For Dockets See 1:92cv00589

United States District Court, S.D. Florida.
JOHN/JANE DOE NO.'S 1-13, et. al., Plaintiffs,
v.
Lawton CHILES, in his official capacity as Governor of the State of Florida, et. al., Defendants.
No. 92-0589-CIV-DAVIS.
February 19, 1993.

Plaintiffs' Memorandum of Law in Opposition to Defendants Williams and Clarke's Motion for Summary Judgment (Individual Capacity)

Respectfully submitted, Steven M. Weinger, Esq., Dana J. Lesemann, Esq., Kurzban Kurzban & Weinger P.A., 2650 SW 27th Avenue, 2nd Floor, Miami, Florida 33133, Telephoner (305) 444-0060, Steven M. Weinger, Esq., Florida Bar No. 280585.

I. *INTRODUCTION*

Plaintiffs are individuals who, as Defendants concede for purpose of this Motion, have been deprived of Intermediate Care Facilities for the Mentally Retarded services for an extended period of time by Defendants Robert Williams and Gary Clarke. Defendant Williams is the Secretary of the State of Florida's Department of Health & Rehabilitative Services and Defendant Clarke is the Assistant Secretary of HRS for Medicaid.

Defendants seek Summary Judgment in their individual capacity on the basis of qualified immunity and Defendants claim that no remedy for damages exist against state officers sued in their individual capacity under Section 1983 for violations of the Medicaid Act because it is a "spending clause statute." Both of Defendants' arguments are frivolous.[FN1] Defendants claim of a good faith defense is belied by 20 years of case law specifically holding that the failure to promptly provide Medicaid services to individuals who are eligible for those services represents a violation of Federal law. *See infra* at Section V. Further, in 1990 the United States Supreme Court specifically found the Federal rights contained 42 U.S.C. §1396a(a) to be legally enforceable. *Wilder v. Virginia Hosp. Ass'n,* 110 S.Ct. 2510 (1990). Indeed, Defendant Clarke is currently subject to a Preliminary Injunction entered by the Honorable Lenore C. Nesbitt in 1991 based upon his violations of 42 U.S.C. §1396a(a) for violations of the companion obligation to insure adequate payments to providers of ICF/MR Medicaid services.[FN2] Defendant Williams is also the subject of that Injunction, but only in his official capacity.[FN3]

FN1. In addition, tracking the claims in the Defendants' other Motion for Summary Judgment, these Defendants suggest that no violation of Federal law has been committed by anyone. Obviously there is no liability on the part of any Defendant (in an official or individual capacity), if no violation of Federal law occurred. That topic is addressed separately in Plaintiffs' Cross-Motion for Summary Judgment and Response to Defendants' Motion for Summary Judgment, which has already been filed with this Court. The Plaintiffs' position in their Memorandum of Law in Support of the Cross-Motion for Summary Judgment is incorporated herein by reference.

FN2. Order Granting Preliminary Injunction, *Florida Asso, of Rehabilitation Facilities, Inc., et al., v. State of Florida Department of Health and Human Services, et al.,* Case No. 89-0984-CIV-Nesbitt, Sept. 13, 1991.

FN3. *Id.*

As if the foregoing was not sufficient to show the frivolousness of the good faith claim, the Defendants have admitted that a legal opinion was issued by the Department of Health & Rehabilitative services General Counsel's Office significantly prior to the time this lawsuit was filed. The HRS General Counsel's Office wrote as follows:

It is our understanding that your office has already culled down a list of people the ICF/DD program is appropriate for and who are eligible for the service and you cannot pick one person and say more than another person that they need the service....

It is our view that you have to service this waiting list of individuals with reasonable promptness to get them ICF/DD services. Failure to provide these services through Jack of legislative appropriations or otherwise would leave us open to a federal lawsuit and indeed one has already been threatened.[FN4]

FN4. Memorandum from former Assistant Counsel John Hedrick to Kingsley Ross, former Assistant Secretary for Developmental Services, May 11, 1990 (emphasis added) attached as Exhibit 2 to Defendants Clarke and Williams' other Motion for Summary Judgment, and attached hereto as Exhibit 1.

Under these circumstances no colorable claim of a good faith defense can be raised.

As to the unavailability of a damage award under section 1983 based on the "spending clause" nature of the Medicaid statute, Defendants rely upon the 11th Circuit's decision in *Franklin v. Gwinnett County Public Schools,* 911 F.2d 617 (11th Cir. 1990) for the proposition that "[i]n the Eleventh Circuit 'binding precedent' holds that compensatory damages are *not available* for the violation of rights arising under spending clause statutes." Defendants, however, neglect to advise this Court that the Eleventh Circuit's decision in *Franklin* was reversed by the United States Supreme Court. *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60 112 S.Ct. 1028 (1992). Not only did the Supreme Court reverse the *Franklin* decision relied upon by Defendants Williams and Clarke, but the Court specifically rejected the Eleventh Circuit's interpretation of *pennhurst* and *Guardians Association,* as well as the other cases misinterpreted by Defendants Williams and Clarke in support of their "Spending Clause" argument.

