

5-17-1971

## 05-17-1971 Preliminary Memorandum

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No. 6744

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Carter et al v. Stanton, Director, Marion County  
Dept. of Public Welfare et al.

SD Ind.

app. from 3-judge dist. ct. (Kerner, Steckler and  
Noland)

Timely

Facts:

(a)  
Section 406<sub>1</sub> of the Social Security Act,  
42 U.S.C. 606(a) provides in part:

[T]he term 'dependent child means a needy  
child . . . who has been deprived of parental  
support or care by reason of the death,  
continued absence from the home, or physical  
incapacity of a parent . . . .

Indiana Board of Public Welfare Reg. 2-402(b),  
Burn's Ind. Admin. Rules & Regs. Ann. Sec. 52-1001(2-b)

provides:

When the continued absence is due to  
desertion or separation, the absence shall  
have been continued for a period of at least  
six(6) months prior to the date of application  
for assistance to dependent children; except  
that under exceptional circumstances of need  
and where it is determined that the absence  
of a parent is actual and bona fide an  
application may be filed and a child may be  
considered immediately eligible upon a special  
finding of the county department of public  
welfare setting forth the facts and reasons  
for such action.

Appellants are mothers who claim that their children were rendered destitute as the result of the desertion or separation of the father. They assert that they applied to the Marion County Dept. of Public Welfare and were denied the right to complete application forms for AFDC assistance or were denied AFDC assistance itself, after being permitted to complete the application, on the ground that the desertion or separation had occurred within the previous six months; that no investigation was commenced by appellees to determine any exceptional circumstances of need; and that no administrative appeals were taken from the adverse rulings on their attempts to secure the AFDC assistance.

Appellants filed a complaint in the USDC under the Civil Rights Act, 42 U.S.C. 1983, claiming that Indiana Public Welfare Reg. 2-402(b) was unconstitutional. The three-judge dist. ct. was convened and dismissed the complaint on the grounds that appellants had failed to exhaust the available state administrative appeal procedures and on the ground that the complaint presented no substantial federal question.

Contentions:

Appellants assert that the State Reg. is unconstitutional because there is no reasonable relation between the six-month requirement and the interest of the State in determining qualification for the assistance; there is no requirement that the State welfare officials conduct an investigation to determine exceptional circumstances of need and the officials are granted standard-less and arbitrary discretion to determine who is eligible to apply for the assistance within the six-month period; the Indiana authorities would have granted the AFDC assistance to appellants <sup>within the 6-month period</sup> had they been willing to file for legal separation or divorce, and this coercion to terminate the marital status violates appellants' 9th amend. right of privacy and their constitutional right to travel (the requirements for divorce would inhibit their travel to another state); and the six-month requirement conflicts with the Social Security Act because the latter "contains no rigid waiting period to establish a 'continued absence'".

Appellants maintain that the dist. ct. had jurisdiction under 28 U.S.C. 1343(3) and(4); that the question presented is substantial; and that the action of the dist. ct. in dismissing the complaint for failure to exhaust state administrative remedies is directly contrary to the decision in Damico v. California, 389 U.S. 416 (1967), pc, Harlan dissenting (Held that where suit was filed under the Civil Rights Act challenging as unconstitutional the California welfare law and regulations, relief under the Civil Rights Act may not be defeated by failure to seek relief under available State administrative remedy.).

Motion to Affirm:

The SG of Indiana argues that the question presented is not substantial; that the six-month waiting requirement is not absolute, that it can be bypassed by demonstrating exceptional circumstances of need, and that the requirement is reasonably necessary in determining qualification for AFDC assistance because of desertion or separation--that a father who leaves

the home for a "brief soiree" is not absent in any "continued" sense; that the State Reg. does not conflict with the federal statute because a "continued absence" is one which lasts more than an instant and the State's definition of a continued absence as one for six months is not unreasonable and does not violate the federal requirement to provide assistance "with reasonable promptness" to all eligible individuals; that appellants should be required to exhaust their State administrative remedies for otherwise there is no case or controversy and Damico should be distinguished because that case dealt with the question of the constitutionality of a State statute while this case deals only with the question of the constitutionality of a State regulation.

Motion to Dismiss or Affirm:

Appellee Stanton argues that a claimant is not required to file for separation or divorce in order to receive assistance within six months after desertion or separation, but that the filing is only one factor considered in determining

eligibility and need; that absence for six months is not a mandatory condition for assistance; and that ~~XXXXX~~ administrative remedies must be exhausted before seeking extraordinary relief which the administrative relief might render the judicial determination of the issues unnecessary, Chicago Automobile Trade Ass'n v. Madden, 328 F. 2d 766 (CA 7 1964).

Addendum:

Appellants argue that the decision below conflicts with the following cases in which it was held that similar three-month periods for determining "continued absence" were unlawful because they conflicted with the requirements of the Social Security Act: Damico v. California, 2 Pov. L. Rep. Par.10,478 N.D. Cal. 1969), and Doe v. Hursh, 2 Pov. L. Rep. Par. 11, 753 (D. Minn. 1970). Appellee Stanton asserts that Damico should be distinguished because the Cal. regulation prohibited assistance prior to the expiration of the three-month period unless legal action was taken to terminate

do not determine  
Supp. citations  
these cases.

the marital relation, or the parent was deported or incarcerated, and that Doe v. Hursh should be distinguished because the applicable Minnesota statute created an irrebuttable presumption that separations for less than three months were not "continued absence from home".

Discussion:

✓ Affirm summarily, noting that the decision below is erroneous insofar as it provides that exhaustion of State administrative remedies is a prerequisite to the 1983 action. It seems to me that the Indiana regulation is constitutional and that the question presented is not substantial. I would affirm the decision below on the merits.

It seems clear that the decision below is wrong on the issue of exhaustion of State admin. remedies. I am persuaded that Damico v. California, 389 U.S. 416, applies to this case. I would reverse the judgment below on this issue.

MAL 5/17/71

Nease