

**IN THE STATE OF MICHIGAN
COURT OF APPEALS**

KELLIE SAUNDERS, ET AL.,

COA No. 362033

Plaintiffs/Appellants,

Michigan Court of Claims

v.

Case No. 22-00007-MM

Hon. Brock A. Swartzle

STATE OF MICHIGAN
UNEMPLOYMENT INSURANCE
AGENCY and JULIA DALE, in her
official capacity,

Defendants/Appellees.

**APPELLANTS' REPLY IN FURTHER SUPPORT OF THEIR
APPLICATION FOR LEAVE TO APPEAL**

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TABLE OF CONTENTS

INDEX OF AUTHORITIES.....III

I. THE COURT OF CLAIMS ERRED IN DISMISSING COUNT I UNDER MCR 2.116(C)(4) 1

A. ADMINISTRATIVE EXHAUSTION IS IRRELEVANT BECAUSE THE ADMINISTRATIVE PROCESS DOES NOT PROVIDE RELIEF FOR THE CONSTITUTIONAL VIOLATION 2

i. *Plaintiffs Have Utilized the Administrative Process but it Cannot Provide Relief or Remedy Their Constitutional Claims* 2

ii. *Michigan Authority Confirms that the Administrative Process is Inadequate and Irrelevant to the Relief Sought* 3

B. THE COURT OF CLAIMS ERRED IN DISMISSING COUNT I WHERE PLAINTIFFS CLEARLY ALLEGE DEPRIVATION OF PROPERTY 5

i. *Due Process Has Procedural and Substantive Components That Must be Analyzed Before Dismissal of a Due Process Claim*..... 5

ii. *Defendants Violate Claimants’ Rights to Substantive Due Process by Seizing Property Based on Void Monetary Redeterminations* 6

C. DEFENDANTS DID NOT PRESENT ANY EVIDENCE THAT SAUNDERS’ TREATMENT WAS ISOLATED 7

II. THE COURT OF CLAIMS ERRED IN DISMISSING COUNT II UNDER MCR 2.116(C)(8) BECAUSE DEFENDANTS SEIZE CLAIMANTS’ PROPERTY WITHOUT PROVIDING DUE PROCESS 7

A. THE COURT OF CLAIMS ERRED IN FINDING NO PROPERTY RIGHT IMPLICATED BY DEFENDANTS’ OVERPAYMENT COLLECTION ACTIVITY..... 9

B. DEFENDANTS ADMIT THERE IS NO PROCESS TO REQUEST REVIEW FOR ADMINISTRATIVE ERROR WAIVER..... 9

III. CONCLUSION 10

INDEX OF AUTHORITIES

CASES

California Department of Human Resources Development v Java, 402 US 121; 91 S Ct 1347; 28 L Ed 23 666 (1971)..... 9

AFT Mich v State, 497 Mich 197; 866 NW2d 782 (2015)..... 6

Barnowski v UIA, unpublished per curiam opinion of the Court of Appeals, issued May 20, 2021 (Docket No. 344917) 11

Bauserman v UIA (“Bauserman I”), 503 Mich 169; 931 NW2d 539 (2019) 2, 4

Bauserman v UIA (“Bauserman III”), ___ Mich ___; ___ NW2d ___ (2022) (Docket No.160813), slip op. at 25-26 5

Bauserman v Unemployment Ins Agency, 330 Mich App 545; 950 NW2d 446 (2019)..... 2, 4

Bonner v City of Brighton, 495 Mich 209; 848 NW2d 380 (2014) 6, 7

Garner v Mich State Univ, 185 Mich App 750; 462 NW2d 832 (1990) 6

Herrick Dist Library v Library of Mich, 293 Mich App 571; 810 NW2d 110 (2011) 6

Mays v Snyder, 323 Mich 1; 916 NW2d 227 (2018) 7

Mooney v Unemployment Compensation Comm ’n, 336 Mich 344; 58 NW2d 94 (1953)..... 4

