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COMMONWEALTH OF MASSACHUSETTS
The Trial Court

FRANKLIN, ss.

3, IT, SUPERIOR COURT DEPARTMENT /a/
GREENFIELD DIVISION
Civil Action No. 94-025

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HENRY HUNTER, individually
and on behalf of all similarly
situated persons,
Plaintiff

v.

JOSEPH GALLANT, in his capacity)
as the Commissioner of the)
Massachusetts Department of)
Public Welfare,)
Defendant)

PLAINTIFF'S MEMORANDUM
IN SUPPORT OF MOTION
FOR CLASS CERTIFICATION

I. INTRODUCTION

Henry Hunter brings this action to challenge the Department of Public Welfare's policy and practice of terminating his AFDC benefits solely because his daughter was temporarily in foster care and receiving foster care payments, without regard to the fact that he continued to exercise care and control of his daughter during her temporary absence from the home. Mr. Hunter seeks to maintain this action on his own behalf, and also seeks to represent a class consisting of

As a result of the Department's illegal policy and practice, plaintiff Henry Hunter and the class he seeks to represent have been denied critical subsistence benefits needed in order to maintain a home to which the child can return.

I. ARGUMENT

Rule 23(a) of Massachusetts Rules of Civil Procedure establishes four prerequisites to the maintenance of a class action:

1. The class must be so numerous that joinder of all members is impracticable;
2. There are questions of law or fact common to the class;
3. The claims or defenses of the representative party are typical of the claims or defenses of the class; and
4. The representative party will fairly and adequately represent the class interests.

In addition, Rule 23(b) imposes a further requirement that questions of law or fact predominate over any questions affecting only individual members and that a class action be superior to other methods for the fair and efficient adjudication of the controversy.

The plaintiffs in this case have satisfied each of these class action prerequisites.

A. **The Class Is So Numerous That Joinder of the Members Is Impracticable.**

In determining whether the numerosity requirement of Rule 23 (a)(1) is met in a particular case, the Court must look to all the circumstances of the case to determine whether the number of persons in the class is so large as to make joinder of all the parties impracticable. Hansberry v. Lee, 311 U.S. 32 (1940); Gatling v. Butler, 52 F.R.D. 389 (D. Conn. 1971). The key to fulfillment of Rule 23(a)(1) is impracticability of joinder, not mere numerosity of the class. Thus, the Supreme Judicial Court has looked at whether “a few individuals are fairly representative of the legal and equitable rights of a large number who cannot be readily joined as parties.” Snear v. H.V. Green Co., 246 Mass. 259, 266-67, 140 N.E. 795, 797-98 (1923) (emphasis added). In accordance with this precedent, the Appeals court has defined “impracticable” as “impracticable, unwise or imprudent rather than impossible or incapable of being performed.” Bronhy v. School Committee of Worcester, 6 Mass. App. Ct. 73, 1,735, 383 N.E. 2d 521, 524 (1978).

In Bronhy, the Appeals Court approved the trial judge's determination that two classes, one containing 160 individuals, and another 70 individuals were sufficiently numerous to warrant class certifications. Applying the analogous provision of the federal rule governing class actions, F.R.C.P. 23, classes have been certified for much smaller groups of individuals than the proposed class here. See, e.g., Arkansas Education Assn. et. al. v. Board of Education of Portland, 446 F.2d 763 (1971), (class of 20 teachers certified); Cvoress v. Newport News Ho&al, 375 F.2d 648 (1967) (18 members sufficient).

Where the plaintiff has demonstrated that a class of persons exists, an estimate based on the available evidence of numerical composition of the class will be sufficient for class certification. As the court ruled in Doe v. Charleston Area Medical Center, 529 F.2d 638, 645 (4th Cir. 1975), "[w]here plaintiff has demonstrated that the class of persons he or she wishes to represent exists, that they are not specifically identifiable supports rather than bars the bringing of a class action, because joinder is impracticable. " Id. at 645. Accord, Andrews v. Bechtel Power Corn., 780 F.2d 124, 131-32 (1st Cir. 1985) (joinder not practicable where class members are difficult to identify), cert. denied, - U.S. ___ (1968); Wilcox v. Petit, 117 F.R.D. 314,317 (D. Me. 1987).

Plaintiffs in the instant case can easily demonstrate both numerosity and the impracticability of joinder as required by Rule 23(a)(1). While information regarding the precise number of class members is in the defendant's possession, it is estimated that several thousand AFDC households each year are adversely affected by the Department's illegal policy. The Commonwealth had an average of 4,225 children per month in Title IV-E foster care during fiscal year 199 1. (See 1992 "Green Book" Overview of Entitlement Programs, attached hereto as Exhibit A). Title IV-E foster care is provided to children who were eligible for AFDC prior to foster care placement. According to the 1993 demographic report from the Department of Social Services, the agency responsible for administering the foster care program in Massachusetts, there were a projected 12,577 children in foster care placement. (See, Massachusetts Department of Social Services Annual Demographic Report on Consumer Populations, pp. 29-3 1. July 1993, attached hereto as Exhibit B). Using the Green Book's determination that 3 1% of children in foster care came from AFDC households, this would mean that approximately 4,---- children during 1993 were

potential class members because they were eligible for AFDC prior to their foster care placement.’ Given the upward trends in the number of annual foster care placements, it can be expected that this number has increased during 1994. (See, Exhibit A, pp. 903-4, and Exhibit B, p. 29, showing a - % increase in the foster care placements from 1987 to 1993).