As set forth in far greater detail below, the Defendants' Motion for Summary Judgment in their individual capacity should be denied. In accordance with 42 U.S.C. § 1983, Defendants should be held responsible for the damages incurred by the Plaintiffs.[FN5]

FN5. Defendants do not seriously question the extent of damages incurred by the Plaintiffs. These damages are well documented in the Whitaker report, which was supplied with the Plaintiffs' Motion for Class Certification and in the depositions taken by the Defendants, which have also been filed with this Court.

Defendants Williams and Clarke contend that they were public officials acting within the scope of their discretionary authority when they violated federal law and that their actions are protected by qualified immunity.[FN6] The Defendants were not acting within the scope of their discretionary authority. They violated a specific

requirement of federal Medicaid law by failing to include in the state plan for medical assistance the assurance that assistance would be provided with reasonable promptness. That requirement is mandatory and binding upon the Defendants. *see Wilder.* 110 S.Ct. 2510.

FN6. Defendant Williams' and Clarke's Statement of Material Facts in Support of Defendants' Motion for Summary Judgment (Individual Capacity), ¶ 1, quoting *Hudgins v. City of Ashburn,* 890 F.2d 396 (11th Cir. 1989).

II. BRIEF INTRODUCTION TO THE MEDICAID PROGRAM AND DEFENDANTS WILLIAMS AND CLARKE'S RESPONSIBILITIES

Defendant Gary Clarke is the Assistant secretary of Health and Rehabilitative Services for Medicaid. Defendant Clarke is responsible for ensuring compliance by the State of Florida with the federal Medicaid Requirements. Although participation in the Medicaid program is voluntary, if a state wishes to receive federal funding it must comply with the requirements established by the Medicaid Act and the regulations promulgated by the secretary of health and Human Services. *Harris v. McRae,* 448 U.S. 297, 301, 100 S.Ct. 2671, 2680 (1980).

To qualify for federal assistance, the state must adopt a "plan for medical assistance," which must contain the elements set out in section 1396a(a) At issue in this case is section 1396a(a) (8):
(a) A State plan for medical assistance must, ...
(8) provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that *such assistance shall be furnished with reasonable promptness to all eligible individuals;*

42 U.S.C. *§* 1396a(a) (8).

Defendants Clarke and Williams are charged with promulgating and enforcing the state Medicaid plan.[FN7] As the responsible officials, they are required to do more than simply adopt a plan that mimics the federal requirements. The United States Supreme Court, in *Wilder v. Virginia Hosp. Ass'n,* 110 S.Ct. 2510, 1519-20 (1990), held that state officials (Governor Wilder, in that case) must follow through on their plan and actually fulfill their responsibilities under the Medicaid Act. *Wilder* merely reaffirmed a long line of cases from the circuit Courts of Appeal to the same effect.[FN8]

FN7. Fla. Stat § 393.001(9).

FN8. *See, e.g., Lipton by Arnold v. Carney by Kimble,* 779 F. Supp. 925 (M.D. Tenn. 1990); *Clark v. Kizer,* 758 F. Supp. 572, 580 (E.D. Cal. 1990); *Cornelius v. Minter,* 395 F. Supp. 616 (D. Mass. 1974); *Barnes v. Cohen,* 749 F.2d 1009, 1019 n.6 (3rd Cir- 1984); *Smith v. Miller,* No. 76 Civ. 526 (N.D. Ill. Nov. 1, 1979), *aff'd,* 665 F.2d 172, 177 (7th Cir. 1981); *Morgan v. Maher,* 449 F. Supp. 229 (D. Conn. 1978); *Adens v. Sailer,* 312 F. Supp. 923 (E.D. Pa. 1970).

Having elected to receive Medicaid funding and having elected to cover treatment of developmentally disabled individuals within their state plan, the Defendants are obligated to provide reasonably prompt medical assistance to disabled individuals.[FN9] Medical assistance specifically includes the "payment of part or all of the cost of the [ICF/MR] care and services ... for individuals." 42 u.s.c. § 1396d(a)(15).

FN9. Fla. Stat. § 393 *et seq.* Because the state includes ICF/MR services, the federal government pays

> the majority of the costs of these services for Medicaid-eligible individuals. 42 U.S.C. § 1396a(a)(31). As noted above, a condition of federal financial participation is that the state comply with 42 U.S.C. § 1396a(a) (8); that "such assistance shall be furnished with reasonable promptness to all eligible individuals."

