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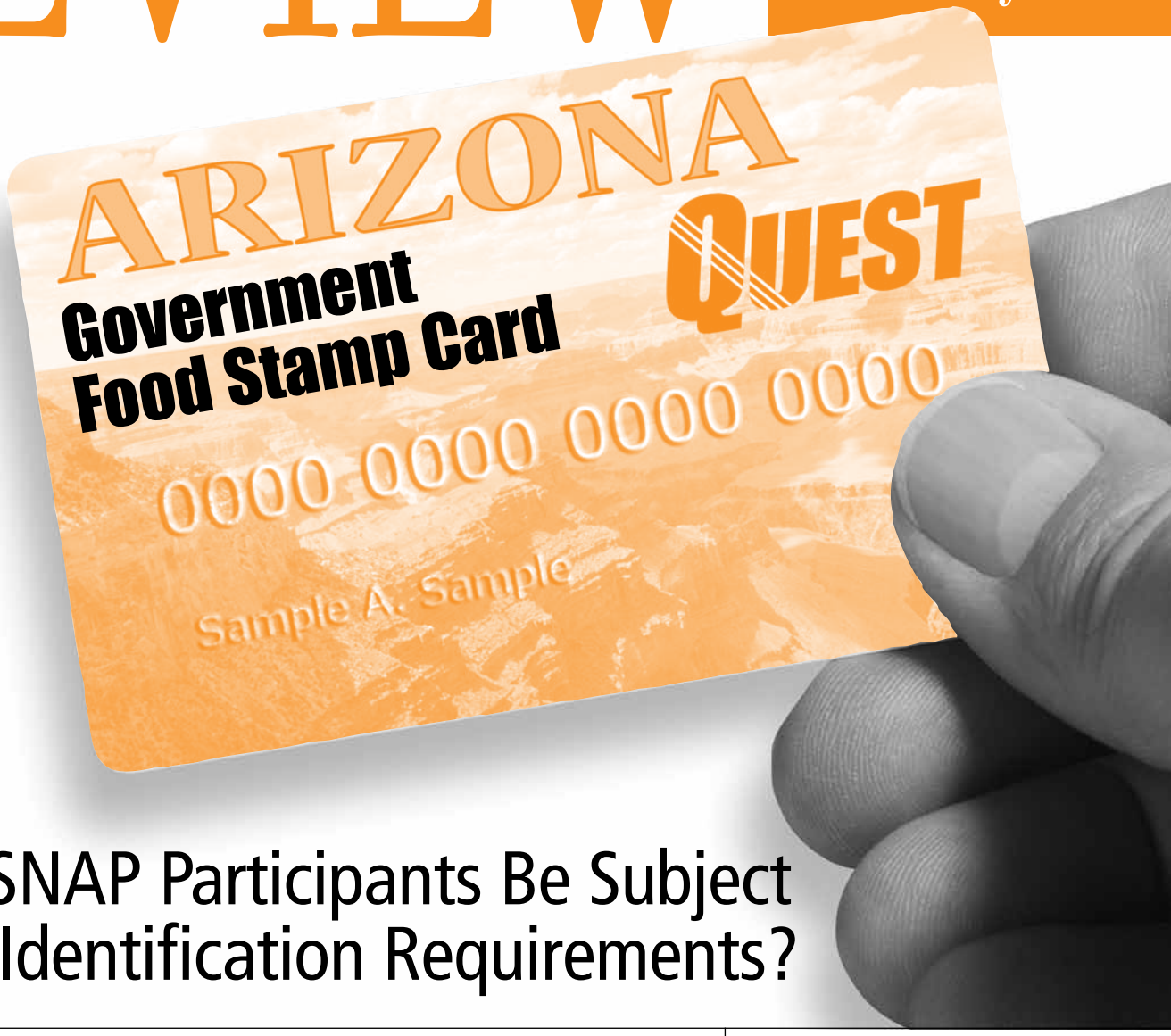

Should SNAP Participants Be Subject to New Identification Requirements?