STATUTES

MCL Ch 421, Act 1 5

MCL 421.32a(1) 1

MCL 421.62(a) 9

I. THE COURT OF CLAIMS ERRED IN DISMISSING COUNT I UNDER MCR 2.116(C)(4)

Count I alleges that Defendants violated claimants' rights to due process by seizing property based on Monetary Redeterminations that are void because they were made more than one year after the original Monetary Determinations finding them eligible for benefits. *See* MCL 421.32a(1), (2). These Redeterminations were issued after there was already a final Determination to which the Agency must accord finality. *See* UIAC Appeal Docket No. 22-001042 (App'x 00351-00357). Several cases have found that these late Redeterminations are void *ab initio*. *See, e.g.,* UIAC Appeal Docket No. 264147W-REH at 5 (App'x 00362); UIAC Appeal Docket No. 264147W (App'x 00364-00367). In support of their claim, Plaintiffs allege that:

- The Agency has a policy and practice of issuing new Redeterminations beyond their jurisdiction and without any authority to do so (i.e., they are issuing them arbitrarily) (*See, e.g.,* First Am Compl at ¶¶ 178, 222, 224);
- The Agency seizes tax refunds, garnishes wages, or collects money from claimants based on these void Redeterminations (*See, e.g.,* First Am Compl at ¶ 227);
- This collection activity violates Plaintiffs' rights to due process (*See, e.g.,* First Am Compl at ¶ 178);
- Plaintiffs seek equitable relief, including mandamus and injunctive relief, and monetary damages (*See, e.g.,* First Am Compl at ¶ 228); and
- There is no administrative remedy available to Plaintiffs to provide them recourse for the constitutional violation (*See, e.g.,* First Am Compl at ¶ 11).

The Court of Claims dismissed Count I (except as to Plaintiff Saunders) under MCR 2.116(C)(4).

The administrative process for eligibility of benefits cannot address Plaintiffs' claims that Defendants violated their right to due process. Although MCR 2.116(C)(4) allows the Court to rely on information outside of the pleadings, Defendants did not produce any evidence to establish that the administrative process provides an adequate remedy, nor did the Court of Claims identify any evidence to establish, as a matter of law, that the administrative remedies are even available.

A. ADMINISTRATIVE EXHAUSTION IS IRRELEVANT BECAUSE THE ADMINISTRATIVE PROCESS DOES NOT PROVIDE RELIEF FOR THE CONSTITUTIONAL VIOLATION

Plaintiffs do not challenge administrative eligibility decisions here. Rather, they challenge Agency action seizing property without legal authority and thus without due process. Defendants misstate Plaintiffs' claims by directing the Court to the fact that claimants must challenge an eligibility decision through the administrative process. Here, Plaintiffs do not challenge an eligibility decision. Defendants have not—and cannot—identify a portion of the administrative process that would provide a remedy for seizing property based on void Redeterminations.

i. *Plaintiffs Have Utilized the Administrative Process but it Cannot Provide Relief or Remedy Their Constitutional Claims*

Defendants seize Plaintiffs' property without legal authority. Void Redeterminations are issued after there is already a final Determination under Section 32a that the claimant is eligible for benefits. As soon as property is seized, no administrative remedy or later reversal of collection can remedy the constitutional harm. *See Bauserman v UIA ("Bauserman I")*, 503 Mich 169, 186; 931 NW2d 539 (2019) (“[T]he ‘actionable harm’ in a pre deprivation due-process claim occurs when a plaintiff has been deprived of property, and therefore such a claim ‘accrues’ when a plaintiff has first incurred the deprivation of property.”).

The administrative process cannot address constitutional harm or prevent future constitutional harm. For example, Plaintiff Eggleston exhausted administrative remedies after the Agency seized his property based on void Redeterminations. The Agency collected \$500 from Eggleston while his appeal was pending. Then Defendants cancelled his appeal and issued a new Redetermination restoring his benefits. There is no administrative process for him to recover damages for the constitutional harm or to stop the Agency from again conducting the same unconstitutional sweep. Under the Agency's position, it could reissue a new Redetermination at

any time and initiate collections anew. The Legislature did not provide the Agency power to do so. For Plaintiff Saunders, even though an Administrative Law Judge found the Redetermination on which Defendants relied to be void, the Agency continued collecting, unaware of the favorable Redetermination until months later when Plaintiff raised the issue. Saunders demonstrates that the administrative process cannot remedy seizure of property based on void Redeterminations.

