

STATE OF MICHIGAN
COURT OF CLAIMS

GRANT BAUSERMAN, KARL WILLIAMS,
and TEDDY BROE,

Plaintiffs,

v

UNEMPLOYMENT INSURANCE AGENCY,

Defendant.

OPINION AND ORDER

Case No. 15-000202-MM

Hon. Judge Cynthia Diane Stephens

At a session of said Court held,
Detroit, Wayne, Michigan, on

March 8, 2016

PRESENT: Honorable Cynthia Diane Stephens
Court of Claims Judge

In this putative class action, plaintiffs challenge the constitutionality of aspects of Michigan's unemployment benefits program. Named plaintiffs are three individuals who were recipients of unemployment benefits under the Michigan Employment Security Act, MCL 421.1 *et seq.* On September 9, 2015, plaintiff, Grant Bauserman, filed a complaint in the Court of Claims alleging that defendant's fraud-detection program, and its collection and seizure of assets pursuant to the program, violated the due process clause of the Michigan Const 1963, Art 1, § 17. After defendant filed, in lieu of an answer, its October 5, 2015 motion to dismiss, plaintiff amended his complaint on October 19, 2015, as a matter of course, adding as named plaintiffs, Karl Williams and Teddy Broe. The matter has been fully briefed and a hearing was held before

the Court on March 8, 2015. For the reasons set forth below, defendant's motion to dismiss is DENIED.

A. Factual Background and Procedural History¹

In 2013, defendant, the Unemployment Insurance Agency ("UIA"), implemented a fraud-detection program. At the core of this program was an automated system known as the Michigan Integrated Data Automated System ("MIDAS"). The software was allegedly designed to search for discrepancies and inconsistencies that might be suggestive of fraudulent claim behavior. Although each of the plaintiffs' factual scenarios is slightly different, a review of plaintiff Bauserman's factual allegations demonstrates how the automated system was employed. According to the amended complaint, Bauserman was terminated from his employment in September 2013. After his termination, Bauserman applied for unemployment (UIA) benefits. Bauserman received UIA benefits from October 2013 through March 2014. In late March 2014, plaintiff received from his former employer, a lump sum deferred payment of his pro-rated 2013 bonus, which he earned during his employment from January 1, 2013 through September 30, 2013. According to plaintiff, although the bonus was received in 2014, it did not reflect any earning during the year 2014. Apparently, defendant's automated system, however, detected a discrepancy and concluded that plaintiff had received UIA benefits while he was earning income. On October 9, 2014, defendant sent a request for information relative to ineligibility or disqualification to Mr. Bauserman's online "MiWAM" account (the Michigan Web Account Management System). Bauserman had no reason to check this electronic account in October

¹ The facts were discerned from plaintiffs' amended complaint.

2014 because he was no longer receiving UIA benefits. (UIA benefits ended in March 2014.) Indeed, Bauserman did not see the message until late November 2014. In December 2014, Bauserman began contacting defendant in writing to explain that the bonus received in 2014 was for work performed prior to his termination in 2013. Plaintiff even provided UIA with a letter from his former employer explaining that he had not worked for or received income from the former employer during his UIA benefit period. Defendant failed to respond to Bauserman's written communications. Then, on February 13, 2015, defendant notified Bauserman that he had been overpaid UIA benefits, and would be assessed a \$15,928.00 penalty. The letter also advised Bauserman that collection actions may ensue. On March 17, 2015, Bauserman again sent correspondence to defendant explaining that his bonus, received in March 2014, was for work performed before unemployment benefits began. Then, on June 6, 2015, the United States Department of Treasury notified Bauserman that his federal income tax refund had been seized by the State of Michigan to collect on his unemployment debt. Similar action was taken by the State of Michigan Treasury. Finally, on September 30, 2015, the UIA issued a redetermination indicating, without explanation, that its earlier fraud determination was null and void. At the time of the filing of the amended complaint, Bauserman still had not received any refunds from the UIA. However, at the time of the March 8, 2016 hearing, plaintiffs' counsel represented that partial repayment had been refunded to Bauserman. (M, pp 35-36.)

Plaintiff Teddy Broe's factual scenario is similar to that alleged by Bauserman. According to the amended complaint, between February 15, 2013 and April 15, 2013, Broe worked for Fifth Third Bank under a seasonal tax trust internship to assist with filings for the 2012 tax year. When the internship concluded, plaintiff applied for UIA benefits and represented that employment terminated due to "seasonal discharge." UIA approved Broe's claim for

unemployment benefits and plaintiff received approximately \$2,200.00 in UIA benefits before he obtained new employment in November 2013. However, UIA continued to send requests for information and other communications regarding ineligibility or disqualification to Broe's MiWAM account. Indeed, in the summer of 2014, UIA sent to Broe's MiWAM account notice of determination indicating that Broe had committed fraud and would be liable for restitution, interest and penalties. However, Broe did not receive any of these notices because they were sent only to his MiWAM account, an online account he no longer accessed because he was re-employed and not claiming any UIA benefits. In 2015, Broe received a notice from UIA that he owned a debt of approximately \$8,800.00, representing overpayment, interest and penalties for fraud. Broe filed a protest with the UIA, however, his protests were denied as untimely. Then, in May 2015, UIA intercepted Broe's state and federal income tax refunds. Finally, according to the affidavit of Teresa Burns, UIA issued a redetermination on November 4, 2015, wherein UIA determined that Broe did not owe restitution or penalties.