Home- and Community-Based Services and the Affordable Care Act

Home Health Aides and the Fair Labor Standards Act

Foreclosures and the Equal Credit Opportunity Act

Better Pay for Legal Services Attorneys

SNAP Benefits and Fast-Food Restaurants

Access Issues in Supreme Court's 2010 Term

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Sargent Shriver National Center on Poverty Law

wood Oakland Community Organization, Logan Square Neighborhood Association, and Metropolitan Tenants Organization—to fill them in on the background of the innocent-tenant defense and its relevance to public housing residents. These organizations spread the word to other community organizations, advocacy groups, and stakeholders and mobilized their members. The result was busloads of residents mobilized to attend the public hearing—over 400 people came to be heard. While most of the comments were against the drug-testing policy, many residents and advocates spoke out as well against removing the innocent-tenant defense. The hearing went on for several hours.

After the hearing, the focus turned to the submission of written comments from all the groups who had already participated. And, with the assistance of John McDermott of Logan Square Neighborhood Association, Legal Assistance Foundation reached out to aldermen (the Chicago equivalent of city council members) who had public housing developments in their wards and asked them to submit letters in support of the innocent-tenant defense.

■ ■ ■

On June 21, 2011, little more than a month after the proposals became public, CHA announced that it was "shelving" the proposals to require drug testing and remove the innocent-tenant defense (Maudlyne Ihejirika, *CHA Kills Controversial Plan to Drug Test Residents*, Chicago Sun-Times, June 21, 2011, http://bit.ly/m5Bggr). CHA credited the "tremendous amount of feedback" for its decision (*id.*).

From the perspective of a legal aid attorney, the lessons learned from this experience are many. The cooperative division of labor between our two organizations—the Sargent Shriver National Center on Poverty Law focused on opposing the drug-testing requirement while Legal Assistance Foundation concentrated on advocacy to retain the innocent-tenant defense—enabled us to concentrate our resources. A network of community organizers who have grassroots skills and media savvy was key to this victory; the community organizers helped us learn to break down "legal issues" in a way that could capture the public's attention and imagination—a skill all advocates should cultivate. Most important, we must not limit our imagination to what can be achieved through litigation.

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A Victory for Collaborative Advocacy: *Odems v. New York City Department of Education*

"Fabulous news!" was the subject line of Molly Kovel's e-mail to me in June 2011. Kovel's organization, Bronx Defenders, was cocounsel with MFY Legal Services, where I am a senior staff attorney, in *Odems v. New York City Department of Education* (2009 NY slip op. 33070U (N.Y. Sup. Ct. N.Y. Cnty. Dec. 16, 2009), http://1.usa.gov/r3L8xf). The New York City Department of Education had just told Bronx Defenders that the department was withdrawing its appeal to the New York State Appellate Division, First Department, in the *Odems* case. Only a month earlier, opposing counsel had filed a motion for an extension of time to file the department's appeal.

The collaboration between MFY and Bronx Defenders on the *Odems* case started in December 2008. Bronx Defenders was interested in appealing the New York City Department of Education's administrative decision against hiring a job applicant based on a single felony conviction. Bronx Defenders heard that MFY had a similar case against the department on the appellate track and reached out to us. MFY was eager to share what it had learned in *Acosta v. New York City Department of Education* as well as the handful of other cases that MFY had filed against the department (*Acosta v. New York City Department of Education*, 16 N.Y.3d 309 (2011)). *Acosta* eventually worked its way to the New York Court of Appeals, and the timeliness of that court's favorable decision on March 24, 2011, likely influenced the department's decision to withdraw its appeal in *Odems*.

Without the significant collaborative support of reentry advocates that began in *Acosta*, the successful outcomes reached in both cases would not have been possible. In both cases, however, the collaborative relationships between the attorneys and the clients were central to the effectiveness of the advocacy. After all, the clients' personal stories of how they struggled and triumphed and the clients' desires for better lives formed the basis of the advocates' work.