Defendants' legal arguments confirm it is their policy and practice to issue void Monetary Redeterminations. Even if a claimant receives a favorable Redetermination, the Agency's position is that it is free to issue a new Monetary Redetermination at any time without any time limit and to use it to seize property. This makes the violation capable of repetition, yet evading review. The Court of Claims acknowledged as to Count III that Plaintiffs were "alleging that the entire process, i.e., one that takes alleged property interests during the pendency of administrative proceedings, is unconstitutional. This type of claim is not subject to exhaustion requirements, as an administrative agency lacks authority to decide whether the administrative scheme itself is unconstitutional." Ord. at 13 (App'x 21). With respect to Count I, Defendants did not even attempt to claim that the administrative process could address the constitutionality of seizing or threatening to seize property based on void Redeterminations or whether it could provide a remedy for the violation.

ii. *Michigan Authority Confirms that the Administrative Process is Inadequate and Irrelevant to the Relief Sought*

The Court of Claims is empowered and vested with the jurisdiction to decide whether inferior Agencies of the States are acting within their authority and to enjoin unconstitutional actions depriving claimants of due process. *See Bauserman v UIA ("Bauserman II")*, 330 Mich App 545, 557-559; 950 NW2d 446 (2019) (summarizing the history of a due process claim for money damages against the Agency that originated in the Court of Claims).

The administrative process cannot redress constitutional violations. *Id.* at 572. In

Bauserman II, the Court rejected the Agency’s argument that the plaintiffs’ due process claims should be dismissed because the plaintiffs had a remedy through the MES Act, stating:

[W]hile the procedure set forth in the MES Act establishes a way for claimants to challenge the Agency’s decision regarding their unemployment benefits, we agree with the Court of Claims that it does not provide a suitable avenue for plaintiffs to challenge the Agency’s alleged systemic and concerted deprivation of their due-process rights caused by the Agency’s implementation of the MiDAS system. Put another way, we disagree with the Agency that the administrative process set forth in the MES Act provides a remedy for plaintiffs to seek redress for the due-process violations that they claim to have suffered as a result of the Agency’s allegedly unlawful actions. [*Bauserman II*, 330 Mich App at 572.]¹

The *Bauserman II* Court found that the administrative process did not provide a remedy on any constitutional claims when the plaintiffs were contesting an administrative process that resulted in the seizure of their property without their consent. *Id.* at 572-573.

The Michigan Supreme Court recently affirmed that there can be a constitutional tort for damages unless (1) “the Constitution has delegated to another branch of government the obligation to enforce the constitutional right at issue” or (2) “another branch of government has provided a remedy that we consider adequate.” See *Bauserman v UIA* (“*Bauserman III*”), ___ Mich ___; ___ NW2d ___ (2022) (Docket No.160813), slip op. at 25-26. The Court went on to reject arguments about the sufficiency of the administrative process, stating:

While the Agency argues that plaintiffs have a remedy in the form of an appeal under the Michigan Employment Security Act, MCL 421.1 *et seq.*, plaintiffs are not challenging the administration of the act and this isn’t a “super appeal” from a benefits determination. Rather, this is a tort claim challenging the Agency’s use of MiDAS to deprive plaintiffs of property without due process of law. There is no remedy available to vindicate their substantive rights other than an action under the Michigan Constitution. Administrative agencies don’t have the power to determine

¹ Defendants cite *Mooney v Unemployment Compensation Comm’n* for the proposition that the Legislature allows for only limited judicial review of unemployment decisions. In *Mooney*, the plaintiffs sought judicial review of whether they were eligible for benefits. 336 Mich 344, 348; 58 NW2d 94 (1953). However, *Mooney* addressed appeals related to individual eligibility. Here, Plaintiffs are alleging constitutional violations, not seeking individual judicial review related to questions of law or fact related to their eligibility for benefits.

constitutional questions or afford consequential damages. [*Bauserman III*, slip op. at 29-30 (footnote omitted).]