From any perspective the Defendants have failed to follow the law. The Defendants have failed to provide ICF/MR services directly to the disabled individuals, permit others to provide services and reimburse those providers or, under 42 U.S.C. S 1396n(c), to provide treatment in community-based facilities or in the home.

Although Defendants Williams and Clarke admit to the facts alleged in the Plaintiffs Complaint and admit, for the purposes of their Motion for Summary Judgement, that the state Medicaid plan for the developmentally disabled violates federal law because it fails to provide medical assistance with reasonable promptness, they deny any personal liability for the violation. Defendants do not suggest, however, how the violations might have occurred without the secretary of Health and Rehabilitative Services or the Assistant Secretary of HRS for Medicaid's knowledge and consent, direction, participation or personal involvement, any of which is sufficient to establish liability under section 1983. *See Kentucky v. Graham.* 473 U.S. 159, 166 (1985), *Andrews v. City of Philadelphia.* 895 F.2d 1469 (3d Cir. 1990); *Dean v. Barber,* 951 F.2d 1210 (11th Cir. 1992); *Duchesnes v Sugarman,* 566 F.2d 817 (2ds Cir. 1977); *Ranscon v. Hardimon,* 813 F.2d 269, 274 (7th Cir. 1986), discussed *infra.* Nor do the Defendants put forth any other individuals as parties responsible for the deprivation of the Plaintiffs' rights.

III. DEFENDANTS CLARKE AND WILLIAMS ARE INDIVIDUALLY LIABLE FOR THE VIOLATIONS OF THE PLAINTIFFS' RIGHTS BECAUSE THEY WERE PERSONALLY INVOLVED IN THE DECISION TO VIOLATE FEDERAL MEDICAID LAW.

This lawsuit against Defendants Robert Williams and Gary Clarke for monetary damages is based on the Defendants' personal responsibility for the violation of the Plaintiffs' rights under the Medicaid Act. The Defendants are personally responsible for the deprivation of the Plaintiffs' rights because the Defendants knowingly and wilfully refused to enforce the federally-mandated requirement to provide medical assistance to the Plaintiffs with reasonable promptness.[FN10]

> FN10. Complaint, ¶¶ 54, 55.

Personal capacity suits seek to impose personal liability upon a government official for actions he takes under color of state laws. *Kentucky v. Graham.* 473 U.S. 159, 165, 105, S.Ct. 3099, 3104-05 (1985). "On the merits, to establish *personal* liability in a section 1983 action, it is enough to show that an official, acting under color of state law, caused the deprivation of a federal right." *Kentucky v. Graham,* 473 U.S. at 166, 105 S.Ct. at 3105. The Defendants are liable in their individual capacities if they are personally involved in the deprivation of legal and constitutional rights. *Duchesnes v. Sugarman,* 566 F.2d 817 (2d Cir. 1977). "It is not necessary for section 1983 liability that the Defendants directed any particular action with respect to these specific plaintiffs, only that they *affirmatively* promoted a policy which sanctioned the type of action which caused the violations." *Id.* at 831.

An official is personally involved if (a) he participates directly in the deprivation of rights, (b) he acts or fails to act with reckless disregard of the plaintiff's rights, or (c) the conduct that deprived the plaintiff of his rights occurred at the official's direction or with his knowledge and consent. *Ranscon v. Hardiman,* 803 F.2d 269, 274 (7th Cir. 1986).

By any of these standards -- personal involvement, direction, knowledge of and consent to the deprivation of rights, affirmative promotion of the illegal policy -- Defendants were personally involved in the deprivation of the Plaintiffs' rights.

A. Defendant Robert Williams Was Personally Involved in the Deprivation of the Plaintiffs' Right to Reasonably Prompt Medical Assistance Under Section 1396a(a)(8).

The Defendants have admitted the facts in the Plaintiffs' Complaint for the purposes of the determination of the pending summary Judgment Motion.[FN11] Thus, the Court must accept as proven that Defendant Robert Williams was and is aware of the obligations created by the receipt of federal Medicaid funds; that Defendant Williams authorized the creation and/or perpetuation of an extensive waiting list for services, has refused to adopt the federally required policy of providing that Medicaid services are delivered with reasonable promptness, is aware of the existence of an extensive waiting list for ICF/MR services and has proved the present illegal policy.[FN12] These facts clearly demonstrate that Defendant Williams was personally involved in the deprivation of the Plaintiffs' rights.

FN11. Defendant Williams' and Clarke's Statement of Material Facts in Support of Defendants' Motion For Summary Judgment (Individual capacity), ¶ 2.

