SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3744-92T1

L.M.,

Appellant,

-v-

MARION E. REITZ, in her official capacity as Director of the New Jersey Department of Human Services, Division of Family Development; and NEW JERSEY DEPARTMENT OF HUMAN SERVICES, DIVISION OF FAMILY DEVELOPMENT,

Respondents.

CIVIL ACTION

On Appeal from the Final Decision of the Director, Division of Family Development

BRIEF AND APPENDIX OF APPELLANT L.M.

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on the Brief

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Respondent-appellant L.M. brings this action in the Appellate Division pursuant to R. 2:2-3(a)(2) against respondents Marion E. Reitz and New Jersey Department of Human Services, Division of Family Development, and pursuant to 42 U.S.C. 1983 against respondent Reitz in her official capacity as Director of the Division of Family Development. L.M. seeks judicial review and reversal of the February 12, 1993 final decision by respondent Reitz upholding the Passaic County Board of Social Services' (PCBSS) $912 food stamp overpayment assessment against her and its budgeting of her rent discount as earned income for purposes of determining her household's food stamp eligibility. L.M. asks this Court to permanently enjoin respondent Reitz from permitting PCBSS to recoup this alleged overpayment and budget her rent discount as earned income. She also asks this Court to order respondent Reitz to restore all food stamps withheld because of the erroneous budgeting of her rent discount as earned income. Should she prevail in this action, L.M. will move this Court under 42 U.S.C. 1988 for attorney fees against respondent Reitz. (See also Pa 6-7).

The facts in the instant matter are uncontroverted. L.M., her husband and their four minor children reside in

Paterson in a basement apartment currently owned by Irwin Nijaki. (T8-19 et seq). Their rent is, and has for some time been, $150 monthly, because L.M. is the building superintendent. (Pa 19-20, 53, 56, 63,75; T30-9 et seq). The household's only income is Social Security; L.M.'s husband is disabled. L.M. receives no wages from Mr. Nijaki; in exchange for her services, he charges her only $150 for a $400 apartment. (T33-17 et seq; Pa 75).

Mr. Nijaki has reported this arrangement to the State and listed L.M. as an employee. (Pa 47-48). Armed with this information -- and despite being informed that L.M. only received a "rent allowance" -- PCBSS commenced intentional program violation (IPV)[1] disqualification proceedings against L.M. for not reporting the receipt of earned income for the period of September 1990 through September 1991. (Pa 30-53). The overpayment was assessed at $912. (Pa 32 - 37).

L.M.'s IPV hearing was held December 4, 1992 in Totowa before Administrative Law Judge (ALJ) Gerald T. Foley of the New Jersey Office of Administrative Law. (Pa 23). PCBSS, by investigator Frances Adamo, testified that L.M.'s food stamp overpayment had been based upon a budget of $150 monthly rent and additional monthly earned income of $250, the "rent

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1. See 7 C.F.R. 273.16 for an explanation of these proceedings.

allowance."[2] (T8-25, T9-7; T25-21). L.M. argued at hearing that this rent allowance could not be budgeted as earned income as it was not paid as money. She further argued that if the $250 were earned income, then, for consistency's sake, her rent had to be budgeted at $400 monthly. (T42-13 et seq).

In his December 21, 1992 initial decision ALJ Foley rejected L.M.'s arguments and recommended imposition of an IPV sanction against L.M. and assessment of a $912 food stamp overpayment. (Pa 23). In her letter of exceptions dated January 8, 1993, L.M. renewed her arguments that the budgeting of her rent allowance contravened federal law. She also moved for re-opening of her hearing based upon documentation in her complete file, not presented at hearing by Ms. Adamo, that she had informed PCBSS of her rent allowance as early as 1984 and had been advised that this rent allowance was not countable income. L.M. noted that she had requested a fair hearing in early 1992 on the budgeting of her rent discount as earned income and that to date no action had yet been taken on that request. She requested recalculation and restoration of all benefits wrongfully withheld. (Pa 10 et seq).

In her final decision dated February 12, 1993, respondent Reitz "amended" ALJ Foley's decision by reversing only the IPV charge. Respondent Reitz stated, "I am not persuaded of an

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2. Ms. Adamo initially testified L.M.'s rent was $344, with L.M. paying $150 and HUD (HUA) paying $194. (T24-6 et seq.) The HUA reference, however, is not to HUD, but Heating Utility Allowance, a component of shelter costs. See 7 C.F.R. 273.9(d). L.M. receives no HUD subsidy; her landlord has reduced her rent because of her superintendent duties.

actual intent to defraud the CWA." The overpayment assessment remained unchanged,[3] however, as did the calculation of L.M.'s rent discount as earned income. (Pa 9). L.M. commenced this action by filing her notice of appeal on March 22, 1993. (Pa 4).

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3. Because no fraud was found, at the least the alleged overpayment should have been reduced. (Pa 32).

