UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
Western Division
Civ. No. 5:11-cv-00273-BO

HENRY PASHBY, *et al*, individually and on behalf of all others similarly situated,

Plaintiffs

v.

ALDONA WOS, Secretary, North Carolina Department of Health and Human Services, in his official capacity,

Defendant.

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO AMEND AND SUPPLEMENT COMPLAINT

On April 26, 2013, Plaintiffs filed a motion for leave to amend and supplement their complaint to update their factual allegations, pursuant to Fed. R. Civ. P. 15(a) and (d). [DE 131] Defendant's Response in opposition to this motion [DE 149] mischaracterizes both the applicable facts and law and provides no reason for Plaintiffs' motion to be denied.

I. THE CASE IS NOT MOOT.

In her Response, Defendant repeats the argument that this action was rendered moot by the adoption of Clinical Policy 3L. Def. Resp. at 6-7 [DE 149]. Plaintiffs previously responded to this contention and will not repeat that response here. *See* Pla. Resp. in Opp. to Def. Mot. to Dismiss [DE 139]. Indeed, this Court has already ruled that the adoption of Policy 3L does not render the case moot. May 3, 2013 Order at 1-2 [DE 142]. Moreover, in the same order, this Court required Defendant to provide additional relief to the Plaintiff class. *Id*. at 2-3. To date,

Defendant has not complied with this Order. *See* Ex. A (emails between counsel). At the very least, Defendant must comply with the Court's orders before asking for this action to be dismissed as moot.

II. PLAINTIFFS' PROPOSED AMENDED COMPLAINT IS CLOSELY RELATED TO THEIR ORIGINAL COMPLAINT.

Defendant also argues that Plaintiffs' proposed Second Amended and Supplemental Complaint ("2d Amended Complaint") states an entirely "separate and distinct cause of action" from their first amended complaint. Def. Resp. at 8 [DE 149]. This assertion ignores the very close nexus between the prior complaint and the 2d Amended Complaint.

Plaintiffs' 2d amended complaint is against the same state agency on behalf of the same named plaintiffs (except for one who has died) and on behalf of all members of the certified Plaintiff class. *See* 2d Amended Compl. at ¶¶11-16, 50-137. Plaintiffs seek a modification of the class definition solely to include those denied or terminated from in-home PCS under new Policy 3L *as well as* those denied or terminated under Policy 3E. *See* 2d Amended Compl. at ¶16.

Plaintiffs' legal claims in the 2nd amended complaint are precisely the same as those made in their original complaint: that Defendant continues to violate the community integration mandate of the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act, comparability and reasonable standards provisions in the Medicaid Act, Medicaid notice and hearing requirements, and the Due Process clause of the U.S. Constitution. *See* 2d Amended Compl. at ¶¶219-241; 1st Amended Compl. at ¶¶ 193-217 [DE 44]. For example, the due process challenge to Defendant's Personal Care Services (PCS) notices contained in the last complaint is continued in the 2d amended complaint, an issue not addressed by the Fourth Circuit Court of Appeals outside of the context of a "mass change." *See* 2d Amended Compl. at ¶¶208-217; 1st

Amended Compl. at ¶¶ 185-192. The 2d amended complaint also continues to seek the same relief sought in the prior complaint: a declaratory judgment and permanent injunction requiring Defendant to comply with these legal requirements. 2d Amended Compl. at pp. 49-50; 1st Amended Compl. at pp. 41-42.

The factual basis for the lawsuit also has not fundamentally changed. Indeed, the 2d amended complaint contains almost all of the factual allegations contained in the prior complaint, simply updating them. *See* 2d Amended Compl. at ¶¶1-200, 208-218; 1st Amended Compl. at ¶¶ 1-192. Plaintiffs' 2d amended complaint challenges the same conduct as did the prior complaint, both alleging that in determining whether to approve or continue PCS, Defendant discriminates in favor of residents of institutional Adult Care Homes (ACHs) and against Medicaid recipients with comparable needs who live in their own homes. *See, e.g.,* 2d Amended Compl. at ¶¶ 2 ("DHHS continues to treat the two populations differently" and thus "continues its violations of the Medicaid Act and the Americans with Disabilities Act"), 5, 6, 206, 207. For example, the 2d amended complaint alleges that Defendant is assuming that all ACH residents have an unmet need for assistance with eating, thus effectively reducing the eligibility requirement to receive Medicaid PCS from three to two activities of daily living (ADL's) for ACH residents. 2d Amended Compl. at ¶ 204.B. Plaintiffs thus are alleging that the ability to obtain or retain eligibility for Medicaid coverage of PCS remains significantly biased in favor of those in institutional settings.