FN12. Complaint, ¶ 54.

Defendant Williams is liable for the deprivation of the Plaintiffs' rights because he both personally directed the illegal programs and because he had actual knowledge of Defendant Clarke's illegal practices and acquiesced to their continuation. *See Andrews v. City of Philadelphia,* 895 F.2d 1469 (3d Cir. 1990).

The state plan for medical assistance promoted by Defendant Williams does not provide that medical assistance will be provided to eligible individuals with reasonable promptness- Nonetheless, Defendant Williams accepted federal Medicaid funds, regardless of the fact that he was not in compliance with federal law.

Defendant Williams authorized the creation and/or the perpetuation of an extensive waiting list for ICF/MR services[FN13] and has thu?? affirmatively promoted the policy that caused the deprivation of the plaintiffs' federally guaranteed right to ICF/MR services with reasonable promptness. *Duchesnes v. Sugarman,* 566 F.2d 817, 831 (2d Cir. 1977).

FN13. Complaint ¶ 54.

Defendant Williams co-authored a report to the Florida Legislature entitled *Strategic Plan for people With Developmental Disabilities: Developmental Services 1992-2002.*[FN14] This report clearly demonstrates Defendant Williams' personal involvement with the deprivation of federally guaranteed ICF/MR services. In the Report, Defendant Williams lists his “major accomplishments” in the provision of services to developmentally disabled individuals and admits to the decision to develop only 258 new ICF/MR beds, which would not provide services to any additional individuals but would only “depopulate unlicensed developmental services institution beds and high cost community beds.”[FN15]

FN14. Williams & Chiles, *Strategic Plan for people With Developmental Disabilities: Developmental Services 1992-2002.,* attached hereto as Exhibit 2 [hereinafter “Williams & Chiles”].

FN15. *Id.* at 10.

Defendant Williams also acknowledged that the number of developmentally disabled individuals has grown at an average rate of 6.75% per year.[FN16] In this Report, Defendant Williams admits that "as of Spring, 1991, 2745 persons were in immediate need of a home" and that waiting lists for services are large and continue to grow.[FN17]

FN16. *Id.* at 18.

FN17. *Id.*

Defendant Williams was fully aware of Defendant Clarke's illegal practice of refusing to provide medical services to the Plaintiffs and refusing to allow any others to provide medical services to the Plaintiffs. He failed to halt this illegal practice and in fact acquiesced to Defendant Clarke's failure to provide medical services with reasonable promptness. Defendant Williams' knowing acquiescence to the illegal practices requires his being held liable for the deprivation of the Plaintiffs' rights under section 1983. *Andrews v. City of Philadelphia,* 895 F.2d 1469 (3d Cir. 1990); *see also Dean v. Barber,* 951 F.2d 1210 (11th Cir. 1992) (a supervisor may be held liable under section 1983 if the supervisor had personal involvement in the deprivation of rights or if a sufficient causal connection exists between the supervisor's conduct and the violation).

Under any of the standards of personal involvement for the purposes of section 1983, Defendant Williams is personally liable for the deprivation of the Plaintiffs' federally-guaranteed rights to ICF/MR services with reasonable promptness.

B. Defendant Gary Clarke Was Personally Involved in the Deprivation of the Plaintiffs' Right to Reasonably Prompt Medical Assistano?? Under section 1396a(a)(8)

This Court must also accept as fact that Defendant Gary Clarke is personally aware of the requirements for a State Medicaid plan and has violated these requirements in the past.[FN18] Despite his personal awareness of the obligation to provide ICF/DD residential placements without delay and his knowledge of HRS's policy of creating a waiting list on which individuals names appear year after year, he continued to operate the ICF/MR Medicaid program in Blatant violation of federal law as HRS Assistant Secretary for Medicaid.[FN19]

FN18. Complaint, ¶ 55.

FN19. *Id.*

Defendant Clarke has refused to allow others to provide ICF/MR services and has routinely turned down proposals to provide such services. For example, in 1991, Defendant Clarke documented the receipt of bids from 19 providers who were willing to develop 960 additional ICF/MR beds to serve eligible individuals. The Defendants, however, denied requests to provide services for 702 developmentally disabled individuals.[FN20]

FN20. Letter from Defendant Gary Clarke to Robert Wardwell, Chief, Medicaid Special Issues Branch, Health Care Financing Administration, August 6, 1992, attached hereto as Exhibit 3, [hereinafter "Clarke Letter"].