ARGUMENT

I. Respondents' Budgeting Of Appellant's Rent Discount As Earned Income Violates Federal Law.

Appellant L.M. argues in the instant case that respondent Reitz's final decision upholding the treatment of L.M.'s rent discount as earned income for food stamp budgeting purposes contravenes federal law, and is, therefore, unlawful. States participating in the food stamp program must follow federal eligibility standards in determining client food stamp eligibility. See, e.g. Harrington v. Blum, 483 F. Supp. 1015 (S.D.N.Y. 1979), aff'd, 639 F.2d 768 (2d Cir. 1980).

In exchange for her assuming the superintendent duties for his apartment building, L.M.'s landlord has reduced her rent by $250 to $150 monthly. L.M. receives no money from the landlord. She provides him janitorial services, and he provides her discounted housing. (Pa 75). 7 U.S.C. 2014(d) provides in pertinent part that

> [h]ousehold income for purposes of the food stamp program shall include all income from whatever source excluding only (1) any gain or benefit which is not in the form of money payable directly to a household....[Emphasis supplied].

See also 7 C.F.R. 273.9(c). 7 C.F.R. 273.9(c)(1) (iv)(A) expressly states that "if the employer provides housing to an employee, the value of the housing shall not be counted as income." See also H. Rep. No. 464, 95th Cong., 1st Sess. 29-34, reprinted in 1977 U.S.C.C.A.N. 2006-2011 (value of employer

housing subsidy to be disregarded as income in food stamp program).[4]

Respondent Reitz's action permitting the recoupment of a $912 overpayment as well as the further reduction of L.M.'s monthly food stamp allotments through budgeting of her rent discount as earned income must be enjoined. All food stamp benefits wrongfully withheld must also be restored under 7 C.F.R. 273.17, in accord with L.M.'s requests for such relief in early 1992 and in December 1992. (Pa 10, 12, 17).

II. The Instant Action Is Properly Brought Under 42 U.S.C. 1983 Against Respondent Reitz.

Appellant L.M. brings this action against respondent Marion E. Reitz under authority of 42 U.S.C. 1983, which provides that:

> [e]very person, who under color of any statute, ordinance regulation, custom or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and

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4. Instead of budgeting the rent subsidy as income, the United States Congress and Secretary of Agriculture have chosen to disregard the rent subsidy in determining shelter costs. "[A]n expense which is covered by excluded vendor payments shall not be calculated as part of the household's shelter cost." 7 C.F.R. 273.10(d)(1). In general, the higher a food stamp household's rent, the larger the food stamp grant. In the instant case, respondent Reitz has excluded the employer subsidy in determining shelter costs; only $150 is budgeted for rent. However, the subsidy has also been budgeted as earned income, contrary to federal law.
The procedure for determining the proper food stamp grant appears at 7 C.F.R. 273.10.

> laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Under 42 U.S.C. 1988, a prevailing party in a section 1983 action is entitled to her attorney fees. This fee provision is part of the section 1983 remedy whether the action is brought in federal or state Court. Maine v. Thiboutet, 488 U.S. 1, 11 (1980).

In the case at bar, L.M. seeks to force respondent Reitz's compliance with 7 U.S.C. 2014(d)(1) and 7 C.F.R. 273.9(c) in determining her food stamp eligibility. As its language plainly states, section 1983 is available as a remedy for violations of federal statutory, as well as constitutional, rights. Maine v. Thiboutet, supra. It provides a remedy "against all forms of official violation of federally protected rights." Monell v. New York City Dept. of Social Serv., 436 U.S. 658, 700-1 (1978). The United States Supreme Court has repeatedly held that the coverage of section 1983 must be broadly construed. Golden State Transit Corp. v. City of Los Angeles, ____ U.S. ____ 110 S.Ct. 444, 448 (1989). Actions under section 1983 had been found proper to secure compliance with federal welfare statutes on the part of participating states. See, e.g., Edelman v. Jordan, 415 U.S. 651 (1974) (AFDC program); see also e.g., Velez v. Coler, 767 F. Supp. 253 (M.D. Fla. 1991) (food stamp program).

1983 compliance welfare statutes

A determination that section 1983 is available to remedy a federal statutory or constitutional violation involves a two step inquiry. Golden State, 110 S. Ct. at 448.

> First, the plaintiff must assert the violation of a federal right.... In deciding whether a federal right has been violated, we have considered whether the provision in question creates obligations binding on the governmental unit or rather "does no more than express a congressional preference for certain kinds of treatment."..... The interest the plaintiff asserts must not be "too vague and amorphous" to be "beyond the competence of the judiciary to enforce."..... We have also asked whether the provision in question was "inten[ded] to benefit" the putative plaintiff. [Id. (citations omitted)].

