Matter of Andersen v Hein
2022 NY Slip Op 35242(U)
October 25, 2022
Supreme Court, Albany County
Docket Number: Index No. 901412-17
Judge: David A. Weinstein
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
DANNY ANDERSEN, LYNDA J. OHLSSON and
TARRANCE ASH, on behalf themselves,
and on behalf of all individuals similarly situated,

Petitioners-Plaintiffs,

-against-

DECISION & ORDER

Index No.: 901412-17
RJI: No.: 01-17-123777

MICHAEL P. HEIN, as Commissioner of the New York State Office of Temporary and Disability Assistance;

FRANCIS PIERRE, as Commissioner of the Suffolk County Department of Social Services; and

THALIA WRIGHT, as Commissioner of the Monroe County Department of Human Services,

Respondents-Defendants,

For a Judgment Pursuant to § 3001 and § 5239 and Articles 9 and 86 of the CPLR.

(Supreme Court, Albany County All Purpose Term)

APPEARANCES:

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National Law Center for Law and
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David A. Weinstein, J.:

In this hybrid class action/special proceeding brought under CPLR 3001 and 5239, petitioners-plaintiffs[1] Danny Andersen, Lynda J. Ohlsson and Tarrence Ash seek declaratory and injunctive relief against defendants-respondents Commissioner of the New York State Office of Temporary and Disability Assistance ("OTDA") Michael Hein, Commissioner of the Suffolk County Department of Social Services Frances Pierre, and Commissioner of the Monroe County Department of Human Services Thalia Wright.

Petitioners challenged certain policies arising out of New York State's work requirements imposed on recipients of Public Assistance ("PA")[2] under the Work Experience Program ("WEP")[3], and in particular the manner in which OTDA has interpreted the decision by the Court of Appeals in *Matter of Carver v State of New York* (26 NY3d 272, 275 [2015], which applied the minimum wage requirements of the federal Fair Labor Standards Act ("FLSA") to work performed under the WEP.

Pursuant to a Stipulation and Order entered between the parties, which I have "so ordered" today (the "October 25 Stipulation & Order"), this matter has been resolved as to all but one issue: whether, pursuant to the FLSA, respondents must provide WEP credit[4], pursuant to *Carver*, in situations where an individual performs work as a condition of receiving Interim Assistance ("IA") during the pendency of their application for federal Social Security Income ("SSI") benefits. That question is the subject of petitioners' declaratory judgment motion now before me.

IA works as follows: when an individual applies for SSI, the application process can take

[1] For simplicity's sake, I will refer to the parties in this action as "petitioners" and "respondents" and to the petition-complaint as the "petition." Since only Hein has filed papers in opposition to petitioners motion, I will refer below to the opposition papers as having been filed by "respondent" (or "Hein" or "OTDA" or "the State").

[2] Public assistance or "PA," per the parties' stipulation, means Family Assistance and Safety Net Assistance and veteran assistance as set forth in Social Services Law § 2(19) (October 25 Stipulation & Order ¶ 1[e])

[3] WEP, as stipulated between the parties, is a program administered by a local social services district in accordance with and as defined by Social Services Law § 336-c (*see* October 25 Stipulation & Order ¶ 1[g])

[4] Pursuant to the parties' stipulation, "WEP creidt" is defined as credit for time spent participating in a district-assigned WEP activity by any recipient or former recipient of Public Assistance, calculated by multiplying the number of hours a recipient or former recipient participated in WEP by the Applicable Minimum Wage, which shall be applied against the monthly total of recoverable public assistance issued in the same month (*see* October 25 Stipulation & Order ¶ 1[h]). "Recoverable Public Assistance" is defined as public assistance "that has been issued and is treated as an obligation subject to recovery" (*id.* ¶ 1[f]).