After Plaintiffs filed this lawsuit, Defendant Clarke wrote a letter to the Federal government's Health Care Financing Administration (HCFA) admitting that there was a huge need for services for developmentally disabled individuals -- 3,857 persons with "critical unmet service needs."[FN21] Defendant Clarke admitted that he had allowed service providers to develop only 3,459 beds, even though Defendant Clarke admitted to the federal

government that the "[s]tate has a demonstrated capacity to license a total of 6,878 ICF/MR beds."[FN22]

FN21. Even the certification of 258 beds did not increase the services provided to the developmentally disabled. It was only a cost-saving effort that moved individuals from unlicensed beds paid with state funds alone to facilities eligible for federal funding. This increase in beds, the only one in eight years, did not result in the provision of additional services or the removal of anyone from the waiting list. See Williams & Chiles, *supra* note 14, at 10.

FN22. *Id.*

In the letter to HCFA, Defendant Clarke asked for a "waiver" from federal requirements that he provide adequate ICF/MR services to Medicaid-eligible developmentally disabled individuals and instead provide lower cost alternative services.[FN23] Defendant Clarke acknowledged that the Defendants were facing a lawsuit brought on behalf of up to 8,000 developmentally disabled individuals and were forced to finally provide services to these people.[FN24]

FN23. *Id.*

FN24. *Id.*

The failure to provide services to thousands of individuals was not a new or unusual situation. Defendant Williams acknowledged in a published report that the number of developmentally disabled individuals has grown at an average rate of 6.75% per year,[FN25] and as Assistant Secretary of HRS for Medicaid, Defendant Clarke knew of the huge and growing waiting lists for ICF/MR services long before this lawsuit was filed in March, 1992.[FN26] Defendant Clarke could have taken action to remedy his violation of federal law, but failed to do so until he was faced with the reality of a lawsuit.

FN25. *Id.* at 15, 18.

FN26. Complaint, ¶ 55.

Defendant Clarke has directly participated in the deprivation of the Plaintiffs' rights. His effort in August, 1992 to secure services for the Plaintiffs -- after this lawsuit was filed -- while possibly reducing further harm, does not in any way substitute for damages for past deprivations of federally guaranteed rights.

IV. REMEDIES FOR VIOLATIONS OF THE MEDICAID ACT UNDER SECTION 1983 ARE NOT RESTRICTED TO PROSPECTIVE RELIEF, THEREFORE THE PLAINTIFFS ARE ENTITLED TO BE MADE WHOLE THROUGH THE AWARD OF DAMAGES AND THE CASE CITED BY WILLIAMS AND CLARKE WAS REVERSED BY THE SUPREME COURT.

In their Memorandum of Law in support of their Motion for Summary Judgment, the individual Defendants apparently contend that even if violations of the Medicaid Act are remediable through a suit under section 1983, this court cannot award damages for those violations. This proposition suggests a startling and heretofore unknown limitation on the remedies available under section 1983, which, as the Supreme Court has repeatedly noted, "as a remedial statute, ... should be 'liberally and beneficently construed.' " *Dennis v. Higgins.* 111 S.Ct. 865, 868 (1991), quoting *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 684, 98 S.Ct. 2018, 2032 (1978) (citation omitted); *see also Golden State Transit Corp., supra.* This Court may order any appropriate relief to remedy a violation of federal rights.

Defendants Williams and Clarke rely on the Eleventh Circuit's opinion in *Franklin v. Gwinnett County Public Schools,* 911 F.2d 617 (11th Cir. 1990). In a remarkable lack of candor, Williams and Clarke failed to advise this court that the cornerstone of their summary judgment motion, *Franklin,* was reversed by the United States Supreme Court. *Franklin v. Gwinnett County Public Schools,* ?? S.ct. 1028 (1992).[FN27]

> FN27. In a similar instance of what the Court described as either "sloppy research or warped advocacy tactics", counsel who failed to inform the court that a case on which it relied for its defense had been specifically overruled were "admonished that diligent research, which includes Shepardizing cases, is a professional responsibility, *see Taylor v. Belger Cartage Service. Inc.,* 102 F.R.D. 172 (W.D. Mo. 1984), and that officers of the court are obliged to bring to its attention all important cases bearing on the matter at hand, including those which cut against their position. *See* Model Rules of Professional conduct, Rule 3.3(a)(3)." *Cimino v. Yale University,* 638 F. Supp. 952, 959 n.7 (D. Conn. 1986)

The Supreme Court specifically rejected the Eleventh Circuit's reliance on *Pennhurst* and *Guardians' Association* and overturned the lower court's determination that awards of damages are not available for violation of Spending Clause statutes. *Franklin v. Gwinnett County Public Schools,* 112 S.Ct. 1028, 1037 (1992). In that ruling, the Court reiterated that "if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief." *Franklin,* 112 S.ct. at 1034, citing *Davis v. Passman,* 442 U.S. 228, 247 n.26, 99 S.Ct. 2264, 2278 n.26 (1979).

