STATE OF MICHIGAN
COURT OF CLAIMS

KELLIE SAUNDERS, *et al.*,

Plaintiffs,

v

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY AND JULIA DALE,

Defendants.

No. 2022-000007-MM

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DEFENDANTS MICHIGAN UNEMPLOYMENT INSURANCE AGENCY AND JULIA DALES' JULY 5, 2022 MOTION FOR RECONSIDERATION OF THIS COURT'S JUNE 13, 2022 OPINION AND ORDER

Defendants Michigan Unemployment Insurance Agency and Julia Dale, by and through its attorneys, and under MCR 2.119, move for reconsideration of this Court's June 13, 2022 Opinion and Order regarding Defendants' motion for summary disposition and Plaintiffs' motion for preliminary injunction. In support of its motion, Defendants state:

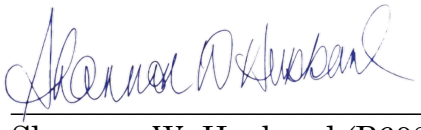
1. Defendants have responded to Saunders administrative decisions and thus, dismissal of Saunders and Count I is appropriate (as to the underlying complaint and injunctive relief.

2. While not challenging this Court's conclusion regarding injunctive relief, Defendants seek clarification as to whom injunctive relief applies to, whether it applies to untimely protests or appeals, and what collection activity it applies to.

3. The undersigned spoke to Plaintiffs' counsel to request concurrence in the relief sought on July 5, 2022 and concurrence was denied.

For these reasons, Defendants asks this Court to reconsider its June 13, 2022 Opinion and Order.

Respectfully submitted,



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Dated: July 5, 2022

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BRIEF IN SUPPORT OF DEFENDANTS MICHIGAN UNEMPLOYMENT INSURANCE AGENCY AND JULIA DALES'S JULY 5, 2022 MOTION FOR RECONSIDERATION OF THIS COURT'S JUNE 13, 2022 OPINION AND ORDER

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Rules

INTRODUCTION

On June 13, 2022, this Court issued an Opinion and Order concerning Defendants Michigan Unemployment Insurance Agency and Julia Dale's Motion for Summary Judgment and Plaintiffs' Motion for a Preliminary Injunction. (June 13, 2022 Opinion and Order, Exhibit A.) The Opinion and Order granted Defendants' motion in part and denied it in part. (*Id*.) Specifically, this Court dismissed Count I of Plaintiffs' First Amended Complaint as to all Plaintiffs but for Kellie Saunders because Defendants failed to act in response to a favorable decision that she obtained by utilizing her available administrative remedies. (*Id*., pp 8–10.) This Court dismissed Count II in its entirety and denied Defendants' Motion as to Count III. Further, this Court granted in part and denied in part Plaintiffs' Motion for a Preliminary Injunction. (June 13, 2022 Opinion and Order, Exhibit A.)

Defendants file this motion for two limited purposes. First, Defendants ask this Court to reconsider its summary judgment decision concerning Saunders and Count I because she obtained relief through the administrative process. Second, Defendants ask this Court to clarify the parameters of the preliminary injunction. Defendants are not seeking to challenge the issuance of a preliminary injunction in this case, but merely to who the ascertain the scope who the injunctive relief applies to, whether collection suspension applies to untimely or late appeals, and what collection activity must be suspended. Such clarification is needed to ensure Defendants comply with this Court's Opinion and Order as well as well-established unemployment law.

PROCEDURAL HISTORY

Five plaintiffs filed this action.[1] In their complaint, they alleged that Defendants violated their due process rights under article 1, paragraph 17 of the Michigan Constitution by: (1) issuing monetary redeterminations more than one year after the issuance of the initial monetary determination, (2) failing to conduct reviews of overpayment accounts to determine if overpayment should be waived due to "agency error," and (3) engaging in collection activity where a timely protest or appeal had been filed. (See January 28, 2022 Complaint, ¶¶ 162–189).

In response, Defendants filed a Motion for Summary Disposition. (See March 14, 2022 Motion.) Defendants sought dismissal pursuant to MCR 2.116(C)(4)(lack of subject matter jurisdiction) and (C)(8)(failure to state a claim). (*Id.*)

In addition, Defendants filed a Motion for Preliminary Injunction. (See March 10, 2022 Motion for Preliminary Injunction.) Plaintiffs sought injunctive relief seeking to suspend collection activity for the Plaintiffs and the putative class by: (1) suspending all collection activity against claimants that were based upon a redetermination issued more than one year after a monetary determination, (2) suspending all collection activity against claimants who owe an overpayment and for whom Defendants have not determined if waiver is appropriate under the theory of "administrative error," and (3) suspending all collection activity against

[1] On March 24, 2022, Plaintiffs filed their first amended complaint pursuant to MCR 2.118(A)(1) which added five plaintiffs but did not change the general allegations or counts.

claimants who had not received a "final" determination regarding the merits of their claim. (*Id.*, p 24.)