many months, during which time the applicant is often in need of funds to ensure that basic needs are met (*see* Affidavit of Alison Maura ["Maura Aff"] ¶¶ 13, 20-21). If and when the SSI application is approved, the State is reimbursed by the federal government for such IA benefits as had been paid, pursuant to an agreement between the State and the Social Security Administration ("SSA") (*see Baez v Bane*, 89 NY2d 1, 9 [1996]; 42 USC § 1383[g]; *see also* Maura Aff, Ex A [Agreement between SSA and New York State]). The State then must "pay to the individual the balance of such payment in excess of the reimbursable amount as expeditiously as possible, but in any event within ten working days" or any shorter period provided for by agreement (42 USC § 1383[g][4][A]). Under this arrangement, the State gets back the money it paid for IA (the IA Reimbursement or "IAR"), and the applicant receives the same dollar amount of benefits for the period during which the SSI application was pending as she would have if no IA had been given. By way of example, if the retroactive SSI benefit was $1,000 and no IA had been paid, she would receive the full $1,000. If, on the other hand, she had received $100 in IA, then she would receive $900 in her retroactive payment – but the total amount (retroactive SSI plus IA) would still be $1,000.

There is a wrinkle in this scheme, however, which forms the crux of the remaining issue in this proceeding: New York and federal law (in the Personal Responsibility and Work Opportunity Reconciliation Act enacted by Congress in 1996) provides for the imposition of work requirements on recipients of public benefits[5] (*see Elwell v Weiss*, 2007 WL 2994308, at *1 [WD NY Sept. 26, 2006]; 42 USC § 607[d]). Accordingly, OTDA has conditioned the receipt of IA by applicants – including petitioners Ohlsson and Ash – on their performance of work under the WEP (*see* Second Amended Verified Petition and Class Action Complaint ["Pet"] ¶¶ 65-92]).[6] It is petitioners' contention that the deduction of IA benefits from the retroactive SSI

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[5] It is apparent from the administrative decisions appended to petitioners' motion that work requirements existed prior to 1996 (*see* Antos Aff, Ex F [reference to work requirements in 1979 fair hearing decision]). The manner in which such programs were altered by the federal codification of such requirements in the 1996 legislation is not material to the matters before me, and is not addressed by the parties.

[6] While I cite here to the allegations of the complaint, I note that respondent does not dispute that this is the practice, but rather argues that the deduction of IA benefits from these individuals retroactive SSI payments was permissible as a matter of law (*see* Mauro Aff ¶¶ 24 & 27 ["The individual is not entitled to the same assistance in the form of benefits from both the State and a federal SSI benefit during the pendency of the application" and "recipients of IA who engaged in WEP are not entitled to both IA and a minimum wage credit for their participation in WEP"]). Moreover, in the May 27, 2021 Stipulation and Order Relating to Interim Assistance Recovery [the "May 27 Stipulation"]), discussed further below, the parties agreed that no discovery or summary judgment practice was necessary on this issue (*see* May 26 Stipulation ¶ 2).

payment they receive in these instances reduced the recipients' compensation for WEP work below that mandated by the FLSA, and thus "failed to give [the recipient] credit for the value of his work" in "making the calculation as to the amount to be recovered," in violation of *Carver* (*see* Pet ¶ 92). Petitioners assert that this reflected a change in policy commenced in 1997, prior to which time recipients of public assistance received credit for work they had performed when the IA reimbursement was calculated (*see* Affirmation in Support of Motion for Declaratory Judgment of Susan C. Antos, Esq., dated March 2, 2022 ["Antos Aff"] ¶ 23 & Exs G-H).

For its part, respondent maintains that unless the IA benefits are deducted, petitioners will be able to keep both the IA funds intended to hold them over until their full SSI payments were received, and the full retroactive SSI benefit amount, resulting in a windfall to the recipients at the expense of the State of New York (*see* Memorandum of Law in Opposition to Plaintiffs' Motion ["Resp Mem"] 6).

This issue was previously briefed in a motion to dismiss made by respondent back in 2020. In denying the motion, I decided the legal issue in petitioners' favor, reasoning as follows:

> "Applying the minimum wage to IAR would do nothing more than allow petitioner Ohlsson to receive what she is entitled to under the FLSA for work performed as part of her WEP participation, and by statute under SSI if she qualifies. As a result, no double dip will have occurred. On the flip side, any reduction of her SSI benefit to the extent it reduced her per-hour work-conditioned benefits below the federal minimum wage would violate the FLSA. Since respondent's motion to dismiss in this regard is at odds with these conclusions, it must be denied" (Decision and Order, dated December 11, 2020 ["D&O"] at 16).