Moreover, whether or not an implied right of action under the Medicaid Act contains limits on the availability of remedies is irrelevant to this case because these plaintiffs have brought their action under section 1983. *See Guardians Ass'n v. Civ. Serv. Com'n of city of N.Y.,* 103 S.Ct. 3221, 3251 (Stevens, J., dissenting). The availability of remedies is determined by the scope of section 1983. The analysis put forth by the Defendants, even if correct, is only applicable if the Plaintiffs had sought relief through an implied right of action in the Medicaid Act itself. while in other circumstances, Defendants' could have made a colorable argument in this regard, the Supreme Court specifically held that violations of 42 U.S.C. § 1396a are remediable through an action under 42 U.S.C. § 1983. *Wilder v. Virginia HosPital Ass'n,* 110 S.C. 2510, 2517-23.

Because the Supreme Court has determined that violations of the Medicaid Act are remediable through section 1983, the full range of remedies available through section 1983 are at this court's disposal. *Monell v. Department of Social Services,* 436 U.S. 65*8,* 98 S.Ct. 2018 (1978), and *Carey v. Piphus,* 98 S.Ct. 1042, 1047 (1978), and all the cases that follow, establish unequivocally that section 1983 provides a damages remedy. There is no such limitation on the remedies available under section 1983 and no authority to restrict the remedy available to those individuals whose constitutional and federal rights were violated by the Defendants.

The Defendants agreed to abide by the laws and regulations of the Federal Government in providing Medicaid Assistance. They violated clearly established law in failing to live up to their obligations and by their actions they have greatly harmed these Plaintiffs. Only by providing retrospective relief to these injured Plaintiffs who have been deprived of ICF/MR services through the actions of these Defendants Clarke and Williams can the courts fulfill the terms of the "contract" between the Federal Government and recipients of federal financial assistance.

V. DEFENDANTS WILLIAMS AND CLARKE ARE NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE THEY HAVE NOT MET THE TEST OF *RICH v. DOLLAR:* THEIR ACTIONS WERE NOT TAKEN WITHIN THEIR DISCRETIONARY AUTHORITY AND THE LAW IS CLEARLY ESTABLISHED THAT

THE DEFENDANTS ARE BOUND BY THE REQUIREMENTS OF THE MEDICAID STATUTE AND THE CONSTITUTION IN ADMINISTERING MEDICAID ASSISTANCE.

Qualified immunity is an affirmative defense that must be raised and proven by the Defendants. *Harlow v. Fitzgerald,* 457 U.S. 800, 812, 102 S.Ct. 2727, 2736 (1982); *Rich v. Dollar,* 841 F.2d 1558, 1563 (11th Cir. 1988). In order to demonstrate that summary judgment is warranted, the Defendants must establish both that they are entitled to summary judgment as a matter of law because they are shielded by qualified immunity and that there are no genuine issues of material fact pertinent to those questions of law. *Rich v. Dollar,* 841 F.2d at 1562 (11th Cir. 1988).

A. Defendants williams and Clarke were Not Acting Within the Scope of their Discretionary Authority When They Failed to Provide that ICF/MR services would Be Provided With Reasonable Promptness

Defendants Williams and Clarke have the burden of proving that they were "acting within the scope of [their] discretionary authority when the allegedly wrongful acts occurred." *Rich v. Dollar.* 841 F.2d at 1563-64. Federal law mandates that the state program for medical assistance *must* "provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that *such assistance shall be furnished with reasonable promptness to all eligible individuals.*" 42 U.S.C. § 1396a(a)(8).

The *Wilder* Court recognized that the terms of section 1396a are mandatory, noting that the "[S]tates *must comply* with certain requirements imposed by the Medicaid Act (Act) and regulations promulgated by the secretary of Health and Human Services (Secretary)" and that to qualify for federal assistance, "a state *must submit* to the secretary and have approved a plan for medical assistance, 42 U.S.C. § 1396a(a) , that contains a comprehensive statement describing the nature and scope of the State's Medicaid program," 110 S.Ct. 2510, 2513 (emphasis added).[FN28]

FN28. To the extent the Defendants rely on *Pennhurst State School* & Hospital v. Halderman, 451 U.S. 1, 101 s.ct. 1531 (1981), they are mistaken. In concluding that the requirements of section 1396a are binding on the States, the Supreme Court specifically held that *Pennhurst* was not controlling in this context. *See, Wilder, supra,* 110 S.Ct. at 2518-19.