The Court concluded that enforcement had not been delegated to the Legislature and there was no other adequate remedy “to vindicate the alleged violations of plaintiffs’ rights.” *Id.*, slip op. at 30. Here, like the *Bauserman* plaintiffs, Plaintiffs allege that Defendants violate claimants’ rights to due process by seizing property based on void Redeterminations. The administrative process cannot remedy harm caused by Defendants’ property seizure without due process.

B. THE COURT OF CLAIMS ERRED IN DISMISSING COUNT I WHERE PLAINTIFFS CLEARLY ALLEGE DEPRIVATION OF PROPERTY

Defendants fail to address the fact that Plaintiffs argue that the *seizure of property* related to the void Monetary Redeterminations violates due process. An executive Agency has only the jurisdiction granted to it by the Legislature. The Legislature enacted the Michigan Employment Security Act to define the procedures within which Defendants may act. *See* MCL Ch 421, Act 1; *see also Herrick Dist Library v Library of Mich*, 293 Mich App 571, 582; 810 NW2d 110 (2011) (“Therefore, being creations of the Legislature, they are only allowed the power that the Legislature chooses to delegate to them through statute.”). Here, the Agency is intentionally acting beyond the jurisdiction granted to it and seizing property despite the lack of jurisdiction. As soon as the property is seized, there is a constitutional wrong, and the harm has accrued.²

i. *Due Process Has Procedural and Substantive Components That Must be Analyzed Before Dismissal of a Due Process Claim*

“[T]he term ‘due process’ encompasses not only procedural protections, but also contains a ‘substantive’ component that protects individuals against ‘the arbitrary exercise of governmental

² As the Court of Claims noted in ruling on Defendants’ Motion for Summary Disposition, “even the temporary deprivation of a constitutional right is an irreparable harm.” Ord. at 16 (App’x 24) (citing *Garner v Mich State Univ*, 185 Mich App 750, 764; 462 NW2d 832 (1990)). It makes no difference whether administrative proceedings have been exhausted.

power.” *AFT Mich v State*, 497 Mich 197, 245; 866 NW2d 782 (2015) (quoting *Bonner v City of Brighton*, 495 Mich 209, 223-224; 848 NW2d 380 (2014)); *see also Mays v Snyder*, 323 Mich 1, 58-59; 916 NW2d 227 (2018) (describing substantive due process as a “component” of due process, rather than a separate claim). A Court must decide whether there was both notice and opportunity to be heard (procedural due process), and whether the government abused its discretion (substantive due process). It is reversible error when a Court fails to analyze procedural and substantive due process claims separately. *Bonner*, 495 Mich at 225.³

ii. Defendants Violate Claimants’ Rights to Substantive Due Process by Seizing Property Based on Void Monetary Redeterminations

Count I alleges that Defendants violate claimants’ rights to substantive due process by seizing property only after arbitrarily modifying benefits based on Monetary Redeterminations that the Agency has no lawful power to issue. Count I specifically alleges that Defendants violated their rights to due process by seizing property after “operating without jurisdiction and outside of any statutory authority.” First Am. Compl. ¶ 223. Count I further alleges that “Defendants wrongly subject the Jurisdiction Class members to Monetary Redeterminations...” and relies on “illegal Redeterminations issued outside of its jurisdictional limits, and seeks, *inter alia*, a declaratory judgment that untimely Monetary Redeterminations “are void because they were issued by the Agency without jurisdiction to do so.” *Id.* ¶¶ 226, 227, 228(a). The essence of these allegations is that Defendants arbitrarily used their power to seize claimant property.⁴

³ In response to this appeal, Defendants also raise arguments that Plaintiffs only alleged procedural due process violations. In doing so, Defendants selectively refer to Plaintiffs’ response to motion for summary disposition related to Count III of Plaintiffs’ Complaint—a claim not at issue here.