Notwithstanding this reasoning, petitioners had not moved for summary judgment at that time, and I declined to perform the procedural backflip of converting the motion to dismiss into one for summary judgment under CPLR 3211(c) for the purpose of granting it to the non-moving party under CPLR 3212(b). As a result, no formal determination was made on the IA causes of action, notwithstanding that I had decided the merits of the issue.

In light of my conclusions in the D&O concerning IAR, however, the parties entered into a Stipulation so ordered by the Court on May 27, 2021 (*see* n 6). In that stipulation, the parties agreed that the December 11, 2020 D&O had decided the IAR dispute in petitioners' favor "as a matter of law" and that decision rendered further discovery and summary judgment "unnecessary," on the condition that respondents reserved their right to further challenge this ruling and that any final judgment herein shall be stayed pursuant to CPLR 5519(a), unless vacated pursuant to CPLR 5519(c) (Ex B, ¶¶ 4-5).

Having resolved the remaining issues in the case by stipulation, petitioners now move for declaratory judgment on the IAR question (Antos Aff at 9-10). Respondent Hein opposes petitioners' motion based on his position that the FLSA has no application to IAR, i.e., the position I rejected in my prior D&O (Resp Mem at 2, 11-19). In support of this argument, respondent has provided an affidavit from Alison Maura, the Director of Temporary Assistance within OTDA's Division of Employment and Income Support Programs, who contends that recipients of IA who engaged in WEP are not entitled to both IA *and* minimum wage credit for their participation in WEP (Maura Aff ¶ 27). Petitioners have submitted a reply memorandum in response, and respondent Hein has (with leave of the Court) filed a sur-reply letter as well.

Oddly, both parties completely ignore the May 27 Stipulation in their filings, engaging in extensive legal argumentation on the issues they had agreed had been resolved (save for the appeal) in the Court's prior decision, and acting as if that so ordered agreement was some kind of fevered dream in the Court's imagination, rather than Document No. 124 in the NYSCEF index for this case. But given that the parties have in their present filings augmented their prior arguments to some degree, and neither objects that such submissions are at odds with the aforementioned Stipulation, I will consider in full the arguments before me. In the end, though, I reach the same conclusion as I did before: the deduction of IA reimbursement from retroactive SSI benefits without credit for IA that was conditioned on WEP work violates *Carver* and the FLSA as it was construed in that decision. As a result, petitioners' motion for a declaratory judgment is granted.

The State argues in its opposition papers that "[i]nasmuch as the [Social Services Law] requires that the individual can, at most, be required to participate in WEP activities for such number of hours as is determined by the sum of the PA grant and Supplemental Nutrition Assistance Program grant divided by the higher of the applicable federal or State minimum wage, there can never be a time that the recipient is not receiving the equivalent of minimum wage compensation" (Resp Mem 3). In other words, the manner in which the IA was calculated ensured that each recipient was paid minimum wage for work performed.

The problem with this assertion is that the calculation of IA on which it is based does not take into account that the IA payments are subsequently returned to the State in the form of an offset against the recipient's retroactive SSI award, ultimately resulting in a benefit less than the minimum wage per hour of work. Respondent claims this does not undermine his argument; since "the [social services] district has already provided to the individual for basic needs," the reimbursement OTDA receives out of the petitioner's benefit award "results in no impact with regard to FLSA compliant compensation the individual is construed to have received as a result of having participated in WEP" (*id.* at 3-4). In other words, the IA benefit is intended as a temporary measure, and since it comported with minimum wage rules at the time it was received, once applicants receive the full set of SSI benefits, they have been afforded all funds to which they were entitled.