Defendant claims that the prior complaint challenged Policy 3E on its face while the 2d Amended Complaint challenges Policy 3L as it has been implemented. Def. Resp. at 11-13 [DE 149]. In fact, the 1st amended complaint also challenged Defendant's failure to implement the

PCS policy approved by the federal Medicaid agency. 1st Amended Compl. at ¶¶ 176-77.[1] More fundamentally, the attempted distinction is without significance, as it would mean that so long as the agency's discriminatory policies have ended on paper, this Court loses jurisdiction to determine if the discrimination has ended in practice. This position, if accepted, would undermine the authority of federal courts to assure that violations of law actually are corrected. *See, e.g., Alexander v. Hill*, 707 F.2d 780 (4th Cir. 1983) (district courts have wide discretion to fashion a remedy to ensure full compliance with the law, a duty which everyone, particularly governments, have).

Defendant also argues that no Plaintiff has been prejudiced by Defendant's alleged continuing discriminatory application of Policy 3L. Def. Resp. at 10, 16 [DE 149]. This assertion ignores both the allegations of the 2d amended complaint and the law of this case. Plaintiffs have specifically alleged that they and the certified class have been harmed or are threatened with harm by the agency's continued discriminatory practices. 2d Amended Complaint at ¶¶ 3, 5, 16, 206, 207, 217, 218. Indeed, Plaintiff Robert Jones *has already been terminated from in-home PCS* under Policy 3L and has directly experienced Defendant's discriminatory implementation of Policy 3L. 2d Amended Complaint at ¶¶ 127; Percer Decl. at ¶¶ 7-16 [DE 134-26]. As to the other plaintiffs, both this Court and the Fourth Circuit Court of Appeals have already ruled that the plaintiffs' regular reassessments by Defendant create a sufficient threat of harm to give them a continuing stake in the litigation. *See Pashby v. Cansler*, 279 F.R.D. 347, 352 (E.D.N.C. 2011); *aff'd*, *Pashby v. Delia*, 709 F.3d 307, 316 (4th Cir. 2013). It is also clear

[1] The 2d amended complaint also challenges N.C. Session Laws 2012-142§ 10.23A.(f), which was enacted in 2012. This provision does discriminate on its face in the eligibility criteria for state funding of PCS, creating eligibility for residents of ACH's but not for those in their homes.

that the alleged continuing harm to the Plaintiff class would be redressed by the relief sought in the second amended complaint - reinstatement of all class members terminated from or denied in-home PCS until Defendant corrects her discriminatory practices. 2d Amended Complaint at 4 (¶7), 49-50.

Defendant emphasizes that the state plan amendment upon which Policy 3L is based was approved by the federal Medicaid agency, CMS. Def. Resp. at 4-5 [DE 149]. This argument ignores prior rulings by this Court and the Court of Appeals that federal approval of a state plan amendment is entitled to weight *only if Defendant actually implements what was approved*. *See Pashby v. Cansler*, 279 F.R.D. 347, 354-55 (E.D.N.C. 2011); *aff'd*, *Pashby v. Delia*, 709 F.3d 307, 324 (4th Cir. 2013). This is precisely what is alleged in the 2d amended complaint: Defendant still has not implemented the uniform PCS policy that CMS required. 2nd Amended Compl. at ¶¶ 1, 2, 6, 204, 206, 223, 229, 232, 235.

The case law cited by Defendant does not support her position. In *Planned Parenthood v. Neely*, 130 F.3d 400 (9th Cir. Ariz. 1997), the court denied the plaintiff's motion to supplement a complaint not because the plaintiff's supplemental complaint challenged a different statute but rather because a final judgment had been rendered in the original action four years prior to the plaintiff's motion to supplement the complaint and the district court had not retained jurisdiction. 130 F.3d at 402. In this case, the original action is ongoing, and discovery has not begun. In *Schwarz v. City of Treasure Island*, 544 F.3d 1201 (11th Cir. Fla. 2008), the proposed supplemental complaint asserted an entirely new legal theory after discovery was underway. 544 F.3d at 1229. Here Plaintiffs' legal theory has not changed at all. In *Trilink Saw Chain, LLC v. Blount, Inc.*, 583 F. Supp.2d 1293 (N.D. Ga. 2008), the court denied the motion to supplement

the complaint because the new allegations concerned a completely new set of facts leading to a new set of injuries, and because discovery was complete and summary judgment motions had been ruled upon. 583 F. Supp.2d at 1329. In this case, because the 2d amended complaint timely alleges continuation of the same legal violations based on the same discriminatory behavior that was challenged in the original complaint, Plaintiffs motion to amend should be allowed.

