative submissions which consist largely of self-serving affidavits from CBRF operators who complain, unsurprisingly, that they are not making enough money caring for Family Care beneficiaries. But those same submissions also include the uncontroverted representation that very few residential or other care providers have actually left the Family Care provider network for any reason, Kallas Aff., Exhibit H. At this advanced stage of the game, after the case has been pending for many months and plaintiffs' counsel has had years prior to the commencement of the action to collect plaintiffs and information, plaintiffs have not offered to identify a single provider which has gone out of business or stopped serving Family Care clients, or to identify a single Family Care beneficiary who was forced into institutional care or otherwise adversely affected because Family Care had failed to enlist a sufficient number of CBRF's and other residential care providers. They have not offered to make even a minimal showing sufficient to establish a viable claim under s. (30)(a).

VII. Standing and the "putative class".

No attempt will be made here to improve upon the exposition of the jurisprudence of standing which the State of Wisconsin defendants have presented.

At the risk of some redundancy, however, defendant Milwaukee County urges the court to consider, under the rubric of standing and also of common sense, the distance between what the plaintiffs can factually and fairly allege about their own situations and the rather more

expansive conclusory allegations which, they maintain, constitute viable causes of action. The plaintiffs are six individuals who might have to make the transition from the care provided at the CBRF's where they now reside to the care provided at different CBRF's (all of which has been and will be paid for by the defendants so long as they remain eligible for Family Care) because two CBRF operators demand higher rates for their care than the Family Care program can pay. The allegations in the Fourth Amended Complaint disclose that they have made such transitions in the past. There is nothing in the pleadings from which the court can reasonably infer that any of the named plaintiffs has been deprived of any right protected by the ADA or the Rehabilitation Act as the result of discriminatory "disparate treatment" by the defendants, that any of them has been denied, by reason of disability, any benefit or service to which he or she is entitled, or that any of them is or is likely to be in "unjustified institutional isolation" in violation of the integration mandate. There is likewise nothing in the pleadings from which the court can reasonably infer that any of the plaintiffs has been harmed in any way by a failure of the defendants to enlist sufficient care providers as required by 42 U.S.C. s. 1396(a)(30)(A).

Nor should the plaintiffs be permitted to "borrow" standing to assert those claims from some imaginary putative class plaintiffs. As mentioned above, plaintiffs' counsel has had a long time to troll for plaintiffs, yet he is unable to identify and plead the cause of even one real plaintiff who can allege that the defendants' discrimination on the basis of disability has caused his or her unjustified institutional placement, has denied him or her any right or benefit to which he or she is entitled, or has deprived him or her of any right or caused him or her any injury which would give rise to a cognizable claim under the ADA, the Rehabilitation Act, or the Medicaid Act. He should not be permitted to continue to this action.

CONCLUSION

For the foregoing reasons, together with those set forth in the previously filed briefs and in the reply brief of the State of Wisconsin defendants, Milwaukee County respectfully urges the court to dismiss the Fourth Amended Complaint under Rule 12(c), on the grounds that the named plaintiffs do not state claims upon which relief can be granted because the claims as stated are not cognizable or, with regard to those sections of the complaint which may describe viable private causes of action, the plaintiffs lack the standing to raise them.

Dated at Milwaukee, Wisconsin this 5th day of August, 2005.

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