

COPY

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JACKIE FLESHMAN, on behalf of a class of individuals similarly situated,

Plaintiffs,

v.

MARTHA WALKER, in her capacity as Secretary, West Virginia Department of Health and Human Services,

Defendant.

Civil Action No. 06-c-1301
Judge King

FILED
2005 JUL -3 PM 2:39
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COURT REPORTER
KANAWHA CO. CIRCUIT COURT

COMPLAINT

INTRODUCTION

1. (a) This case arises out of the Defendant's policy of discriminating against qualified recipients of and applicants to the Medicaid Home and Community Based Aged/Disabled Waiver Program ("ADWP") program on the basis of mental disability and denial of due process to applicants and recipients of the program. The ADWP provides benefits to individuals who qualify for Medicaid nursing home care so that the individuals may receive community-based skilled nursing care. The Defendant conducts annual eligibility determinations to verify that recipients still qualify for ADWP services.

(b) In November 2005, the Department changed its policy to make more stringent eligibility requirements in the program by discriminating against those recipients and applicants who suffer from mental impairments. As a result of this new policy, (which is unannounced) hundreds of individuals have been denied ADWP services, without any change in their underlying eligibility status, and hundreds of appeal requests have been filed by recipients whose services have been terminated. These putative class members now face the loss of essential services, leading to probable institutionalization or possibly death.

(c) The named Plaintiff, Jackie Fleshman, has lost his ADWP benefits despite having received benefits from the program for over five years and having experienced no improvement (in fact, experiencing a deterioration over that time) in his medical condition. He brings this action on his behalf and all others similarly situated to enjoin the Defendant from unlawfully terminating their benefits in violation of the West Virginia Constitution and the West Virginia Human Rights Act.

PARTIES

2. (a) Jackie Fleshman is a sixty-five year old single man living alone at his home in Green Sulpher Springs, Summers County, West Virginia. He is mildly mentally retarded and illiterate with a history of paranoia and brain atrophy of unknown cause. He has suffered seizures nearly all his life, has suffered a stroke, and is intermittently disoriented.

(b) Mr. Fleshman suffers from multiple physical impairments as well, including, but not limited to, stents in both kidneys and his heart, ringing of the ears, arthritis, asthma, bronchitis, prostatitis, anemia, chronic pain, incontinence, and he uses a cane to walk and transfer.

(c) Mr. Fleshman is a Medicaid beneficiary and has been receiving services through the ADWP program since 2000. On January 10, 2006 he was notified that his benefits would be terminated. He appealed the decision and his appeal was denied by decision dated June 22, 2006. Currently, Mr. Fleshman is without ADWP services.

(d) Mr. Fleshman is a disabled person, as that term is defined in *West Virginia Code* section 5-11-3(m).

3. (a) The Defendant, Martha Walker, is the Secretary of the Department of Health and Human Resources (“DHHR”) and is responsible for administering all or part of the ADWP program. She is sued in her official capacity for prospective injunctive and declaratory relief.

(b) The Defendant is an “employer” as that term is defined in *West Virginia Code* section 5-

11-3(d).

CLASS ACTION ALLEGATIONS

4. Jackie Fleshman brings this action on his own behalf and on behalf of all other similarly situated individuals, pursuant to *West Virginia Rules of Civil Procedure*, Rule 23(a) and (b)(2). The class consists of ADWP recipients or applicants from November 1, 2005 to the present and all future ADWP recipients and applicants. The requirements of Rule 23 are satisfied as follows:

- (a) The class is so numerous joinder of all members is impracticable;
- (b) There are questions of law and fact as to the adequacy of Defendant's policies and practices with respect to her administration of the ADWP that are common to all members of the class;
- (c) The named Plaintiff's claims are typical of those of the class as a whole;
- (d) The Plaintiff has displayed an interest in vindicating the rights of the class members, will fairly and adequately protect and represent the interests of the class, and is represented by skillful and knowledgeable counsel. The relief sought by the named Plaintiff will inure to the benefit of the class generally.
- (e) The Defendant has acted or refused to act on grounds generally applicable to the entire class, thereby making final injunctive and declaratory relief appropriate for the class as a whole.

STATEMENT OF FACTS

West Virginia Home and Community Based Aged and Disabled Waiver Program

5. In 1983, the Department of Health and Human Services instituted a community-based Medicaid program called the Home and Community Based Aged/ Disabled Waiver Program ("ADWP").

6. The ADWP is designed to provide recipients with long-term health care services, commensurate with nursing home services, in their homes. Services include case management,

homemaker, and medical adult care. The purposes of the program is to provide services for disabled and aged individuals who would be eligible for Medicaid if institutionalized and who require services that do not exceed the statewide average cost of nursing home care. The program is designed to save money by providing a community based alternative to nursing home care. Participants in the ADWP must be both medically eligible and financially eligible for services.

7. The ADWP has only a limited number of slots available. Accordingly, applicants awaiting services are first required to undergo a six-month wait for their services. Likewise, if a current recipient were subsequently denied services, he or she would potentially be placed behind other applicants for these limited number of slots when he or she successfully challenged or reapplied for services. This system creates a possible imminent harm to recipients facing termination of their benefits.

