

IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA

Katherine Fisher, Earlee Heath,  
and Karol Loy, on behalf of  
themselves and all others  
similarly situated,

Plaintiffs

v.

State of Oklahoma,  
Oklahoma Health Care Authority  
and  
Mike Fogarty, in his capacity as  
CEO of the Oklahoma Health Care  
Authority,

Defendants

Civil Action No.

**02CV 762P (C)**

Class Action

**FILED**  
OCT 1 2002  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

COMPLAINT

Introduction

1. Plaintiff Earlee Heath is a 73 year old woman who is currently enrolled in the Medicaid Home and Community-Based Services (HCBS) Waiver Program administered by Defendant Oklahoma Health Care Authority (OHCA). She is an insulin-dependant diabetic who also has hypertension, asthma, congestive heart failure, residual bilateral paresis and deep vein thrombosis. Plaintiff Karol Loy is a 46 year old woman and current participant in the HCBS Waiver Program who has a seizure disorder and cardiac malfunction. Plaintiff Katherine Fisher is a 48 year old woman and current participant in the HCBS Waiver Program who has cerebral palsy and a history of multiple cerebrovascular accidents.

2. Defendant, Oklahoma Health Care Authority (OHCA) administers the Medical Assistance program for the state. In that capacity, it provides services to eligible recipients to enable them to remain in their homes rather than being forced into a nursing home or other institution, under the Medicaid Home and Community-Based Services (HCBS) Waiver Program.

3. On or about September 19, 2002, OHCA informed Plaintiffs by letter that, effective October 1, 2002, those enrolled in the HCBS Waiver Program would receive coverage of no more than five (5) prescriptions per month through the program.

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4. OHCA did not provide plaintiffs and class members with notice of their opportunity to request a hearing and their right, upon filing a timely appeal, to continue to receive prescriptions as needed without a set limit during the pendency of the appeal.

5. The Americans with Disabilities Act, 42 U.S.C. § 1201 et seq. (ADA), and its regulations require that "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 CFR § 35.130(d).

6. By federal statutory definition, all those eligible for the HCBS Waiver Program must establish their need for the level of care provided by the institution in which they would reside but for the waiver program. Thus, all of the named and class plaintiffs meet the state's medical criteria for nursing home Medical Assistance.

7. OHCA will continue to provide unlimited prescription benefits to recipients of medical assistance who are residents of nursing homes and other institutional care facilities. The limit of five (5) prescriptions per month applies only to those enrolled in the HCBS Waiver Program. In this respect, the action taken by OHCA violates the rule that services to disabled persons must be delivered in the most integrated setting possible, as set forth in the ADA and by the United States Supreme Court in Olmstead v. L.C. ex rel. Zimring 527 U.S. 581 (1999) and by the Third Circuit Court of Appeals in Helen L. v. DiDario, 46 F.3rd 325 (C.A. 3, 1995); cert.den. 116 Sup. Ct. 64 (1995).

8. If OHCA is permitted to impose this limitation upon waiver program participants those disabled persons who, like the named and class plaintiffs, require more than five (5) prescription medications per month to maintain their health and simply to survive, will be forced to make this choice: enter a nursing home or risk serious physical harm and even death. Defendants' action therefore violates the ADA and Olmstead because the receipt of more than five (5) prescriptions per month will be covered under its Medical Assistance plan only if the recipient resides in a nursing home, hospital, or other institution, settings that are wholly segregated from the community.

9. Plaintiffs, who currently reside in their homes amongst family and friends and as fully integrated members of their communities, require more than five (5) prescriptions per month to survive. Effective October 1, 2002, they must either enter a hospital (where defendants will cover the prescriptions plaintiffs need under their Medical Assistance program) or a nursing home (where defendants will also cover necessary prescriptions under Medical Assistance).

10. Absent the actions of defendants in failing to continue to provide the same prescription coverage to recipients residing in their homes as to those residing in institutions, plaintiffs could continue to live their lives integrated within their communities. This class action challenges the provision of necessary prescriptions without a fixed limit to those residing in institutions, but not to those in the community.

## II. Jurisdiction and Venue

11. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343 (3)-(4).

12. Plaintiffs claims are authorized by 42 U.S.C. § 1983, Title XIX of the Social Security Act (cite) the Americans with Disabilities Act (cite) . Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202 and Federal rule of Civil Procedure 57.

## III. Parties

13. Plaintiff Earlee Heath is 73 year old individual with type one (insulin-dependent) diabetes and other serious health problems, who resides in Tulsa, Oklahoma.

14. Plaintiff Karol Loy is a 46 year old individual with a seizure disorder and other serious health problems, who resides in Tulsa, Oklahoma.

15. Plaintiff Katherine Fisher is a 48 year old individual with cerebral palsy and related health problems, who resides in Tulsa, Oklahoma.

16. Defendant Oklahoma Health Care Authority (OHCA) is a state agency responsible for administering the Medical Assistance Program in Oklahoma. Plaintiffs only assert a claim against OHCA pursuant to the Americans with Disabilities Act.