Background

Theresa Odems applied for employment as a part-time school aide at Public School 7 in New York City in 2008. Odems submitted substantial evidence in support of her employment application, but the Department of Education denied her application in December 2008 based on a single felony conviction more than eighteen years old. According to the department, employing Odems would pose an unreasonable risk to the safety and welfare of the school community.

During the department's review of applicants with a prior criminal history, Odems explained that she was in her early 20s when she became entangled in an abusive relationship, which caused her problems with the law. She pled guilty to a felony charge of attempted criminal sale of a controlled substance in 1990. Soon after, she voluntarily entered a residential treatment facility and completely rehabilitated herself from drugs and the abusive relationship once and for all. Odems was then granted early termination from probation and continued to live a productive life, doing volunteer work and holding a job.

She worked in retail in 1993 and, after a few years, decided to stay home to care for her three children.

When Odems's youngest child began attending Public School 7, Odems started volunteering at the same school and continued to do so as of the date the Article 78 proceeding was filed. She greeted the children in the morning; assisted at breakfast, lunch, and recess programs; and chaperoned students walking to after-school programs. She volunteered in after-school and summer programs, was a member of the school leadership team (a group that sets the school's budget and curriculum), was a learning leader in a citywide organization that trains parents to tutor and mentor public school students, and held leadership positions in the school's parent-teacher association.

Odems performed these duties without pay for more than eight years. She did so without a single safety incident and was highly regarded at the school. She documented her experience through numerous recommendation letters from persons involved with her work at the school (one was a letter from the school principal who was supportive of her application for this paid part-time position) and her then-employer, Memorial Sloan Kettering Cancer Society. Odems established that she received a passing score on the 2008 New York State Assessment for Teaching Assistant Skills and that she had received the necessary certificate and registration as a child care provider. She also submitted a certificate of relief from disabilities; issued by the Queens County Supreme Court in 2006, the certificate creates a presumption of rehabilitation from her 1990 felony conviction.

Applicable Law

New York State Correction Law Article 23-A bars discrimination against people convicted of criminal offenses (N.Y. Correction Law §§ 750–755 (McKinney 2011)). The statute provides that employment (or licensure) may not be denied based on an applicant's criminal history unless (1) there is a direct relationship between the criminal offense(s) and the specific employment (or license) sought or held by the individual or (2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public (N.Y. Correction Law § 752).

Private and public employers are required to consider each of the eight enumerated factors under Section 753 of Article 23-A to determine whether either exception applies. These factors are (1) New York's public policy to encourage the licensure and employment of persons convicted of one or more criminal offenses; (2) the specific duties and responsibilities necessarily related to the license or employment sought or held by such persons; (3) the bearing, if any, that the criminal offense(s) for which such persons were convicted will have on their fitness or ability to perform one or more of those duties or responsibilities; (4) the time that has elapsed since the occurrence of the criminal offense(s); (5) the age of such persons at the time of occurrence of the criminal offense(s); (6) the seriousness of the offense(s); (7) any information produced by such persons, or produced on their behalf, in regard to their rehabilitation and good conduct; and (8) the legitimate interest of the public agency or private employer in protecting property and the safety and welfare of specific individuals or the general public. Section 753(2) also requires consideration of any certificate of relief from disabilities or certificate of good conduct, which creates a presumption of rehabilitation from the offense(s) specified on the certificate.

Under Correction Law Article 23-A, an Article 78 proceeding pursuant to the Civil Practice Law and Rules is the exclusive remedy against public employers and agencies that discriminate against applicants based on a prior criminal conviction record (N.Y. Correction Law § 755 (McKinney 2011)). In an Article 78 proceeding the court uses an "arbitrary and capricious" or rational basis standard when reviewing an agency decision and the statute of limitation is four months from the date of the final agency decision. A notice of claim must also be served within ninety days if the claim is against a school district (N.Y. Education Law § 3813 (McKinney 2011)).