⁴ Defendants argue that Plaintiffs did not allege a substantive due process claim because they did not use the specific words prescribed by Defendants. Plaintiffs’ Complaint does not separately allege “procedural” and “substantive” due process violations—nor are these “magic words” that must be included to state a claim. This Court must consider the substance of Plaintiffs’ Complaint to determine which components of due process Plaintiffs have alleged to be violated.

C. DEFENDANTS DID NOT PRESENT ANY EVIDENCE THAT SAUNDERS' TREATMENT WAS ISOLATED

Defendants did not provide any justification for the Court of Claims' finding that the Agency's error with respect to Saunders was isolated and inadvertent. In so finding, the Court of Claims improperly reviewed the allegations in the light most favorable to Defendants. Under MCR 2.116(C)(8), the Court can only look to the pleadings. To the extent the Court of Claims relied on MCR 2.116(C)(10) in dismissing Count I based on a finding that Defendants' error with respect to Plaintiff Saunders was isolated and inadvertent, this finding is unsupported by the record. The Agency's Response has not provided evidence that the violations are actually isolated or inadvertent. Defendants cannot do so because, as alleged, the violations are pervasive.

II. THE COURT OF CLAIMS ERRED IN DISMISSING COUNT II UNDER MCR 2.116(C)(8) BECAUSE DEFENDANTS SEIZE CLAIMANTS' PROPERTY WITHOUT PROVIDING DUE PROCESS

Count II alleges that Defendants violated claimants' rights to due process by seizing property before determining there is an actual debt owed. There are two prerequisites to Agency collection of "restitution": (1) an Agency Determination that one or more weeks have been "overpaid"; and (2) an Agency Determination that the claimant is required to repay the overpayment in "equity and good conscience." Until the Agency makes both Determinations with finality, there is no overpayment and, therefore, no debt. The Court of Claims decision rested on the erroneous legal assumption that claimants were not deprived of a liberty interest because an overpayment is a debt that was "owed." In support of their claims, Plaintiffs allege that:

- The Agency assessed overpayments, before reviewing for whether the overpayment is required to be repaid under state or federal law or issuing a notice of that determination (*See, e.g.*, First Am Compl at ¶¶ 162-165);
- Defendants then seized tax refunds, garnished wages, or otherwise collected from claimants before providing notice and opportunity to be heard on whether the overpayment must be repaid (*See, e.g.*, First Am Compl at ¶¶ 233-237);

- This failure to make a final Determination that there is actually a debt owed before seizing property violates due process (*See, e.g.*, First Am Compl at ¶ 233-237);
- Plaintiffs seek equitable relief and monetary damages caused by Defendants' collections on overpayments made before Defendants make a final Determination that there is an actual debt owed (*See, e.g.*, First Am Compl at ¶ 242); and
- There is no administrative remedy available to Plaintiffs to remedy the constitutional violation (*See, e.g.*, First Am Compl at ¶¶ 11, 242).

Due process requires a pre-deprivation Determination on disputed issues with notice and opportunity to be heard on all Determinations impacting the right to benefits. *California Department of Human Resources Development v Java*, 402 US 121, 125-126; 91 S Ct 1347; 28 L Ed 2d 666 (1971). This includes waivers of overpayment due to administrative error. The Department of Labor provided clear instructions with respect to determinations regarding waivers. *See* UIPL 23-80 (App'x 302-303) (outlining two options states may use to satisfy due process obligations for waiver determinations); *see also* UIPL 01-16 (App'x 306-308) (requiring that states “clearly communicate the potential availability of a waiver to individuals when establishing an overpayment and, if an individual requests a waiver, make an official determination on the waiver request before initiating overpayment recovery” and providing that “if state law provides for a waiver of recovery of an overpayment, the notice of the overpayment determination must provide enough information to enable the individual to understand under what circumstances a waiver may be granted and how to request such a waiver.”); UIPL 20-21 Change 1 (App'x 325-327).