OTDA cites nothing in the FLSA, *Carver* or the Social Security Act for the proposition that so long as it pays minimum wage for WEP work *at the time* IA is first provided, it can take that money back later, and still comply with the requirements of the FLSA. And I can find no authority for this assertion. Rather, as the one trial court to previously address this issue found in reaching the same conclusion I do here, an employer should not "be able to reimburse itself for FLSA wages previously earned by an employee out of an award the employee receives under a separate and distinct disability entitlement" (*see Elwell v. Weiss*, 2007 WL 2994308, at *6 [WD NY 2006])

The State contends that barring its recovery of the IA benefits it had extended is inconsistent with the SSA and the State's agreement with the federal government (Respondent's Sur-Reply Letter ["Resp Sur-Reply"] at 2]). Specifically, it points to 42 USC § 1383, which provides that any retroactive SSI payment of "past-due monthly benefits" is to be made "after withholding by the Commissioner for reimbursement to a State for interim assistance" (42 USC § 1383[a][2][F][i][II]; *see id.*). But that does not answer the question of how such reimbursement is to be calculated. If OTDA receives back the entire amount of IA, then it is as if such was never paid at all. And if the recipient performed compensable work for that IA, then respondent has failed to comply with the FLSA.

Indeed, this was the position taken once upon a time by OTDA hearing officers, as set forth in the administrative opinions appended to petitioners' submission. In the decision on one such hearing, the hearing officer found that "a person engaged in public works project is working off his grant and is therefore entitled to have the agency compute the amount of the public works project hours worked by appellant and have those deducted from the amount of the interim assistance grant prior to the agency's determining the amount to be recovered from the supplemental security income check" (Antos Aff, Ex F at 3). The same reasoning applies here – and now it has now been etched into controlling State authority in *Matter of Carver*, which accepted the argument that "were OTDA permitted to recoup a portion of the benefits paid to [the recipient] . . . , then [he] would be paid less than minimum wage, in violation of the FLSA" (26 NY3d at 277).

Indeed, the missing piece in all of respondent's various contentions is that petitioners have not simply received IA benefits as an advance on their SSI so that they can keep body and soul together while they await the results of their SSI application. They have also *performed work in exchange for these benefits*. And under *Matter of Carver*, this entitles them to FLSA-level compensation. Once the IA funds were returned, that compensation is gone. and the recipient has in hand only the SSI benefits for which he or she has been deemed to have qualified under federal law – and would have received regardless of any work performed.

I made these point at length in my December 11, 2020 D&O as follows:

> ". . . Petitioners do not claim that a recipient is entitled to be paid twice for the same work activities, since SSI benefits are not conditioned on performance of work at all, but rather "shall . . . be paid" to "[e]very aged, blind, or disabled individual who is determined . . . to be eligible on the basis of his income and resources" (42 USC § 1381a). And that is the problem with respondent's argument. Under OTDA's policy, Ohlsson ultimately received the total amount to which she was entitled under SSI, since the IAR deduction reflected benefits she had been paid previously by the State. But she received no compensation for her participation in WEP, since she would have received the same SSI benefit had she performed no work at all. What petitioner claims here is not that she should be paid twice for the same work, but that she should be compensated once for the work upon which her interim assistance was conditioned, in addition to receiving the full SSI benefit she would have received in the absence of such work.
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> As the Third Department has stated: "The fact that recipients of public assistance must participate in a WEP to receive benefits without reduction means that the public assistance paid to WEP participants directly serves as compensation for the work performed" (*see Covert v Niagara County*, 173 AD3d 1686, 1688 [3d Dept 2019]). If that money is deducted from a disability benefit for which no work is required, than the compensation is reduced to zero. That is illegal under the FLSA" (December 11 D&O 13-14).

The State makes various other assertions, but they do not call into question the above logic. Thus, OTDA cites as support the federal district court decision in *Warren v Roberts* (2017 WL 2782216 [SD NY 2017]), which concerned an effort to deprive the State and local social services district of their IA reimbursement on the ground that they had not complied with certain procedural requirements. In particular, the State cites language from the decision upholding local governments' right to reimbursement, and finding that certain provisions of the Social Security Act relied upon by plaintiffs in that case did not give rise to a private right of action (*see* Resp Mem 14; *Warren, supra* at *7-10). But petitioners in this case do not seek to enforce any provision of the Social Security Act here; they seek to enforce their rights under the FLSA[7]. Petitioners point to no authority that such a suit cannot be brought, and there is nothing in *Warren* which says so.