On June 13, 2022, this Court issued an Opinion and Order regarding Defendants' motion for summary disposition. (See June 13, 2022 Opinion and Order.) This Court granted Defendants' summary disposition motion as to Count I (to all Plaintiffs but Kellie Saunders) and to Count II in its entirety, (*Id.*, pp 8–13), but denied the requested relief as to Count III. (*Id.*, pp 13–15.) Further, this Court granted Plaintiffs' preliminary injunction motion as to Count I (as to Saunders) and Count III in its entirety (*Id.*, pp 17–18), but denied injunctive relief as to Count II. (*Id.*)

STANDARD OF REVIEW

Motions for reconsideration are governed by MCR 2.119(F)(3). To succeed, a movant must avoid presenting "the same issues ruled on by the court," and must instead "demonstrate a palpable error by which the court and the parties have been misled" and demonstrate that "a different disposition of the motion must result from correction of the error." MCR 2.119(F)(3). However, a court's decision to grant or deny a motion for reconsideration is ultimately within its discretion. *Kokx v Bylenga*, 241 Mich App 655, 659 (2000). MCR 2.119(F)(3) gives courts "considerable discretion in granting reconsideration to correct mistakes, preserve judicial economy, and to minimize costs to the parties." *Id.*

ARGUMENT

I. Defendants have responded to the administrative order issued regarding Kellie Saunders. As such, Saunders and Count I should be dismissed and injunctive relief should be denied.

A. Because Defendants has responded to Saunders's favorable administrative decision, dismissal of Count I is appropriate.

Defendants ask this Court to reconsider its opinion and order denying Defendants' motion regarding Saunders's one-year-count claim and granting the Plaintiffs' motion for preliminary injunction as to Saunders. (June 13, 2022 Opinion and Order, Exhibit A.) This Court indicated that Defendants would have been entitled, pursuant to MCR 2.116(C)(10), to summary disposition had Defendants implemented the administrative law judge's decision on an issue wherein Saunders had received a final and favorable decision. (*Id.*, pp 8–10.) Citing *Bonner v City of Brighton*, 495 Mich 209 (2014), this Court found that Defendants deprived Saunders of a meaningful opportunity to be heard by not abiding by the administrative law judge's decision, leading this Court to further conclude that summary disposition could not be had under MCR 2.116(C)(10). (*Id.*, p 9.)

In accordance with the reasoning set forth in this Court's Opinion and Order, Defendants move for summary disposition pursuant to MCR 2.116(C)(10) because Defendants have implemented the administrative law judge decision, thereby resolving the central issue underlying Saunders's claim in Count I. (May 13, 2022 Pandemic Unemployment Assistance monetary redetermination and Saunders's account printouts, Exhibit B.) Defendants effectuated the administrative law

judge's decision by issuing a monetary determination confirming her eligibility for benefits. (*Id.*)

With respect to timing, the court rules permit a moving party to seek summary disposition at any time, unless a scheduling order has deemed otherwise, in circumstances where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law at any time. MCR 2.116(C)(10), MCR 2.116(D)(4). Presently, no scheduling order has been entered that would render Defendants' request for reconsideration as to Count I untimely. Accordingly, Defendants seek dismissal of the remainder of Count I on the basis that Saunders has now received a meaningful opportunity to be heard as demonstrated by Exhibit B, which confirm Defendants have implemented the administrative law judge's decision.

B. Because dismissal of Saunders under Count I is appropriate, dismissal of the related injunctive relief under Court I should occur.

Defendants further move this Court to reconsider its order granting injunctive relief with respect to Saunders's one-year-count claim because Saunders is no longer the subject of an irreparable harm. One of the requirements for the extraordinary remedy of injunctive relief is an imminent and real danger of irreparable harm. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1 (2008). Even if this Court is correct in its assertion that Defendants temporarily deprived Saunders of due process by sending her monthly statements after the administrative law judge decided the matter in her favor, this temporary

deprivation has since ended. Defendants have processed the administrative decision and Saunders is eligible for benefits. Because the only cognizable danger of harm has now passed, and any remaining alleged injury would be speculative in nature, injunctive relief can no longer be had on Saunders's one-year-count claim. *Dunlap v City of Southfield*, 54 Mich 398, 403 (1974) (an injunction will not lie upon the mere apprehension of future injury or where the threatened injury is speculative or conjectural).

