

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

**KELLY BOWLIN, on behalf of herself
and all others similarly situated,**)
)
)
 Plaintiffs,)
)
 vs.)
)
**NANCY MONTANEZ, as the Director
of the Nebraska Department of Health
and Human Services,**)
)
)
 Defendant.)

CASE NO. 4:04CV3218

**MEMORANDUM
AND ORDER**

This matter is before the Court on the Report and Recommendation (Filing No. 45) issued by Magistrate Judge F. A. Gossett, recommending the Plaintiff’s Motion for Class Certification (Filing No. 23) be granted. Defendant Nancy Montanez, as the Director of the Nebraska Department of Health and Human Services (“Montanez”) filed a Statement of Objection to the Report and Recommendation (Filing No. 47) and submitted a brief (Filing No. 48) as allowed by 28 U.S.C. § 636(b)(1)(C) and NECivR 72.3. Plaintiff Kelly Bowlin, on behalf of herself (“Bowlin”) and all others similarly situated (“proposed class members”) submitted a brief in opposition to Montanez’s objection (Filing No. 50). For the reasons stated below, the Magistrate Judge’s Report and Recommendation will be affirmed and the Motion to Certify Class will be granted.

STANDARD OF REVIEW

The authority of federal magistrate judges is established through 28 U.S.C. §636(b)(1)(A), which treats motions to “dismiss or permit the maintenance of a class action” as dispositive. Therefore, pursuant to NECivR 72.3, a magistrate judge’s recommendation concerning class certification is reviewed *de novo* and the objecting party is required to file a statement of objection specifying the portions of the recommendation

to which the party objects. The Court may accept, reject, or modify, in whole or in part, the Magistrate Judge's findings or recommendations.

STATEMENT OF FACTS

Plaintiff Bowlin brings this action for declaratory and injunctive relief under 42 U.S.C. § 1983 on behalf of herself and a class of needy Nebraska caretaker relatives. Bowlin seeks certification of a class defined as:

All caretaker relatives in Nebraska with earned income: a) who have received Medicaid under the medically needy category without a spend down for at least three of the six months prior to having their Medicaid benefits terminated due to their earned income; b) who, but for their earned income would continue to receive Medicaid under the medically needy category without a spend down; and c) who have not been or will not be afforded the transitional Medicaid benefits provided for in 42 U.S.C. § 1396r-6.

Bowlin and the proposed class members allege they are covered by the language of 42 U.S.C. §§1396r-6 and 1396u-1. These sections of the Medicaid Act allow certain persons to be treated as recipients of Aid to Families with Dependent Children (AFDC), provided they qualify under the relevant methodology for determining countable income. Persons who are treated as receiving AFDC may therefore be eligible for Transitional Medical Assistance ("TMA"), a transitional form of Medicaid assistance granted to those who no longer qualify for Medicaid benefits.

Bowlin and the proposed class members had neither received assistance through AFDC nor through the AFDC replacement program, Temporary Assistance to Needy Families ("TANF"). Rather, they had received aid under an optional State plan that was designed for medically needy caretaker relatives. After an increase in calculable income precluded their eligibility for Medicaid, Defendant Montanez denied TMA benefits to Bowlin and the proposed class members, stating the optional State plan did not fall under the parameter § 1396u-1. Although both parties agree that TMA extends to those who had

received AFDC or to those identified in § 1396u-1, the parties disagree as to whether Bowlin and the proposed class members fall under the category of persons Congress intended for eligibility of TMA benefits.

In support of Bowlin's Motion to Certify Class (Filing No. 23), she submitted an index (Filing No. 24) and a brief (Filing No. 25), and the Defendant filed in brief in opposition (Filing No. 34). After reviewing both parties' briefs, as well as the Defendant's brief in opposition to the Motion for Preliminary Injunction (Filing No. 33), and cognizant of the Court's earlier order granting the Plaintiffs' Motion for Preliminary Injunction, Judge Gossett issued a Report and Recommendation recommending that the class be certified. Judge Gossett based his recommendation on the following reasons: that the Defendant is able to identify with precision the number of caretaker relatives meeting the class definition given available data; the prerequisites of Rule 23(a) have been satisfied; and the case could be maintained as a class action pursuant to Rule 23(b)(2). (Filing No. 45). In response, the Defendant filed a Statement of Objection to the Magistrate's Report and Recommendation (Filing No. 47), which the parties have fully briefed. (Filing Nos. 48 and 50).

ANALYSIS

Plaintiff Bowlin seeks to have a class of needy Nebraska caretaker relatives certified pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. To certify a class action, Rule 23(a) requires: (1) the class is 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 parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Additionally, per Rule 23(b)(2), the party opposing the class must either act or

refuse to act on grounds generally applicable to the class, thereby making the appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Montanez does not object to the Magistrate Judge's finding that the prerequisites of Rule 23(a) have been satisfied per the class of relative caretakers. Instead, Montanez claims a class action cannot be maintained pursuant to Rule 23(b)(2) because there has been no act or refusal to act on grounds generally applicable to the entire class. (Filing No. 48 at 4). I disagree. Upon termination of those members from the Medicaid program, Montanez's denial of TMA benefits constituted the act that is generally applicable to the entire class as required by Rule 23(b)(2).