17. Defendant Mike Fogarty is the Chief Executive Officer of OHCA. Defendant Fogarty is sued in his official capacity for his actions or inactions taken under color of state law. Plaintiffs only assert claims against Fogarty pursuant to Title XIX of the Social Security act and the Due Process Clause of the Fourteenth Amendment.

## IV. Class Allegations

18. The named plaintiffs bring this law suit against defendants on behalf of themselves and a class comprised of all participants in the HCBS Waiver Program in the Tulsa metropolitan area who require more than five (5) prescriptions per month to survive, and who will be forced by defendants' actions to enter an institution in order to receive the prescription coverage that will allow them to survive.

19. The prerequisites of FRCP 23 (a) are met.

a. The size of the class is so great as to make joinder of all class members impracticable. On information and belief, there are about two hundred class members.

b. There are questions of law and fact common to the class, including:  
(1) whether Defendant Fogarty violated Title XIX of the Social Security Act by failing to give class members adequate notice and opportunity to be heard prior to reducing their prescription coverage;

(2) whether Defendant Fogarty violated Title XIX by reducing class members' services prior to a hearing; (3) whether Defendant OHCA violated the Americans with Disabilities Act by discriminating against class members on the basis of their disabilities; and (4) whether Defendant Fogarty violated the Due Process Clause by failing to provide class members with adequate notice and opportunity to be heard by failing to inform them of their right to continue to receive prescription coverage as needed upon timely filing of an appeal.

c. Plaintiffs' claims are typical of the claims of class members. Defendants have violated the same statutory rights of class members as of the named plaintiffs.

d. Plaintiffs will fairly and adequately represent the interests of the class. Plaintiffs have no interests adverse to or in conflict with those of other class members.

e. This action may proceed as a class action pursuant to FRCP 23 (b) (2). Defendants have acted or refused to act on grounds generally applicable to all members of the class, making final declaratory and injunctive relief appropriate with respect to the class as a whole.

#### V. Factual Background

20. Earlee Heath is a 73-year-old individual, who has insulin-dependent diabetes, hypertension, asthma, congestive heart failure, residual bilateral paresis and deep vein thrombosis. Her monthly income is \$307.00. She is receiving services through the HCBS Waiver Program and lives with her elderly spouse. Her income is barely sufficient to cover her minimum living needs. Her spouse's income is approximately \$863 per month. He also has health problems and medical expenses that are not covered by Medicare. Thus, their combined income is not great enough to purchase needed prescriptions that will no longer be covered through the HCBS Waiver Program.

Mrs. Heath is currently taking 16 different prescription medications. If she does not get the required medications, she is a high risk for exacerbation of her heart failure, hypertension and diabetes. The total prescription costs per month is \$838.79. In addition, she must purchase over the counter medications that are not covered by Medicaid. If she obtains five (5) prescriptions in October, she will have to pay \$255.77 for the remaining required prescriptions in October to meet her minimum medication needs.

Mrs. Heath is a high risk consumer, and failure to continue necessary medications will result in admission to an acute care facility and subsequent transfer to a nursing home where she will have access to unlimited prescription medications. Thus, the reduction in prescription drugs will result in her moving from the most integrated environment to the least integrated, in direct violation of the mandate of the Americans with Disabilities Act (ADA) and of the holding in Olmstead.

21. Karol Loy is a 46-year-old individual who has Acute Mixed Connective Tissue Disease with a seizure disorder, residual from a cerebral vascular accident and cardiac malfunction. Her monthly income is \$547. She is receiving services through the HCBS Waiver Program and lives independently in a subsidized apartment. She has an 18-year-old child, who is still in high school. Her income is barely sufficient to cover her minimum living needs.

Ms. Loy's total prescription costs per month are \$1539.34. In addition, she must purchase over the counter medications that are not covered by Medicaid. If she obtains five (5) prescriptions in October, she will have to pay \$476.71 for the other prescriptions to meet her medication needs for the month. Her income is not sufficient to cover the amount she must pay as a result of the reduction in HCBS coverage.

If Ms. Loy does not receive the needed twenty-four (24) prescriptions, she is in immediate danger of having another stroke, and there is a high probability that she will need admission to an acute care facility. Following this, she will be transferred to a nursing home where she will have access to unlimited prescription medications. Not only would this have a profound adverse effect on her high-school-age son, it would result in her moving from the most integrated environment to the least integrated, in violation of the ADA and of Olmstead.

22. Katherine Fisher is a 48-year-old individual who has cerebral palsy and has had more than one cerebrovascular accident. Her monthly income is \$725. She is receiving services through the HCBS Waiver Program, and these allow her to live independently in an apartment. Her income is barely sufficient to cover her minimum living needs – housing, food, psychological counseling, necessary transportation via the Lift Program, etc. Additionally, she has past medical bills on which she is making payments. She has no informal support or assistance.

Ms. Fisher is currently taking nineteen (19) different prescribed medications. The total cost of the prescriptions drugs is \$857.84. With the reduction in prescription drug benefits through the HCBS Waiver Program, she will have to pay \$274.40 for the other required prescriptions drugs during the month of October. However, she does not have sufficient income to purchase those medications. Thus, if her coverage is cut to five (5) prescriptions per month, she will suffer irreparable harm.