Plaintiffs alleged in Count II that the entire process, i.e., one that allows for seizure of property before determining that there is an actual debt owed under state and federal law, is unconstitutional. This is not subject to exhaustion requirements, as there is no process available to exhaust. Instead of addressing Plaintiffs' waiver claim as alleged in the First Amended Complaint, Defendants falsely stated that “all Plaintiffs asserted, in a conclusory manner, that they were

entitled to an automatic restitution waiver due to unspecified agency error.”⁵ This is not the allegation. Instead, Plaintiffs allege that the Agency violates claimants’ rights to constitutional due process when it seizes claimant property before determining there is an actual debt owed.

A. THE COURT OF CLAIMS ERRED IN FINDING NO PROPERTY RIGHT IMPLICATED BY DEFENDANTS’ OVERPAYMENT COLLECTION ACTIVITY

Plaintiffs have a constitutional right to their property, which Defendants may not seize unless there is *actually* a debt owed. There is no debt owed if overpayment was due to Agency error. Contrary to Defendants’ framing, Plaintiffs allege that Defendants violate due process by seizing claimant property when there is not a debt owed. Collection is permissive (“[i]f the unemployment agency determines that an individual has obtained benefits to which the individual is not entitled, ... the agency *may* recover a sum...”), but waiver is *mandatory* (“the unemployment agency *shall* waive recovery of an improperly paid benefit if repayment would be contrary to equity and good conscience and *shall* waive any interest.”). *See* MCL 421.62(a) (emphasis added).⁶ When Defendants seize property without considering whether an overpayment must be repaid in equity and good conscience, Defendants seize claimant property without the authority to do so.

B. DEFENDANTS ADMIT THERE IS NO PROCESS TO REQUEST REVIEW FOR ADMINISTRATIVE ERROR WAIVER

In their Response to this Application, Defendants leave out a critical component of due process: notice of a Determination on waiver due to administrative error and opportunity to appeal.

⁵ The cited paragraphs did not allege entitlement to waiver—they alleged entitlement to a pre-seizure review to confirm that the overpayment is actually owed and not due to administrative error. ¶¶ 43, 55, 70, 81, 90, 99, 110, 117, 129, 135.

⁶ In contrast to Michigan, some states have statutes that prohibit waiver. *See, e.g., Millar v NM Dep’t of Workforce Solutions*, 304 P3d 427 (NM App 2013); NM Stat Ann 51-1-38(H) (“the unemployment compensation laws at issue here do not permit DWS to ‘compromise or waive’ overpayment liability”). It was error for Defendants—and the Court of Claims—to rely on *Millar’s* interpretation of New Mexico Law to imply there is no right to be considered for waiver in Michigan law when the two laws are incongruous.

Defendants misstate Plaintiffs' waiver count by claiming that "[e]ssentially, Plaintiffs are arguing that Defendants' failure to review every overpayment account to determine whether a restitution waiver should occur is an unconstitutional taking because the failure to waive debt would result in repayment." Def. Br. at 14. That is a gross distortion of the allegations. It is undisputed that Defendants do not have a process to request waiver based on administrative error. Due process requires a notice of a *Determination* on whether a benefit overpayment must be repaid, not merely notice of a statute. This is precisely why the Department of Labor provided two options states may use to satisfy due process obligations for waiver determinations. *See* UIPL 23-80.⁷

III. CONCLUSION

Plaintiffs have clearly alleged repeated, intentional action by Defendants. The immediate issue on appeal, however, is whether Plaintiffs would be harmed if they were not allowed to appeal before final disposition of this case. Defendants apparently do not contest this. Plaintiffs ask that this Court grant their application for leave, enter a briefing schedule, and schedule oral argument on the merits. In the alternative, this matter should be reversed and remanded.

Respectfully submitted,

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⁷ Mention in the statute of waiver does not provide adequate notice and opportunity. The Court of Appeals has rejected Agency argument that "a claimant should be expected to look up the statutory texts cited in the notices in order to comprehend their contents." *Barnowski v UIA*, unpublished per curiam opinion of the Court of Appeals, issued May 20, 2021 (Docket No. 344917), slip op. at 4. The Court found that the claimant did not have an obligation to seek out the statutes to ensure she understood it. *Id.* Here, Defendants' notices do not even cite the statute.