Montanez also claims the relief requested by Bowlin will be identical regardless of whether a class action is maintained. (Filing No. 48 at 3). Citing *Martinez v. Richardson*, 472 F.2d 1121 (10th Cir. 1973) and *Nelson v. Likins*, 389 F.Supp. 1234 (D.Minn. 1974), Montanez claims that if the relief granted would inure to the benefit of all those similarly situated, then a class action would serve no useful purpose. *Martinez* and *Nelson* are distinguishable from the facts presented here. In *Martinez*, the relief granted was an order of future compliance with the court's findings. Because the disputed benefits were restored while the lawsuit was still pending, proper relief only required an opportunity for a future hearing should the benefits be thereafter denied. *Martinez*, 472 F.2d at 1124. Likewise, in *Nelson*, the relief granted included a change in policy that provided benefits to persons currently eligible for AFDC. In that situation, the relief requested by the plaintiffs was not retrospective and was therefore not affected by the certification of a class action since the change in policy affected only those *currently* receiving benefits.

The relief requested in both *Martinez* and *Nelson* is not the same relief as is sought by Bowlin. Like *Nelson*, Bowlin seeks an order permanently enjoining the Defendant from discontinuing Medicaid benefits to those who fall under the parameters of 42 U.S.C. §1396r-6 and §1396u-1. However, unlike both *Nelson* and *Martinez*, Bowlin also seeks relief for those caretaker relatives who have been denied TMA and who are currently precluded from the assistance granted under §1396r-6. Because the Preliminary Injunction only enjoins the Defendant from denying TMA to Bowlin, and not to the proposed class members, a favorable judgment for the Plaintiff would not affect those denied TMA prior to this judgment. Although such persons who meet the definition of the caretaker relative class members may in the future be “treated as receiving” AFDC medical benefits through TMA, the proposed class members whose termination from Medicaid occurred prior to a judgment in this case would have no remedy unless they filed individual claims.

Montanez also argues that furthering the interests of efficiency and economy is a reason to deny Bowlin’s Motion to Certify Class. Montanez claims that certification will complicate the issues due to individual factual scenarios by each member of the class, and due to the fact that individuals go on and off medically needy Medicaid with great frequency. However, as demonstrated in the Defendant’s Answers to Plaintiff’s First Set of Interrogatories (Filing No. 24), Montanez is able to identify all those who qualify for class membership as defined by the Plaintiff – in that response identifying those who would qualify within the temporal restrictions of November 1, 2002, until April 30, 2004¹. So, although it may be true that some persons go on and off Medicaid with great frequency,

¹ April 30, 2004, is the date through which Montanez has available data on the proposed class members. Montanez states that because there was no caretaker class that meets the relevant class definition between the dates of Nov. 1, 2002 and July 1, 2003, the applicable time period for which the 764 class members ranges from July 1, 2003 until April 30, 2004.

the proposed class members in this situation are and have been readily identified and confined through temporal restrictions.

Montanez states a willingness to apply the Court's Memorandum and Order (Filing No. 41) to all those similarly situated as Plaintiff, obviating the need for class certification. Given that the proposed class will seek not only declaratory relief, but also injunctive relief, and given the procedural safeguards contained in Rule 23, this Court finds that certification of this proposed class is in the best interest of judicial economy.

The Eighth Circuit Court of Appeals has recognized that one of the purposes supporting class actions is to eliminate "the possibility of repetitious litigation and providing small claimants with a means of obtaining redress for claims too small to justify individual litigation." *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1176 (8th Cir. 1995)(quoting *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 249 (3d Cir.), cert. denied, 421 U.S. 1011 (1975)). I conclude that this purpose will be served in this case by certifying the proposed class.

I conclude that the class as defined by Bowlin should be certified. The requirements of Rule 23 have been satisfied. The numerosity, commonality, and typicality requirements of Rule 23(a) have been demonstrated. I am persuaded that the representative parties can fairly and adequately protect the interests of the class. The proposed class members can be readily identified. The class members will seek declaratory and injunctive relief, and therefore, the class action form serves a useful purpose. For all these reasons,

IT IS ORDERED:

1. Defendant's Statement of Objection (Filing No. 47) is denied;
2. The Magistrate Judge's Report and Recommendation (Filing No. 45) is adopted;

3. Plaintiffs' Motion for Class Certification (23) is granted; and
4. Pursuant to Fed. R. Civ. P. 23(a) and (b)(2), the following is the certified class:

All caretaker relatives in Nebraska with earned income:

- a) who have received Medicaid under the medically needy category without a spend down for at least three of the six months prior to having their Medicaid benefits terminated due to their earned income;
- b) who, but for their earned income would continue to receive Medicaid under the medically needy category without a spend down; and
- c) who have not been or will not be afforded the transitional Medicaid benefits provided for in 42 U.S.C. § 1396r-6.

5. Having considered the factors outlined in Fed. R. Civ. P. 23(g), Rebecca L. Gould, Patricia A. Knapp, and the NEBRASKA APPLESEED CENTER, are appointed to serve as class counsel. Any person who objects to this appointment must file a written objection to the appointment within 10 days of the date of this order.

Dated this 1st day of March, 2005.

BY THE COURT:

s/Laurie Smith Camp

Laurie Smith Camp
United States District Judge