Two Heads Better Than One

MFY and Bronx Defenders interviewed Odems in December 2008, soon after she received the denial notice from the Department of Education. After reviewing her documents and discussing the merits of the case, we agreed on our next steps and identified working deadlines to keep ourselves organized, given the short statute-of-limitation period. We secured the appropriate administrative approvals and cocounseling agreements from our respective organizations to represent the client. Our cocounseling agreements clearly stated, among other items, who would be the main client contact person, who would maintain the court papers, and how strategic decisions would be made. We had a good and efficient working relationship and divided the necessary tasks to ensure that we covered everything and none of the work was unnecessarily duplicated. MFY already had samples of prior notices, pleadings, and memoranda from having filed a number of cases against the department. There was no need to reinvent the wheel or start from scratch. We sent a request for our client's file under the freedom-of-information law and started drafting the court papers soon thereafter.

We commenced the Article 78 proceeding in March 2009 and fully submitted reply papers in New York County Supreme Court by July 2009. MFY and Bronx Defenders discussed negotiation strategy along the way because we attempted several times to settle the case even after we submitted the papers and before we requested oral argument from Judge Alice Schlesinger (the assigned judge). The paid part-time position that Odems had applied for was no longer available, due in part to the economic downturn, which made settlement particularly challenging. While Judge Schlesinger strongly encouraged the Department of Education to settle, no agreement was ever reached, resulting in the court's December 16, 2009, decision in favor of Odems. The court found the department's decision denying Odems's employment application arbitrary and capricious because it did not adequately demonstrate that it evaluated all the eight factors required under the statute and did not properly apply the presumption of rehabilitation created by the certificate of relief from disabilities submitted by the client. The case was remanded back to the department for a new decision.

Unhappy with the outcome, the Department of Education filed a motion for leave to appeal the decision in March 2010

before the same judge. MFY and Bronx Defenders successfully opposed that motion, but the department then filed a motion for leave to appeal with the appellate division, first department, in May 2010 because Judge Schlesinger denied its initial motion. The first department granted the Department of Education's motion and, under the appellate rules, the Department of Education had until mid-May 2011 to perfect its appeal.

Acosta and Friends

The timeliness of the court of appeals' decision in *Acosta* was likely instrumental in the Department of Education's decision to withdraw its appeal in *Odems*. In October 2006 Madeline Acosta was denied clearance by the department to continue working as an administrative assistant for a nonprofit organization (a subcontractor of the department) solely because of a thirteen-year-old felony conviction for robbery, which resulted from an abusive relationship when she was 17 years old. The department claimed that Acosta would pose an unreasonable risk to the safety and welfare of the school community even though she had successfully reintegrated into society. The department largely ignored substantial evidence of Acosta's rehabilitation that she submitted for consideration. For example, she was a model inmate while incarcerated, completed her college degree with honors while working at night, had been gainfully employed as a paralegal at two major law firms, continued her volunteer work as a motivational speaker and advocate for alternatives to violence, and started a family. After her employment clearance was denied, Acosta retained MFY to represent her in an Article 78 proceeding seeking review of the department's decision. We lost in the Article 78 proceeding and decided to appeal the case to the appellate division, first department.

MFY had been participating in the Community Service Society's monthly New York Reentry Roundtable and related legislative advocacy when the unfavorable Article 78 decision was issued in June 2007. At one of these monthly meetings, MFY reached out to Juan Cartagena (former Community Service Society general counsel) to ask if the society would be interested in writing an amicus brief to support Acosta. After hearing a brief case description, he immediately answered, "Yes!" The Community Service Society also volunteered to rally other reentry service providers in New York City, specifically Bronx Defenders, Legal Action Center, The Fortune Society, Osborne Association, and Strive (Support Training Result In Valuable Employees), to sign onto the brief.