Defendants Williams and Clarke have requested and received federal financing for Medicaid, but have failed to provide for the provision of assistance with reasonable promptness anywhere in the state plan.[FN29] The failure to include such a provision is a ministerial and not discretionary task and therefore is not protected by qualified immunity. *See, e.g., Doe "A" Special Sch. Dist. of St. Louis County,* 637 F. Supp. 1138, 1147 (E.D. Mo. 1986). Defendants Williams and Clarke are obligated to provide that individuals will receive medical assistance with reasonable promptness and they have failed to do so. Defendants Williams and Clarke's actions in failing to provide ICF/MR services with reasonable promptness were not taken within the scope of their discretionary authority.

FN29. See Florida Admin. Code Ch. 10D-38, Intermediate care Facilities for Mentally Retarded or Developmentally Disabled (ICF/MR), attached hereto as Exhibit 4; Florida Title XIX ICF/MR-DD Reimbursement Plan, Version IV, July 1, 1991, attached hereto as Exhibit 5.

B. The Decisional Law clearly Establishes that section 1396a is Binding on the States

More than two years ago, the Supreme Court held in *wilder* that the requirements of the Medicaid Act are bind-

ing on the states and enforceable through section 1983. The Defendants cannot reasonably contend that although the Supreme Court has held that the requirements of 1396a are binding on the states, they cannot be liable for any violations until some prior court has expressly so held on materially similar facts. This argument has been consistently rejected by the Supreme Court and the Eleventh Circuit.

In *Anderson v. Creighton,* 483 U.S. 635, 107 S.Ct. 3034 (1987), the Supreme Court emphasized that the requirement that the law be clearly established does not mean "that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful ...." *Anderson,* 483 U.S. at 640, 107 S.Ct. at 3039 (citations omitted), quoted in *Adams v. St. Lucie County Sheriff's Dept.,* 962 F.2d 1563 (11th Cir. 1992). The Eleventh Circuit held in *Stewart v. Baldwin County Board of Education.* 908 F.2d 1499, 1504 (11th Cir. 1990) that "[t]he very conduct in question need not have been explicitly held to be unlawful prior to the time the official acted; ...." (citations omitted).

In *Adams v. St. Lucie County Sheriff's Dept., supra,* the Circuit warned that a court cannot "unreasonably fail[] to assess liability unless the specific action has been found unlawful" and held that "officials are required .. to relate established law to analogous factual settings." The *Adams* court held an individual police officer liable for actions that violated a supreme Court opinion handed down only *six weeks* before the incident at the heart of that case. 962 F.2d at 1568 (citations omitted). The Supreme Court decided *Wilder* in early 1990, more than two and one-half years ago.

The Defendants' reliance on *wright v. Widdon,* 951 F.2d 297 (11th Cir. 1992), is misplaced. *Wright* dealt with the issue of use of excessive force against an individual who escaped from police custody. In holding that the police officer in *Wright* was entitled to qualified immunity, the court relied on Supreme Court decisions that emphasized that the central legal question at issue in *Wright* was unresolved; therefore, there was no clearly established law of which the defendant should have been aware. In this case, however, the Supreme Court in *Wilder* held only two years ago that this very section of the Medicaid Act was binding on the states.[FN30]

> FN30. Defendant Clarke is not only a high ranking state Medicaid official, but also a lawyer. Defendant Williams was advised by his personal counsel of the illegality of the conduct long before this suit was filed and HRS in-house lawyer (Hedrick) had already rendered a legal opinion advising of the federal law violation.

C. The Decisional Law is Clearly Established that the Medicaid Act Forbids the Use of Waiting Lists in Providing Services with Reasonable Promises

Government officials are charged with knowledge of constitutional developments including all available decisional law -- decisions of state courts, other circuits and district courts. *Tribble v. Gardner,* 860 F.2d 321, 324 (9th Cir. 1988). First, the Defendants are charged with the responsibility of knowing that the Supreme Court held unequivocally that the requirements of section 1396a are binding on the states. *See Wilder,* 110 S.Ct. 2510 (1990). A Supreme Court decision, however, is "not absolutely imperative before law may be considered 'clearly established under *Harlow.' " Gann v. Schramm,* 606 F. Supp. 1442, 1449 (D. Del. 1985). The Third Circuit addressed this same issue in *People of Three Mile Island v. Nuclear Reg. Com'rs,* 747 F.2d 139, 144-45 (3d Cir. 1984):

We ... requir[e] some but not precise factual correspondence and demand [] that officials apply general, well developed legal principles. Such a formulation of the law better strikes the balance between the competing interests that the Supreme Court identified when it fashioned the contours of executive immunity. while we cannot

anticipate the evolution of constitutional law, *neither can we be faithful to the purposes of immunity by permitting such officials one liability-free violation of a constitutional or statutory requirement.*