Plaintiff Williams factual allegations demonstrate yet a different scenario. Williams began his employment with Wingfoot Commercial Tire System in May 2011. At the time he began this employment, Williams was receiving UIA benefits based on his unemployment from a previous employer. After the Wingfoot employment began, Williams continued to contact UIA's automated MARVIN system. When doing so, he reported that he was receiving some earnings from Wingfoot. UIA, however, did not adjust Williams' benefits to reflect an offset for his Wingfoot wages; additionally, Williams believed that he was still entitled to UIA benefits because his Wingfoot wages were, at that time, less than 1 ½ times his weekly UIA benefit rate. On June 22, 2012, the UIA issued a redetermination holding Williams ineligible for benefits. Also on that date, the UIA ordered Williams to pay restitution in the amount of \$9,875.00 and

penalties of \$39,500.00. Also on June 22, 2012, in a second determination of penalty correspondence, UIA found Williams liable for “unpaid Fraud Weeks” and assessed an additional \$11,584.00 penalty.

Plaintiff Williams filed a late protest of these determinations. Then, on July 1, 2014, an administrative law judge concluded that Williams could not establish good cause for failing to timely protest the June 22, 2012 determinations. On October 29, 2013, Williams received a garnishment notice from the UIA for the amount of \$64,069.00. Then, on February 19, 2015, Williams received notice that his Federal income tax refund would be intercepted and seized by the UIA. The Agency is currently reviewing the account to verify the accuracy of the restitution, penalties, and interest. (Teresa Burns Affidavit.)

Plaintiffs’ amended complaint alleges that they possessed a property interest in their unemployment benefits, tax refunds and wages, and that the State garnished and seized such property without due process. Specifically, plaintiffs allege that defendant “deprived UIA claimants of due process through the following customs, polices and practices: (1) utilizing an automated decision-making system (the “MiDAS” system) to detect and adjudicate suspected instances of unemployment fraud, which determines guilt without notice or proof and without providing claimants an opportunity to be heard before penalties are imposed; and (2) utilizing unlawful collection practices to recover alleged overpayments, interest and penalties.”

Defendant moves for summary disposition pursuant to MCR 2.116(C)(4), (7) and (8), arguing (1) that plaintiffs have failed to comply with the notice provisions of MCL 600.6431, (2) that the Court lacks subject matter jurisdiction, and (3) that plaintiffs’ claims are barred by

governmental immunity. None of the arguments presented in defendant's motion merit granting the dismissal of plaintiffs' amended complaint.

(A) Compliance with the Notice Provisions of MCL 600.6431

For its first argument, defendant asserts that plaintiffs failed to comply with the notice provision of MCL 600.6431(3). This Court disagrees. In general, governmental agencies are statutorily immune from tort liability. *McCahan v Brennan*, 492 Mich 730,736; 822 NW2d 747 (2012). "However, because the government may voluntarily subject itself to liability, it may also place conditions or limitations on the liability imposed." *Id.* The notice provision set forth in MCL 600.6431 is one such condition precedent to bringing suit against a government entity in derogation of governmental immunity. *Id.* MCL 600.6431(1) provides that a notice of intent to file a claim against the state, or the claim itself, must be filed in the Court of Claims within a year after the claim accrues. However, if the claim is for personal injuries or property damage, the time frame is shortened to six months. MCL 600.6431(3). Both parties agree that plaintiffs' claims are subject to the six-month notice provision. Defendant asserts, however, that plaintiff did not file their complaint within six months of the date their cause of action accrued. This Court disagrees.

Defendant argues that plaintiffs' causes of action accrued when defendant issued adjudications that the UIA recipients were liable to the Agency for unemployment benefits paid and penalties. For Bauserman, defendant represents that Bauserman was notified on December 3, 2014 of such liability; Broe was notified on July 15, 2014, and Williams was notified on June 22, 2012. Defendant then reasons that because Bauserman's September 9, 2015 complaint was not filed within six months of December 3, 2014, his claims are barred. Similarly, defendant

argues that the claims of Broe and Williams are barred because the October 19, 2015 amended complaint, which named them as party-plaintiffs for the first time, was not filed within six months of defendant's adjudicating them liable for unemployment benefits and penalties. In the Court's opinion, defendant's reasoning is flawed. This Court finds that plaintiffs' causes of action did not accrue when defendant first notified them of their liability for unemployment benefits and penalties, but rather, much later.