Review of an administrative decision in an Article 78 proceeding is narrow, but the amicus brief offered a different perspective by using criminology research and secondary sources that complemented our arguments and showed strong support from the New York reentry community (Brief for Community Service Society et al. as Amici Curiae Supporting Petitioner-Appellant, *Acosta v. New York City Department of Education*, No. 400475/07 (N.Y. App. Div. Sept. 18, 2008))). Without the amicus brief, the *Acosta* case might have been just another Article 78 on appeal before the appellate division, first department.

Another Round

In May 2009, two months after we commenced the *Odems* Article 78 proceeding, the appellate division, first department, issued a favorable decision in *Acosta* (878 N.Y.S.2d 337 (N.Y. App. Div. 2009)). The Department of Education decided to appeal *Acosta* to the New York Court of Appeals, and the Community Service Society agreed to continue its support. As we prepared for the next round in *Acosta*, the Legal Aid Society and Legal Services NYC agreed to sign onto the society's amicus brief. Meanwhile, the New York City Bar Association took an interest in the case and, through its Administrative Law Committee, Corrections Committee, and Criminal Law Committee, submitted a separate amicus brief seizing "an important opportunity to clarify the duties of employers and agencies and the rights of individuals under these statutory provisions" and "to clarify the obligations of all agencies that make decisions about legal rights of New Yorkers" (Proposed Brief of Amicus Curiae the New York City Bar Association, *Acosta v. New York City Department of Education* at 2–3, No. 400475/07 (N.Y. Jan. 11, 2010), http://bit.ly/oEpK4A)). An amicus brief on behalf of New York State Senator Bill Perkins was submitted in support of the case by Kelley Drye & Warren LLP (Press Release, Office of New York State Senator Ruth Hassell-Thompson, New York's High Court Knocks Department of Education for Discriminating Against a Formerly Incarcerated Person (April 5, 2011), http://1.usa.gov/oCLv0Z; Kelly Drye (Jan. 12, 2010), http://bit.ly/ouFQXP). Oral argument was finally scheduled in February 2011, and the court of appeals issued its decision in favor of Acosta the following month.

In the wake of the *Acosta* decision, we hoped that the Department of Education would abandon its appeal in *Odems*; however, with the department's pending motion requesting an extension of time to perfect its appeal, that looked highly unlikely. Confident that we could count on the New York reentry community for support, MFY and Bronx Defenders began to plan to defend the department's appeal. Unlike in the *Acosta* case, our collaboration produced a successful outcome in the Article 78 proceeding. The teachers' union took notice of that victory, and there were indications that the union was another potential ally in the defense of our lower-court victory. A few weeks later, the department withdrew its appeal. Without the enormous show of support MFY received in *Acosta* through the amici submissions, we doubt that the department would have done so. Had the outcome of the *Acosta* case been different, the *Odems* case would very likely still be on the appellate track.

Practical Considerations and Lessons Learned

While earning a favorable decision from the court was rewarding, the job that Odems originally applied for is no longer available. This highlights that clients' expectations as their court cases progress should be managed so that clients keep things in perspective. Collaboratively working with clients to explore other employment options can keep their employment goals on track. Trying to obtain approval or security clearance from the public agency or other employer is always beneficial so that when the same (or a similar) job becomes available again, the client is ready should she decide to accept it. If applicable (and if at all possible), cleaning up any negative in-

formation in the client's personnel file (such as inaccurate rap sheet information and consumer reports) that may affect any future applications with any public agency or other employers is a good idea.

For clients with prior criminal histories, the experience of working with and watching an advocate who understands and articulates their personal struggles while recognizing their strengths generally improves the clients' ability to advocate for themselves—regardless of the outcome of the litigation. This collaborative interaction with the client is not only a teaching opportunity but also a valuable lesson. For some clients, the positive experience changes how they perceive themselves, and that, in turn, changes their outlook.

