

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**JULY 30, 1996**

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 95-2986**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

**LIBBIE PESEK,**

**Plaintiff-Appellant,**

**v.**

**LINCOLN COUNTY,  
LINCOLN COUNTY  
GENERAL RELIEF AGENCY,  
LINCOLN COUNTY  
DEPARTMENT OF SOCIAL  
SERVICES and WISCONSIN  
COUNTY MUTUAL  
INSURANCE CORPORATION,**

**Defendants-Respondents.**

APPEAL from a judgment and an order of the circuit court for Lincoln County: ROBERT A. KENNEDY, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Libbie Pesek appeals a summary judgment dismissing her action against the Lincoln County Department of Social Services and its General Relief Agency and requiring Pesek to pay \$50 costs for filing a frivolous motion to disqualify her opponents' attorney. She also appeals an order denying a free transcript for this appeal. We affirm the judgment and order.

Pesek makes three claims in her complaint. First, she alleges that she asked a General Relief worker and other county employees whether there was a program that provided funds for physical therapy as prescribed by her doctor. The county workers told her there was no such program or that they were unaware of such a program. Two months later, a General Relief supervisor wrote Pesek offering to pay for some physical therapy. Pesek alleges that the delay in granting physical therapy treatment caused her additional damage, stress and trauma.

Pesek's second claim, under 42 U.S.C. 1983, alleges that General Relief officials failed to comply with their duties set out in § 49.03(7), STATS., by denying her an application for benefits, failing to notify her in writing that her application was denied and failing to notify her of her appeal rights. Pesek seeks back payments of the minimum monthly maintenance allowance from the date she first inquired about benefits until she became ineligible for benefits, approximately eleven months later.

Pesek's third claim alleges that she endured pain, physical and mental stress and trauma when General Relief officials refused to pay for orthopedic shoes prescribed by her doctor. Following an administrative review, the circuit court eventually ordered the agency to pay for the shoes. Pesek seeks compensation for the pain and suffering she endured during the time the administrative review was pending.

Whether a complaint states a claim is a question of law that we review without deference to the trial court. *First Nat'l Bank v. Dickinson*, 103 Wis.2d 428, 433, 308 N.W.2d 910, 912 (Ct. App. 1981). In reviewing a judgment dismissing a complaint for failure to state a claim, we must accept the facts pled in the complaint as true. *Evans v. Cameron*, 121 Wis.2d 421, 426, 360 N.W.2d 25, 28 (1985). A complaint is legally insufficient only if it is "quite clear that under

no conditions can the plaintiff recover." *Morgan v. Pennsylvania Gen. Ins. Co.*, 87 Wis.2d 723, 731, 275 N.W.2d 660, 664 (1979). A complaint under the Civil Rights Act, however, requires more than a conclusory allegation. *Cohen v. Illinois Inst. of Technology*, 581 F.2d 658, 663 (7th Cir. 1978). Rather, some particularized facts demonstrating a constitutional deprivation are needed to sustain a cause of action under the Civil Rights Act. *Id.*

Pesek's complaint fails to state a claim for which relief could be granted. The complaint does not state any facts from which a finding could be made that the Department of Social Services or the General Relief Agency failed to perform any nondiscretionary duty. See *Envirologix Corp. v. City of Waukesha*, 192 Wis.2d 277, 288, 531 N.W.2d 357, 363 (Ct. App. 1995). There is no cause of action for failure to notify a person of benefits he or she could apply for. The County's temporary failure to recognize Pesek's eligibility for a particular program is not actionable. As the trial court noted, Pesek, in effect, wants the County welfare officials to act as her attorney actively pursuing benefits Pesek may be eligible to apply for.

Pesek argues that the trial court improperly granted summary judgment because the County did not present an affidavit relating to the first and third claims in her complaint. The first step in deciding a motion for summary judgment requires the court to review the complaint to determine whether it states a claim for which relief can be granted. *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Submission and examination of affidavits is only required if the court concludes that the complaint states a claim for which relief can be granted.

The trial court also properly dismissed Pesek's second claim. To the extent this claim relies on the allegation that County officials violated Pesek's statutory rights, that claim is not cognizable under 42 U.S.C. 1983. To prevail on a civil rights complaint, Pesek must allege a deprivation of "rights, privileges or immunities secured by the constitution or laws of the United States." See *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). The only possible constitutional claim Pesek raises is a violation of her procedural due process rights, notice of an opportunity to be heard. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Procedural due process requires that the State afford an individual an opportunity to be heard at a meaningful time and in a meaningful manner. *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976).

The procedures listed in § 49.037, STATS., and followed by Lincoln County in this case satisfy Pesek's due process rights. On appeal, Pesek describes the due process violation as a refusal to provide her with an application form, a written decision and notification of her right to appeal. Pesek's argument on appeal that she was denied an application form unfairly characterizes the facts as they are alleged in her complaint. The complaint does not state that County employees refused to give Pesek an application form upon specific request. The right to a written decision and to appeal a decision apply only after a written application is filed. *See* § 49.037(3), STATS.

Pesek's third claim, that she was damaged by delay in receiving her corrective shoes, does not state a claim for which relief could be granted. County officials followed the administrative procedure and, upon order of the circuit court, paid for the shoes. There is no cause of action for damages incurred during the pendency of the administrative process.

The trial court properly refused to grant Pesek's motion for free transcripts. Transcripts are not necessary to prosecute an appeal involving summary judgment based on a deficient complaint. No questions of fact are submitted with this appeal. The trial court is not required to produce a transcript of oral argument at taxpayers' expense to decide questions of law.

Finally, the court properly penalized Pesek for filing a frivolous motion to disqualify her opponents' attorney. Pesek challenged the authority of the attorney for the County's liability insurer to appear in this action. We conclude that even a pro se litigant must recognize that a party has very little control over an opposing party's choice of attorney and that attempts to disqualify an attorney may be reasonably viewed as harassment.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.