III. PLAINTIFFS' MOTION IS NEITHER PREJUDICIAL NOR FUTILE.

Defendant concedes that leave to amend a complaint should be "freely" given. Def. Resp. at 6 [DE 149]. A "motion to amend should be denied only where it would be prejudicial, there has been bad faith, or the amendment would be futile." *Nourison Rug Corporation v. Parvizian*, 535 F.3d 295, 298 (4th Cir. 2008). None of those circumstances are present here.

Defendant claims prejudice from Plaintiffs' motion but never explains how the agency is prejudiced, except to repeat the already rejected argument that the case is moot. Def. Resp. at 14 [DE 149]. While it has been two years since this lawsuit was filed, the delay in beginning discovery is entirely due to Defendant's unsuccessful interlocutory appeal. It is certainly reasonable and not prejudicial for Plaintiffs to supplement their complaint to update the court on the intervening events. If the state agency truly has ended its discriminatory PCS eligibility process, it will have every chance to prove that in court.

It is the Plaintiffs, not Defendant, who will be prejudiced if their motion is denied. As discussed above, the 2d amended complaint is based on the same legal theories and the same pattern of facts as the original complaint. Under principles of merger and claim preclusion, it is very unlikely that any named plaintiff or any member of the certified class would be permitted to file a new lawsuit to challenge Defendant's continued discriminatory practices against them in

the implementation of Policy 3L. *See* Restatement (Second) of Judgments §24 (1982); *Migra v. Warren City School Dist. Bd. of Educ*., 465 U.S. 75 (1984). Denial of the motion to amend and supplement thus would deny Plaintiffs their day in court.

Defendant nonetheless repeatedly suggests that Plaintiffs file a new lawsuit, thus ignoring the judicial economies from resolving related claims in one case which are at the heart of Rule 15(d). *New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20, 28-29 (4th Cir. 1963). As discussed above, determining whether Defendant continues to violate the same provisions of federal law through essentially the same discriminatory process will require consideration of the same legal and factual issues as were presented in the original complaint, including many issues already ruled on by this Court and the Fourth Circuit, including plaintiffs' standing, irreparable harm, class certification, and preliminary rulings on the merits of Plaintiffs' claims. *Pashby v. Cansler*, 279 F.R.D. 347 (E.D.N.C. 2011); *aff'd*, *Pashby v. Delia*, 709 F.3d 307 (4th Cir. 2013). Defendant never explains why the parties and courts should have to relitigate these issues in a new lawsuit.

Defendant also cannot claim bad faith or delay by Plaintiffs. Plaintiffs filed their motion and proposed amended complaint as early as they possibly could, within days of the mandate issued by the Fourth Circuit and only after first attempting to settle the case with Defendant. No discovery has been conducted in this case, nor has any summary judgment motion been filed. The agency suggests that amendment would be futile, but as discussed above, this ignores the allegations of the 2d amended complaint and the relief sought therein. Defendant's suggestion that the General Assembly is a necessary party is plainly incorrect. See Pla. Reply in Supp. of Motion to Amend Class Defin. at n.3.

Defendant cites *Graham v. Stansberry,* 2008 U.S. Dist. LEXIS 64067 (E.D.N.C. Aug. 19, 2008), but that court held that a supplemental pleading may state a new cause of action so long as the matters have some relation to the claims set forth in the original pleading. 2008 U.S. Dist. LEXIS 64067 at 3. In *Graham*, the motion to supplement the complaint was denied because the supplemental pleading did not have any relation to the original pleading. *Id.* at 4. *Al-Ra'Id v. Ingle*, 69 F.3d 28 (5th Cir. 1995), also is inapposite as there the plaintiff abandoned the issue on appeal by failing to brief it. 69 F.3d at 33. Because it is clear that the 2d amended complaint will not unnecessarily complicate this matter, will not cause the Defendant undue prejudice, and will serve the purposes of Rule 15, while denial of the motion will severely prejudice the Plaintiff class, the motion to amend should be allowed.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their motion to amend and supplement their Complaint.

Dated: May 31, 2013

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day served a true copy of the Plaintiffs' REPLY IN SUPPORT OF MOTION TO FILE SECOND AMENDED AND SUPPLEMENTAL COMPLAINT upon the Defendant's attorneys via electronic means through the CM/ECF system to:

Ms. Lisa G. Corbett
Iain Stauffer
Olga E. Vysotskaya de Brito
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N.C. Department of Justice

This the 31st day of May, 2013.

/s/ Douglas Stuart Sea
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