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Amending the Illinois Wage Payment and Collection Act: An Organizing Victory Against Wage Theft

Illinois Senate Bill (S.B.) 3568, which Gov. Patrick Quinn signed into law on July 30, 2010, amended the Illinois Wage Payment and Collection Act and gave low-wage Illinois workers some of the nation's strongest protections against wage theft (see 820 Ill. Comp. Stat. 115/1 *et seq*. (2011), http://1.usa.gov/q5cAU6). S.B. 3568 creates new deterrents against wage theft by increasing civil and criminal penalties against violators, especially repeat offenders; gives the Illinois Department of Labor more efficient and effective enforcement mechanisms to combat wage theft; and protects workers from retaliation by employers if workers pursue their rights by complaining about wage theft in court, before government agencies, or even to community organizations.

The passage of S.B. 3568 culminates nearly two years of organizing by Illinois Just Pay for All. The coalition's member organizations documented wage theft, identified some of the law's main inadequacies, and organized their worker members to advocate before the state legislature to obtain greater protections. The Just Pay for All Coalition's collaboration with the Illinois Department of Labor, legislators, and our worker members can offer valuable lessons for state-level campaigns in Illinois or elsewhere.

The Coalition

Just Pay for All's member organizations, the Chicago Workers Collaborative, Latino Union of Chicago, and Centro Trabajadores Unidos, represent and organize low-wage and immigrant workers throughout the greater Chicago area. Working Hands Legal Clinic, also a coalition member, offers to Chicago worker centers legal support ranging from litigation to drafting legislation. The coalition has had legislative victories. In 2005 worker centers in Chicago helped achieve passage of the Illinois Day and Temporary Labor Services Act (820 Ill. Comp. Stat. 175/1 *et seq*. (2011)), which gave Illinois the country's most aggressive protections for temporary staffing agency workers. The coalition has since successfully advocated several amendments to that law to protect it from attack by the fast-growing temp-agency industry. Worker centers were also responsible for the Illinois Minimum Wage Law amendments (820 Ill. Comp. Stat. 105/1 *et seq.* (2011)) that increase the damages available for workers denied wages owed them and prevent staffing industry workers from being labeled "probationary" and thus earning a lower rate. The coalition supported the passage of the Employee Classification Act (820 Ill. Comp. Stat. 185/1 *et seq*. (2011)) and the Illinois Human Rights Act amendments that made people subjected to abusive use of the E-Verify database (which is supposed to inform employers about an individual's eligibility to work in the United States) a protected class, along with giving the class a private right of action.

One key element in Just Pay for All's most recent legislative success was its collaborative relationship with the state agencies charged with combating wage theft. Just Pay for All has always strived to maintain this relationship, even in the face of disagreements between coalition members and, for example, the Illinois Department of Labor. This collaboration has allowed us to learn about the limitations with which the department struggles in combating wage theft, and thus to work with the department and supportive legislators in crafting legislation to overcome those limitations. Studies that documented the gravity of wage theft and its impact on low-wage communities in Illinois, and indeed nationwide, were also useful in marshalling support for the bill.

The coalition's model itself was a significant resource. Worker centers' presence in low-wage and immigrant communities gives worker centers insight into workers' needs—in fact, workers who become victims of wage theft often turn first to these centers. Working Hands Legal Clinic augments the centers' services with legal resources and can, for example, translate worker centers' insight into wage theft and the challenges that low-wage workers face into responsive legislation.

The most important element of the coalition's success, however, was the workers' presence. From drawing attention to the problem by protesting against employers who stole their wages to telling their stories to state legislators, the workers' own advocacy on behalf of their communities was compelling and could not be ignored.

Wage Theft in Illinois

Wage theft—or nonpayment of wages—has reached epidemic proportions in Illinois and across the nation. In the Chicago area alone an astounding $7.3 million in wages is stolen from workers every week (Nik Theodore et al., Center for Urban Economic Development, University of Illinois at Chicago, Unregulated Work in Chicago: The Breakdown of Workplace Protections in the Low-Wage Labor Market (April 2010), http://bit.ly/mY9j6n). Dozens of national studies have also uncovered severe wage payment violations (see, e.g., Annette Bernhardt et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities (2009), http://bit.ly/qwDiib).

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