Moreover, as noted *supra,* federal court after federal court has ruled that the Defendants are obligated by federal law to actually provide Medicaid services and have construed the precise statute (42 U.S.C. § 1396a(a) (8)) that Defendants Williams and Clarke violated. *See, e.g., Linton by Arnold v. Carney by Kimble,* 779 F. Supp. 925 (M.D. Tenn. 1990); *Clark v. Kizer,* 758 F. Supp-572, 580 (E.D. Cal. 1990) ; *Cornelius v. Minter.* 395 F. Supp. 616 (D. Mass. 1974); *Barnes v. Cohen,* 749 F.2d 1009, 1019 n.6 (3rd Cir. 1984); *Smith v. Miller,* No. 76 Civ. 526 (N.D. Ill. Nov. 1, 1979), *aff'd,* 665 F.2d 172, 177 (7th Cir. 1981); *Morgan v. Maher,* 449 F. Supp. 229 (D. Conn. 1978); *Adens v. Sailer,* 312 F. Supp. 923 (E.D. Pa. 1970). Defendants entirely ignore over twenty years of precedent and cite no cases to the contrary.

D. Qualified Immunity Does Not Protect Individuals Like the Defendants Who Knowingly Violate the Law.

Although qualified immunity calls for an objective inquiry, it does not protect those, like the Defendants Williams and Clarke, who knowingly violate the law. *See Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 1096 (1986).

In the Eleventh circuit, the test is whether reasonable individuals, in the same circumstances and possessing the same knowledge as the Defendants, could have believed that their actions violated the rights of the plaintiffs. *Von Stein v. Brescher,* 904 F.2d 572, 579 (11th Cir. 1990). The exhibits supplied by the Defendants and attached to their other Motion for Summary Judgment prove that the Defendants were told that their actions violated the Medicaid statute and that the defendants simply chose to ignore the law.[FN31] With the information that the defendants had informing them of the rights of individuals to receive prompt treatment and their responsibility to provide access to treatment, no reasonable person could have believed the defendants actions were within the law.

FN31. These exhibits have been adopted by the individual defendants, see Defendants Clarke and Williams' Motion and Memorandum of Law at 2, n.2.

Defendants Williams and Clarke were specifically told by former HRS Assistant Counsel John Hedrick that their actions were in violation of clearly established federal law:

It is our understanding that your office has already culled down a list of people the ICF/DD program is appropriate for and who are eligible for the service and you cannot pick one person and say more than another person that they need the service....

It is our view that you have to service this waiting list of individuals with reasonable promptness to get them ICF/DD services. Failure to provide these services through lack of legislative appropriations or otherwise would leave us open to a federal lawsuit and indeed one has already been threatened.[FN32]

FN32. Hedrick Memorandum, *supra* note 4.

Nonetheless, Defendants Williams and Clarke continued on their illegal course. The Defendants cannot now be heard to complain that they had no knowledge or warning of their responsibilities under federal law; their actions are not protected by qualified immunity.

VI. *CONCLUSION*

Defendants Williams and Clarke admit the facts alleged by the Plaintiffs in their Complaint. The facts demonstrate clearly and unequivocally that Defendants Williams and Clarke were personally involved in the deprivation of the Plaintiffs constitutional rights and their rights under federal Medicaid law.

As demonstrated above, for over twenty years the law has been clearly established that federal law does not permit the establishment of waiting lists for Medicaid services. The Defendants are charged with awareness of this case law, as well as the Supreme Court's decision in *wilder* reaffirming that the requirements of section 1396a are binding on the states that accept Medicaid financing.[FN33] Defendants Williams and Clarke were also specifically advised that their administration of the Medicaid program violated federal law. Defendants Williams and Clarke's behavior cannot be considered objectively reasonable in light of the clearly established law and they are not entitled to qualified immunity.

> FN33. Substantial additional precedent, including the legislative history of the Medicaid Act and case law is presented in Plaintiffs' Memorandum of Law in support of Cross-Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment. That Motion, together with the exhibits filed therewith (all dated February 5, 1993), and the depositions filed by the Defendants, also mitigate against entry of summary judgment in favor of Defendants Williams and Clarke in their individual capacities. All of those items are incorporated herein by reference.

Finally, the Plaintiffs are entitled to monetary damages to remedy the deprivation of their rights by the Defendants. The Defendants rely entirely on an Eleventh Circuit opinion, *Franklin v. Gwinnett County,* that was revered by the Supreme court this past term. In a suit brought under section 1983 for the deprivation of federal or constitutional rights, the Plaintiffs are entitled to an award of damages.

Plaintiffs therefore submit that Defendants Williams and Clarke's Motion for Summary Judgment in their Individual Capacities muet be denied.

Respectfully submitted,

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