As such, Defendants ask this Court to dismiss Saunders and Count I in its entirety and deny injunctive relief as to Court I.

II. While not challenging this Court's Opinion and Order granting injunctive relief regarding Court III, Defendants ask this Court for additional clarification regarding who is covered, whether untimely appeals are covered, and what collection activity is covered.

Defendants file this motion not to overturn the grant of a preliminary injunction, but to seek clarification about who exactly the injunction applies to and how the collection pause contemplated in this Court's Opinion and Order should be implemented so as not to run afoul of statutory provisions governing certain collection activity. The following sections detail the issues on which Defendants seek clarification, as well as the legal authority relevant to defining the scope and reach of the injunction.

A. Defendants ask that the preliminary injunction order clarify who it applies to – the named Plaintiffs or the entire putative class.

This Court held that "plaintiffs are entitled to preliminary injunctive relief to prevent the Agency from engaging in collection efforts until after the administrative process has run its course." (June 13, 2022 Opinion and Order, p 17; Exhibit A.) However, the Court then ordered that Plaintiffs' motion was granted in "its entirety" as it applied to Count III. (*Id.* at p 18.) Plaintiffs asked for an injunction that applied not just to *their* claims, but to *all* unemployment claimants state-wide. (*See* Plaintiffs' March 10, 2022 Brief in Support of Preliminary Injunction, pp 1, 17–25.) Given the conflicting language between this Court's reference to only the Plaintiffs in the body of the opinion (*Id.*, pp 15–17) and the Court's reference to the Plaintiffs' motion in the closing order language (*Id.*, pp 17–18), Defendants seek clarification on exactly who the preliminary injunction in this case applies to – just the named plaintiffs or all putative class members in collection status pursuant to Counts I and III.

Defendants believe that the preliminary injunction should be limited to the named parties. Preliminary injunctions are intended to "preserve the status quo" while the "rights of *the parties*" are determined. *Psychological Services of Bloomfield v Blue Cross and Blue Shield of Michigan*, 144 Mich App 182, 185 (1985) (emphasis added), quoting *Bratton v Detroit Automobile Inter-Ins Exchange*, 120 Mich App 73, 79 (1982). State and federal law is clear that putative class members are not parties to an action where a class has not yet been certified. See *Hanton v Hantz Financial Services, Inc*, 306 Mich App 654, 666 (2014), citing *Smith v Bayer*

Corp, 564 US 299, 315 (2011). The United States Supreme Court has found the idea that unnamed class members are parties before class certification to be "surely erroneous." *Smith*, 564 US at 313, quoting *Delvin v Scardelletti*, 536 US 1, 16, n 1 (2011) (opinion of Scalia, J., emphasis in original).

Plaintiffs asked for a preliminary injunction to protect not just themselves, but all possible members of the putative class. (See Plaintiffs' March 10, 2022 Motion, pp 1, 17–25.) But no class has been certified in this matter, and there is no guarantee one ever will be certified. Moreover, even if a class is eventually certified, there will be no certified class until sometime this fall at the earliest. (See June 22, 2022 Stipulated Order to Extend Time for Motion for Class Certification (extending date for class certification motions to September 21, 2022).) Under the *Hanton* and *Smith* precedent, any putative class members are not yet parties and may never be parties. Because preliminary injunctions are intended to protect actual parties to litigation, the preliminary injunction here should be limited to prevent collection against only the named Plaintiffs. Whether the putative class members are entitled to a preliminary injunction can be determined at a future date if a class is certified.

B. Defendants ask that the preliminary injunction order specify its scope and address whether certain collection required by federal law should be suspended.

The Court's Opinion and Order barred collection efforts until completion of the administrative process, but it did not detail how Defendants should implement the collection stop or how the order interplays with collection statutes Defendants

are bound to follow. (June 13, 2022 Opinion and Order, p 15–18; Exhibit A.) Given the complexity of Defendants' collection processes, and the law underlying them, Defendants request this Court issue an order with additional detail on the scope and implementation of the preliminary injunction.