L.M. clearly meets this first step. 7 U.S.C. 2014(d)(1) mandates that any gain or benefit not in the form of money to a household not be counted as income in determining food stamp eligibility. 7 C.F.R. 273.9(c) (1)(iv)(A) specifically mandates that employer-provided housing not be counted as income to the employee recipient. The U.S. Supreme Court has found causes of action under section 1983 in far more ambiguous language. See, e.g., Wilder v. Virginia Hospital Assn., 496 U.S. 498 (1990). Additionally, the provisions at issue clearly intend to benefit food stamp applicants and recipients, including L.M. See, id.

The defendant bears the burden of meeting the second of the two step inquiry.

> [E]ven when the plaintiff has asserted a federal right, the defendant may show that Congress "specifically foreclosed a remedy under Section 1983," by providing a "comprehensive enforcement mechanis[m] for protection of a federal right." The availability of administrative mechanisms to protect plaintiff's interests is not

> necessarily sufficient to demonstrate that Congress intended to foreclose a section 1983 remedy. Rather, the statutory framework must be such that "[a]llowing a plaintiff" to bring a section 1983 action "would be inconsistent with Congress' carefully tailored scheme." The burden to demonstrate that Congress has expressly withdrawn the remedy is on the defendant. "We do not lightly conclude that Congress intended to preclude reliance on section 1983 as a remedy' for the deprivation of a federally secured right."..... Id. (citations omitted)].

Appellant asserts respondent Reitz cannot meet this burden. The U.S. Supreme Court long ago rejected the argument that the courts are without power to review state welfare provisions in view of the fact that Congress has lodged in the federal secretary the power to cut off federal funds for non-compliance with federal statutory requirements. See Rosado v. Wyman, 397 U.S. 397, 420 (1970). Thus, L.M. has a cause of action under section 1983.

Marion E. Reitz has been properly named as a party in this section 1983 action. She is responsible for administering, directing and overseeing the food stamp program in New Jersey. See N.J.A.C. 10:80-1.1 and 1.2. Respondent Reitz has held that L.M.'s rent discount should be treated as earned income in calculating L.M.'s food stamp eligibility. As a consequence, a $912 overpayment is being recouped from L.M.'s current food stamp allotments, which already had been reduced because of the wrongful change in the budgeting of her rent discount. L.M. has asked the Court enjoin respondent Reitz's actions. A state official sued in her official capacity for injunctive relief is a person under section 1983. See Will v.

Michigan Dept. of State Police, ____ U.S. ____, 109 S. Ct. 2304, 2311 n. 10 (1989).

The Appellate Division is the proper state forum for this section 1983 action. State and federal courts share concurrent jurisdiction over section 1983 actions. Martinez v. California, 444 U.S. 277 (1980); Endress v. Brookdale Community College, 144 N.J. Super. 109, 132 (App. Div. 1976). Not only is there concurrent jurisdiction, but a "state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a 'valid excuse'" Howlett v. Rose, ____ U.S. ____, 110 S.Ct. 2430, 2439 (1990). When jurisdiction is otherwise adequate and appropriate under established local law, there is no valid excuse. Howlett, 110 S.Ct. at 2441.

The New Jersey Supreme Court, in pursuance of its constitutional responsibility, has vested review of state administrative action exclusively in the Appellate Division. Pascucci v. Vaggot, 71 N.J. 40, 52 (1976); see also R. 2:2-3 (a)(2). Additionally, the Appellate Division may properly "exercise such original jurisdiction as is necessary to the complete determination of any matter on review." R. 2:10-5; N.J. Constitution (1947), Art. VI, section V, par. 3; Pascucci, 71 N.J. at 53. In light of the "entire controversy" doctrine and the complementary principle of avoiding piecemeal litigation, these matters, in fact, could only be brought in this state forum. See Pascucci, 40 N.J. at 53.

L.M. has also properly pleaded her section 1983 action. (Pa 4 - 7). Courts have, in fact, consistently held that it is not necessary to plead specifically that an action is brought under section 1983 See e.g. Green v. Obledo, 161 Cal. App. 3d. 678, 207 Cal. Rptr. 830 (1984), cert. denied, 474 U.S. 819 (1965); Lucchesi v. Colorado, 870 P. 2d 1185 (Colo. Ct. App. 1990); Gumbhir v. Kansas State Bd. of Pharmacy, 231 Kan. 507, 646 P. 2d 1078 (1982), cert. denied, 457 U.S. 1103 (1983); Packard v. Gordon, 537 A.2d 140 (Vt. 1987). Or that attorney fees are being sought under section 1988. See e.g., Local 391 v. City of Rocky Mount, 672 F.2d 376, 381 (4th Cir. 1982).

L.M. has properly brought a section 1983 action before this Court.

CONCLUSION

For the above state reasons, appellant L.M. prays for the specified relief.

Respectfully submitted,

PASSAIC COUNTY LEGAL AID SOCIETY

BY: 

CARY L. WINSLOW

Dated: July 20, 1993