B. There are Questions of Law Common to the Class.

The questions of law common to the class include the legality of defendant’s determination that all grantee-relatives are ineligible for AFDC solely because their child(ren) are temporarily in foster care and receiving foster care assistance, regardless of the amount of care and control the grantee-relative continues to exercise. There is no doubt that these are “common questions” for purposes of rule 23(a)(2). Accord, Bladarassi v. Public Finance Trust, 369 Mass. 33,39-40,337 N.E.2d 701,706 (1975).

C. The Claims of the Representative Party Are Typical of the Claims of the Class.

Most authorities have held that, to the extent that the typicality requirement of Rule 23(a)(3) does not overlap other requirements, it is met by showing that the claim of the named plaintiff is sufficiently similar to the claims of the class members so that there is no danger that the named plaintiffs “unique circumstances or legal theory will receive inordinate emphasis and that other claims will not be pressed with equal vigor or will go unrepresented.” Weiss v. York Hospital, 745 F.2d 786, 808, 809 n.36 3d Cir. 1984). See also Smith and Zobel, 7 M.P.S. Rules Practice 123.6. Here, there are no circumstances or

¹ **The class is defined somewhat more narrowly, as caretakers of children who are temporarily placed in foster care, and who continue to exercise care and control of their children during such temporary absence. The Department’s current practice, however, is to deny, reduce or terminate AFDC benefits based solely on the foster care placement, without any investigation of the care and control issue. The hearing officer’s decision in the case of the plaintiff illustrates this practice. (See, record, p.) Therefore, as a threshold matter, the class consists of all caretaker relatives whose AFDC has been or will be denied, reduced or terminated without the Department first determining whether or not they continued to exercise care and control of the child(ren) temporarily in foster care.**

legal theories unique to the named plaintiff which would affect his representation of the class. Since the "actual matrix" is the same for the named plaintiff and the class members and the legal theories are the same, the typicality requirement has been met. Weiss, 745 F.2d at 809.

D. The Representative Party Will Fairly and Adequately Protect the Interests of the Class.

The two criteria for determining whether a named plaintiff will adequately represent the class are whether the named plaintiff shares, without conflict, the interests of the unnamed class members and whether the representative party will vigorously prosecute the rights of the class members through qualified counsel. See Kaminski v. Shawmut Credit Union, 416 F. Supp. 1119, 1123 (D. Mass. 1976); Smith and Zobel, 7 M.P.S. Rules Practice §23.7. In this case, the interests of the other members of the class are in no way adverse or antagonistic to the interests of the named plaintiff. The named plaintiff is a member of the proposed class, and he has the same interests, and seeks the same results as the other class members: to prohibit defendants from illegally determining that they are ineligible for AFDC solely because their child(ren) are temporarily in foster care and receiving foster care benefits, and to restore benefits to those whose AFDC benefits were illegally denied, reduced or terminated. The named plaintiff's vigorous pursuit of a successful outcome will necessarily benefit the class members. Furthermore, the plaintiff is represented by an attorney with extensive experience in class action litigation and in representing persons who have been illegally denied benefits by the Department of Public Welfare. The named plaintiff's attorney will vigorously prosecute the action on behalf of the named plaintiff and the class. See Snence v. Reeder, 382 Mass. 398, 409, 416 N.E.2d 914, - (1981). The named plaintiff is therefore an adequate representative for purposes of Rule 23(a)(4).

E. The Proposed Class Satisfies the Requirement of Rule 23(b).

In addition to the requirements of Rule 23(a), Rule 23(b) of the Massachusetts Rules of Civil Procedure requires that "the questions of law or fact - to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Both of these requirements are met here.

First, as discussed above, all of the questions raised by this action are shared by the named plaintiff and the class members. Common questions therefore predominate as required by Rule 23(b). The Department may argue that each putative class member will require an individualized determination of the temporariness of the placement or the degree of care and control the grantee-relative continues to exercise. However, by definition, the class is comprised only of those persons who continue to exercise care and control of their child(ren) during a period of temporary absence. Furthermore the need for subsequent individualized factual determinations does not negate the commonality of law being applied to all class members. Accord, ***GrBn v. Prudential Insurance Co. of America, 11 Mass. App. Ct. 714, 723-724 (198 1). (The Appeals Court reversed the trial judge's denial of class certification, holding that the judge had not given proper weight to the predominance of common questions in a case involving building-wide rent reviews that had resulted in individualized tenant rent increases.)

Second, a class action is superior to other methods for adjudicating the controversy. A class action is particularly appropriate where, as here, a general policy or practice of a governmental entity is being challenged. The defendant may argue that a class action is not superior because they will apply any relief granted on behalf of the named plaintiff to the putative class, even if no class is certified. While such assurances by a governmental defendant may render a class action unnecessary in some cases, a class action is superior in cases, such as this one, that involve retroactive relief. A class action is superior to resolving the controversy because it is the only practical way in which persons who may be entitled to retroactive relief can be identified and such relief can be granted. Without a class action, Henry Hunter is not in a position to press for retroactive restoration of benefits to the thousands of putative class members who have been illegally denied AFDC benefits. Even if he were in a position to seek class-wide retroactive relief without formal class action treatment, there would be serious problems implementing such a judgment retroactively. For example, unless the action is maintained as a class action there would be no mechanism for requiring defendants to give notice to absent class members that they may be eligible for retroactive benefits. Absent class members would therefore have no way of knowing about their eligibility. Such notice is, of course, routine in class actions, see, e.g. Crane v. Commissioner of Public Welfare, 395

Mass. 435,480 N.E.2d 995 (1985), but there is no basis for it where an action is not maintained as a class action.

III. CONCLUSION

For all of the above reasons, plaintiff respectfully requests that this Court certify the above-described class in this matter.

Dated: _____

Respectfully submitted,

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