OTDA also argues that the process for offsetting IA against retroactive SSI is "distinct" from the process specifically addressed in *Matter of Carver* by which the State recovers such income as inheritances, personal injury awards and lottery winnings (Resp Mem 10). As explained by respondent in his sur-reply, the former constitutes a "reimbursement" of the State by a third party (i.e., the federal government), while the latter entails "recovery" of a public assistance obligation (Resp Sur-Reply at 2). That is true as far as it goes. For purposes of the FLSA, though, this is a distinction without a difference. Whatever process is followed, the end result is that the petitioner has performed labor at the behest of OTDA and the local Social Services District, and has less than the minimum wage to show for it. That is not consistent with federal law as it was construed in *Matter of Carver*.

It is also contended by respondent that New York State would be a complete outlier if it were compelled to adopt the position urged by petitioners here, noting that petitioners point only to Maine as a state that has adopted such an approach (as a result of a trial court decision), and setting forth various reasons why that state's circumstances are difference from those that apply in New York (*see* Resp Sur-Reply 1-2). Petitioners note, however – and respondent does not dispute – that only ten states have a legal regime comparable to New York's, in which they provide IA to individuals who are able to work, and thus can perform "workfare" of the sort entailed by the WEP while awaiting the disposition of their SSI application (*see* Pet Reply Br 6). Moreover, OTDA has cited no legal authority in *any* jurisdiction rejecting the rationale advanced

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[7] The Petition cites 29 USC § 206(a)(1)(C), 206(d) and 218(a) of the FLSA, with the latter provision also cited in the supporting affidavit (*see* Petition ¶¶ 48-49, 94; Attorney Affirmation in Support of Motion for Declaratory Judgment ¶ 2). Section 206(a)(1)(C) sets the federal minimum wage at $7.25 per hour, and section 218(a) allows for higher minimum wages to be set under local law. Section 206(d) refers to sex discrimination, and seems to have been cited in error.

by petitioners. Thus, the notion that this State would be pushing against the tide of other authority if the Court were to buy petitioners' argument is not an accurate characterization, and it is not apparent from respondent's submissions that the courts or administrative agencies of any other state have even confronted the issues presented by this proceeding.[8]

Finally, respondent intimates that if the State cannot be reimbursed for its IA outlay, it would "disincentivize the advancement of finite state and local resources on behalf of the federal government in the form of IA" (Maura Aff ¶ 33). That sort of argument – that added expense could undermine the very program which aids petitioners – can always be made when a Court's ruling construes a statute in a way that increases a program's costs, and I cannot ignore the logic of the governing statutes and caselaw on that basis. My only role here is to determine whether IA is subject to the FLSA in light of the Court of Appeals decision in *Matter of Carver*. For reasons set forth above, I find that it clearly is.

Accordingly, it is hereby

ORDERED that petitioner's motion for a Declaratory Judgment is granted; and it is further

ORDERED that petitioner shall by November 7, 2022, present the Court with a proposed final Declaratory Judgment consistent with this Decision & Order, and the parties' stipulations.

This constitutes the Decision and Order of the Court. This Decision & Order is being electronically filed with the County Clerk. The signing of this Decision & Order and electronic filing with the County Clerk shall not constitute notice of entry under CPLR, and counsel is not relieved from the applicable provisions of the CPLR with respect to filing and service of Notice of Entry.

ENTER.

Dated: Albany, New York
October 25, 2022

David A. Weinstein
Acting Supreme Court Justice

10/26/2022

[8] In *Johns v Stewart* (57 F3d 1544 [10th Cir 1995]), the Tenth Circuit rejected the argument that reimbursement of IA benefits for which recipients had performed work violated the FLSA. Its ruling, though, was premised on the finding that the FLSA did not apply to such work in the first instance (*see id.* at 1556-1559). The New York Court of Appeals explicitly declined to follow *Johns* in *Matter of Carver* (*see* 26 NY3d at 279-282), and it therefore has no relevance to this case.