8. The ADWP is currently administered by the Bureau of Medical Services ("BMS") in the West Virginia Department of Health and Human Resources.

November 2005 Policy Change

9. Prior to November 1, 2005, recipients or applicants to the ADWP program were required to establish at least five of the following deficits to qualify medically for ADWP:

- (1) Eating (physical assistance to get nourishment);
- (2) Bathing (physical assistance or more);
- (3) Grooming (physical assistance or more);
- (4) Dressing (physical assistance or more);
- (5) Continence (must be incontinent);
- (6) Orientation (totally disoriented, comatose);
- (7) Transfer (one or two persons assist in the home);
- (8) Walking (one person assist in the home);

- (9) Wheeling;
- (10) Decubitus;
- (11) In the event of emergency, the individual is unable to vacate the building;
- (12) Needs suctioning; tracheotomy, ventilator, parenteral fluids, sterile dressings, or irrigations; and
- (13) Individual is not capable of administering his/her medications.

10. (a) On September 26, 2005, the Department evidently made changes to this eligibility standard, effective November 1, 2005. The changes pertained to the following deficit areas:

- (i) **Vacate in Emergency.** The policy effective prior to November, 2005 provided that a recipient or applicant satisfied this deficit if the individual was “mentally unable” or “physically unable” to vacate her or his home in an emergency. The current policy requires that individuals demonstrate that to be “mentally unable,” the individual must be “totally disoriented” at all times with a diagnosis of dementia. The policy also provides that to be “physically unable,” the individual must be unable to vacate *at all times*.
- (ii) **Continence.** The November, 2005 policy change provided that individuals do not satisfy that they meet this deficit unless they have “no control of bowel or bladder functions at any time.” The policy change excludes individuals who are medically diagnosed as suffering from incontinence, but have brief periods of time in which they are able to maintain some bladder or bowel control.
- (iii) **Transfer.** The policy changes in November, 2005 requires that in order to satisfy the deficit for transfer, an individual must demonstrate that he or she is in need of “one-person or two-person assistance in the home *at all times*.”

Individuals that are in need of assistance on most all occasions, but not all occasions, are unable to satisfy the deficit requirement.

- (iv) **Walking.** The policy changes in November, 2005 requires that in order to satisfy the deficit for walking, an individual must demonstrate that he or she is in need of “one-person in the home *at all times* or non-ambulatory in the home *at all times.*” Again, individuals that are in need of assistance on most all occasions, but not all occasions, are unable to satisfy the deficit requirement.
- (v) **Administer Own Medications.** The recent policy changes require to satisfy this deficit that individuals demonstrate that “the prescription medication must be placed in the recipient’s hand, mouth, tube, or eye by some one other than the recipient *at all times.*” Individuals that may suffer from mental impairments that interfere with their ability to administer their own medications now do not qualify for this deficit if there is any period of lucidity in which they are able to take the medication from the pill box and place it in their own mouth, notwithstanding whether they have the ability to put it in the proper pill box to begin with, or appreciate the appropriate time at which it should be taken, or amount that he or she is required to take.

(b) On information and belief, the changes in the medical eligibility standard were made at the request of bureaucrats within the Department, and without consultation with physicians or other appropriate medical professionals. Consequently, the changes in medical eligibility for ADWP are not consistent with any medically-accepted procedure.

(c) The changes in policy, specifically the changes in the standards for disorientation, ability to vacate home, and the administration of own medication have the effect of discriminating against

recipients and applicants suffering from mental impairments.

11. The Defendant's changes in its standards for administration of medication is inconsistent with the definition of "self administration of medication," embodied in state law, which provides as follows:

"Self-administration of medication" means the act of a resident, who is independently capable of reading and understanding the labels of drugs ordered by a physician, in opening and accessing pre-packaged drug containers, accurately identifying and taking the correct dosage of the drugs as ordered by the physician, at the correct time and under the correct circumstances.

W. Va. Code § 16-50-2(l).

12. The Defendant has failed to publish its policy charges, which had, on information and belief, been amended in part, and later retracted in part, since November, 2005. As a consequence, in determining the medical eligibility of ADWP recipients the Defendant bases decisions on unarticulated and unascertainable standards, which leads to arbitrary and inconsistent eligibility determinations.

Plaintiff Jackie Fleshman

13. (a) Mr. Fleshman received ADWP benefits for approximately five years until he was reviewed on December 7, 2005. On January 10, 2006, Mr. Fleshman was informed that he was no longer eligible for the ADWP. The Defendant asserted that Mr. Fleshman exhibited only four deficits, one less than the five needed for medical eligibility. Mr. Fleshman appealed his decision, and a hearing was held on April 10, 2006. He received a notice of denial of his appeal on June 22, 2006.