The unavailability of the needed medications will almost certainly result in Ms. Fisher's requiring admission to a critical care facility, due to exacerbation of hypertension and attendant complications. She will then be placed in a nursing home, where she will have access to unlimited prescriptions. This will mean a move from the most integrated environment to the least integrated, in violation of the ADA and of Olmstead.

23. On or about September 19, 2002, defendants informed the name and class plaintiffs by letter that, effective October 1, 2002, participants in the HCBS Waiver Program would have their prescription drug coverage limited to no more than five (5) prescriptions per month.

24. Defendants failed to provide plaintiffs with notice that they could request a hearing and, upon filing a timely appeal, continue to receive prescription coverage without set limit during the pendency of the appeal.

25. For each of the named plaintiffs and others similarly situated, the reduction in prescription drugs will cause irreparable harm by triggering an acute episode, admission into an acute care facility and subsequent admission to a nursing home where they will have access to unlimited prescription drugs. This will result in moving the plaintiffs from the most integrated environment to the least integrated environment. That result is in direct contradiction of the dictates of the ADA Olmstead.

VI. Claims

**A. Count One - Title XIX of the Social Security Act**

26. Plaintiffs incorporate by reference paragraphs 1 through 22, above.

27. This claim is brought solely against Defendant Fogarty in his official capacity.

28. Defendant Fogarty has violated Title XIX by failing to give plaintiffs adequate notice of their opportunity to request a hearing and continue to receive the same level of services if they file a timely appeal.

**B. Count Two - The Americans with Disabilities Act**

29. Plaintiffs incorporate by reference paragraphs 1 through 22, above.

30. Plaintiffs assert this claim solely against Defendant OHCA.

31. Defendant OHCA is a public entity as defined by the Americans with Disabilities Act (ADA), 42 U.S.C. §12131 (1) (B).

32. Plaintiffs are qualified individuals with disabilities as defined by the ADA, 42 U.S.C. §§12102(2), 12131 (2). Plaintiffs meet the eligibility requirements for participation in the HCBS Waiver Program administered by Defendant OHCA.

33. The ADA prohibits public entities from discriminating against individuals with disabilities. 42 U.S.C. §12132; C.F.R. § 35.130 (a).

34. The ADA mandates that a “public entity administer...programs...in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 CFR § 35.130 (d).

35. The action of Defendant OHCA in limiting the prescription coverage of plaintiffs, who as participants in the HCBS Waiver Program are living in their homes and are integrated into their communities, while imposing no such limit on the coverage of institutionalized individuals receiving prescription under Medical Assistance, will force plaintiffs into segregated settings such as nursing homes to receive the prescription coverage they must have to survive, in violation of the ADA.

**C. Count Three - Procedural Due Process**

36. Plaintiffs incorporate by reference paragraphs 1 through 22 above.

37. This claim is brought solely against Defendant Fogarty in his official capacity.

38. Plaintiffs and class members have a protected liberty and property interest in prescription coverage provided under the HCBS Waiver Program. Once eligible for those services, those services cannot be denied, reduced or terminated without due process.

39. Plaintiffs and class members also have a protected property interest in continued coverage of prescriptions as needed. Title XIX and state law require that this be continued, pending the outcome of a hearing on a proposed service reduction, if a timely request for a hearing is submitted. 42 C.F.R. §§ 431.230 (a); 431.231 (a).

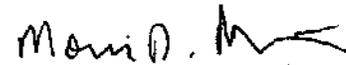
40. Defendants have violated the Due Process Clause of the Fourteenth Amendment by failing to provide Plaintiffs and class members with adequate notice and an opportunity to be heard and by failing to inform them of their right to continue to receive unchanged coverage pending the outcome of timely-requested hearings.

VII. Prayer for Relief

WHEREFORE, Plaintiffs pray that this Court:

1. Exercise jurisdiction over their claims;
2. Certify the plaintiff class pursuant to Federal Rules of Civil Procedure 23 (a) and (b) (2);
3. Declare that the above actions and failures to act by Defendants violate Plaintiffs' and class members' rights under Title XIX of the Social Security Act, the Americans with Disabilities Act, and the Due Process Clause of the Fourteenth Amendment.
4. Grant a preliminary and permanent injunction to enjoin Defendants to provide medical transportation to Plaintiffs and class members;
5. Grant such other relief as the Court deems just and equitable, including an award of attorney's fees, litigation expenses and costs.

Respectfully submitted,



Morris D. Bernstein

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CERTIFICATE OF SERVICE

I, Morris D. Bernstein, do hereby certify that on October 1, 2002, I caused to be served a copy of this document, via certified mail, return receipt requested, to:

Oklahoma Health Care Authority  
4545 N. Lincoln Blvd, Suite 124  
Oklahoma City, OK 73105

Mike Fogarty, CEO  
Oklahoma Health Care Authority  
4545 N. Lincoln Blvd, Suite 124  
Oklahoma City, OK 73105

  
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Morris D. Bernstein