Defendants ask this Court to clarify whether the injunction applies only to claimants with timely protests or appeals, or whether it also applies to claimants with late filings concerning legally final determinations. Additionally, Defendants are legally required to intercept tax refunds in certain cases, and therefore, Defendants asks that these tax intercepts be excluded from the injunction due to the confines of federal law.

1. A late protest does not stay collection, and the preliminary injunction order does not specify whether to pause collection for these cases.

This Court noted that Court III involved allegations that Defendants were engaging in collection activity against several Plaintiffs who had filed timely protests or appeals that had not been finally adjudicated. (June 13, 2022 Opinion and Order, p 4.) This Court further noted that Defendant Agency agreed to suspend collection activity where a timely protest or appeal had been filed pursuant to the *Zynda* settlement agreement. (*Id.*, p 15.)

Agency determinations, including those assessing restitution, are final unless they are protested within thirty days after they are issued. MCL 421.32a(1). While Defendants may consider late protests to a determination upon a showing of good cause, the final determination is not set aside unless and until the claimant

presents evidence of good cause and either a redetermination or an administrative law judge decision is issued finding good cause for considering the late protest. See MCL 421.32a(2). ALJ decisions affirming Defendants are likewise final after 30 days, and they also remain final unless and until a finding of good cause has been made. See MCL 421.33(2); MCL 421.34(7).

As noted by this Court in its preliminary injunction opinion, Defendants have agreed in unrelated litigation that it will not recover overpayments from claimants until the decision assessing the overpayment becomes final. (*Zynda* Settlement, Exhibit C, p 5, ¶¶13-14.) However, neither the law nor the prior litigation agreement prohibits collection after a decision becomes final, including in cases where a claimant files a late protest or appeal of a final decision. *Id.* To effectively comply with the preliminary injunction order, Defendants require clarification on its application to late appeals where collection activity is otherwise permitted.

2. Federal law requires Defendants to intercept federal tax return funds under certain circumstances and thus preliminary injunction should exclude these intercepts.

Michigan law gives Defendants many tools to collect benefits determined to be overpaid, including deduction from benefits, wage garnishments, and tax refund intercepts. MCL 421.62(a). Defendants also can accept voluntary payments made by claimants, *Id.*, and it typically sends regular monthly statements to claimants to facilitate such payments. These collection tools are permissive with § 62(a) stating that Defendants "may" utilize them to collect overpayments. *Id.* However, federal law makes one collection tool mandatory: federal tax intercepts. As a condition of

federal funding, state unemployment agencies are required to use the federal Treasury Offset Program (TOP) to collect certain types of unemployment debt which are more than a year old. 42 USC 503(m). The TOP program offsets a claimant's federal tax refund to pay towards any covered unemployment compensation debt. 26 USC 6402(f)(1). "Covered unemployment compensation debt" which must be paid includes debts for "erroneous payment of unemployment compensation due to fraud or the person's failure to report earnings which has become final under state law . . . and which remains uncollected." 26 USC 6402(f)(4)(A).

Because federal law requires Defendants to intercept federal tax returns to apply to certain final unemployment debt, any preliminary injunction order should exclude federal tax intercepts on covered unemployment debt as defined in federal law. This would include excluding tax intercepts during a late protest or appeal of a final decision. As discussed in Sec. II.B.1, the determinations in late protests and appeals are final and would frequently constitute covered unemployment debt subject to federal tax intercept during the late appeal proceedings. See MCL 421.32a(1); MCL 421.33(2); 26 USC 6402(f)(4)(A). To avoid running afoul of federal law and to avoid risking Agency funding, these federal intercepts cannot be paused.

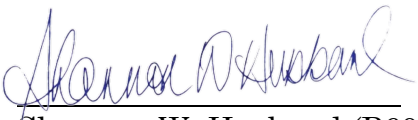
CONCLUSION AND RELIEF REQUESTED

Defendants ask this Court to do thing things: dismiss Saunders and Count I (regarding both the underlying case and as a basis for injunctive relief and clarify the parameters regarding injunctive relief. Defendants does not quarrel with the overall result of the Court's decision to grant a preliminary injunction. It files this

motion merely to seek clarification on the application and scope of the injunction so that it can act consistent with both the law and this Court's injunction order.

As such, Defendants respectfully request this Court to enter an Opinion and Order dismissing Saunders and Court I and clarifying who the preliminary injunction applies to, whether it applies to late protests and appeals, and requiring it to allow continuation of certain federally required tax intercepts.

Respectfully submitted,



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