(b) Between the time he was placed on the ADWP and the date of his proposed termination, Mr. Fleshman's medical and disability conditions did not improve, rather, they deteriorated, and his income and resources did not change. Mr. Fleshman is mildly mentally retarded and illiterate with a history of paranoia and brain atrophy of unknown cause. He has suffered seizures nearly all his life since a childhood accident, has suffered a stroke, and is intermittently disoriented. He has multiple

physical impairments as well, including, but not limited to, stents in both kidneys and his heart, ringing of the ears, arthritis asthma, bronchitis, prostatitis, anemia, chronic pain, incontinence, and he uses a cane to walk and transfer

(c) In the annual re-evaluation conducted by the Department's agent, in December, 2005, the Defendant failed to award the Mr. Fleshman a deficit for inability to self administer his own medication. Mr. Fleshman is required to take as many as twenty-three separate medications. Evidence presented at Mr. Fleshman's hearing established that he was unable to read labels on his medications and has a limited ability to tell time. As a result, Mr. Fleshman, left to his own devices, has a history of taking the wrong medications or taking more medication than is prescribed.

(d) Mr. Fleshman also did not receive a deficit for inability to vacate his premises in an emergency. However, evidence at his hearing established that Mr. Fleshman suffers from disorientation, and the stress of an emergency situation is likely to trigger a seizure.

(e) Since the Defendant proposed to terminate his benefits, Mr. Fleshman has announced a desire to end his life rather than be institutionalized in a nursing home.

COUNT I - VIOLATION OF EQUAL PROTECTION

14. The Plaintiff incorporates paragraphs one through thirteen by reference.

15. Article III, section 10 of the *West Virginia Constitution* incorporates the right to equal protection under the law. See, e.g., Pauley v. Bailey, 74 W. Va. 167, 169 n.2, 324 S.E.2d 128, 130 n.2 (1989).

16. Individuals with mental disabilities are a legislative classification, constituting a suspect class of individuals.

17. The Defendant's changes to the ADWP program treat individuals with mental disabilities differently than individuals with physical disabilities by denying them benefits for which they

are qualified due to their mental disabilities.

18. The Defendant's policy changes are not substantially related to an important governmental interest.

19. The Defendant's policy changes, as alleged above, deprive the Plaintiffs of equal protection under the law, in violation of the *West Virginia Constitution*.

COUNT II - VIOLATION OF THE WEST VIRGINIA HUMAN RIGHTS ACT

20. The Plaintiff incorporates paragraphs nineteen by reference.

21. The named Plaintiff, Jackie Fleshman, suffers from, and has record of, mental and physical impairments which substantially limit one or more of his major life activities.

22. In administrating the ADWP program as alleged herein, the Defendant discriminated against the Plaintiff class in the pursuit of benefits from the ADWP, and/or in the terms, conditions, or privileges of the ADWP program.

23. The Defendant has withheld from the Plaintiff class directly or indirectly accommodations, advantages, facilities, privileges and/or services from the ADWP program because of their disabilities.

COUNT III - DENIAL OF DUE PROCESS

24. The Plaintiff incorporate paragraphs one through twenty-three by reference.

25. The Plaintiff class members have a property interest in ADWP benefits.

26. As described herein, the Defendant and its agents are not using articulated, ascertainable standards when they decide who is eligible for ADWP benefits, in violation of the Due Process Clause of the *West Virginia Constitution*, article three, section ten.

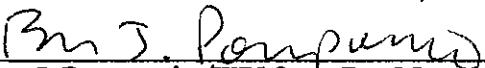
27. The Defendant's policy for denying recipients or applicants for ADWP benefits is not reasonably related to any legitimate government interest.

28. Plaintiffs are suffering or are in danger of suffering irreparable harm. Plaintiffs have no adequate remedy at law.

WHEREFORE, the Plaintiff respectfully requests the following relief:

- (a) The Court certify a Plaintiff class consisting of all applicants and recipients of West Virginia's Home and Community Based Aged/Disabled Waiver Program, and the Plaintiffs so moves;
- (b) The Court declare that the Defendant's practice and policy of terminating or denying ADWP benefits, as hereinbefore alleged, denies the Plaintiff class equal protection under the law in violation of article three, section ten of the *West Virginia Constitution*;
- (c) The Court declare that the Defendant's practice and policy of terminating or denying ADWP benefits, as hereinbefore alleged, discriminates against the Plaintiff class on basis of disability in violation of *West Virginia Code* section 5-11-9.
- (d) The Court declare that the Defendant's practice and policy of terminating or denying ADWP benefits, as hereinbefore alleged, denies the Plaintiff class due process in violation of article three, section ten of the *West Virginia Constitution*;
- (e) The Court enjoin the Defendant from terminating ADWP benefits to any member of the Plaintiff class until such time as the Defendant's practice and policy of terminating or denying ADWP benefits comports with the requirements of due process;
- (f) Appropriate forward adjustment of benefits for the named Plaintiffs and other substantive relief;
- (g) Reasonable attorney's fees and the costs of this litigation; and
- (h) Such other relief as this Court deems equitable and just.

Respectfully Submitted,
JACKIE FLESHMAN,
on behalf of all
other individuals similarly situated,
By counsel.


Bren J. Pomponio (WV State Bar No. 7774)
Daniel Hedges (WV State Bar No. 1660)
Mountain State Justice
922 Quarrier Street, Suite 525
Charleston, WV 25301
304/344-3144
COUNSEL FOR PLAINTIFFS