Generally, a claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. For purposes of MCL 600.6431(1) a claim accrues when a "suit may be maintained thereon." *Cooke Contracting Co v Michigan*, 55 Mich App 336, 338; 222 NW2d 231 (1974). That is, a claim for personal injuries accrues when all of the elements are present and can be properly pleaded in a complaint. *Connelly v Paul Ruddy's Equipment Repair & Service Co*, 388 Mich 146, 151; 200 NW2d 70 (1972). In this case, the Court finds that the plaintiffs' causes of action accrued when defendant issued a redetermination wherein it concluded that plaintiffs had not received UIA benefits fraudulently. Plaintiffs' constitutional tort claim is premised upon the assertion that they were falsely accused of fraud and wrongly deprived of their property without due process. Defendant's redetermination that plaintiffs had not committed fraud and were, in fact, eligible for benefits, was an inherent element of this theory. Thus, at the time the Agency issued its redetermination, plaintiffs could fully allege the elements of their constitutional claim. That is, plaintiffs could then file suit and obtain relief. In Bauserman's case, the UIA issued a redetermination on September 30, 2015, which rendered its previous fraud determination "null and void." Similarly, the Agency issued Broe's redetermination on November 4, 2015. Because the

October 19, 2015 amended complaint was filed within six months of the redetermination dates, plaintiffs have complied with the statutory requirements of MCL 600.6431.

B. Damage Claims

Next, defendant argues that because plaintiffs have been refunded all the monies intercepted, there is no claim upon which relief can be granted. This Court disagrees. Initially, the Court would note that according to representations made on the record, Bauserman and Broe have not been fully refunded the amounts seized. In any event, simply returning that which the UIA allegedly unlawfully intercepted would not, necessarily, make the plaintiffs whole. Depriving plaintiffs, even temporarily, of their wages, unemployment benefits, and tax refunds, could have created additional economic hardships, including damage to their credit ratings, incurring additional debt and finance charges, and non-economic damages related to the false allegations of fraud. Thus, simply returning the funds intercepted and garnished would not render plaintiffs' constitutional claims moot.

C. Governmental Immunity.

Next, defendant argues that plaintiffs' claims for economic damages are barred by governmental immunity. This Court disagrees. In *Smith v Dept of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987), aff'd sub nom *Will v Dept of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989), by memorandum opinion, a majority of the justices agreed that "where it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, governmental immunity is not available in a state court action." (Emphasis added.) This same majority further agreed that "[a] claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in

appropriate cases.” *Id.* Therefore, in general, constitutional tort claims are not barred by governmental immunity. However, defendant further argues that plaintiffs cannot establish an additional prerequisite for maintaining a constitutional tort claim. Following its decision in *Smith*, the Supreme Court in *Jones v Powell*, 462 Mich 329; 612 NW2d 423 (2000), further explained that “*Smith* only recognized a narrow remedy against the state on the basis of the unavailability of any other remedy.” *Id.* at 337 (emphasis added). Relying upon the language in *Smith*, defendant argues that because plaintiffs could pursue the administrative process, they had “other remedies available,” and therefore, they cannot maintain a constitutional tort claim. This Court finds defendant’s argument unavailing. Simply put, the administrative process fails to afford sufficient relief to plaintiff’s challenging an entire statutory and policy scheme. Therefore, a constitutional tort claim continues to be viable.

D. Failure to Exhaust Administrative Remedies.

Next, defendant asserts that plaintiffs’ claims for relief are barred because plaintiffs have failed to exhaust their administrative remedies. Again, this Court disagrees. The doctrine of exhaustion of administrative remedies generally requires that *where an administrative agency provides a remedy*, a party must seek such relief before petitioning the court.” *Cummins v Robinson Twp*, 283 Mich App 677, 691; 770 NW2d 421 (2009) (emphasis added). However, where plaintiffs raise a facial constitutional challenge to defendant’s policies and procedures, they are exempt from a requirement that they exhaust their administrative remedies. *Bruley v City of Birmingham*, 259 Mich App 619, 628; 675 NW2d 910 (2003). Plaintiffs’ complaint challenges defendant’s use of an automated system to detect and decide whether claimants had committed fraud. Plaintiffs allege that the use of the MiDAS automated procedures violated claimants’ rights to due process in violation of Const 1963, art 1, § 17. Plaintiffs also challenge

the constitutionality of defendant's collection policies and procedures. This Court concludes that plaintiffs have raised a facial challenge to the constitutionality of defendant's policies and procedures, therefore, they are not required to exhaust their administrative remedies. *Id.*

E. Standing

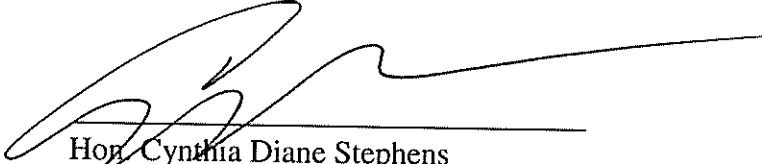
Plaintiffs' amended complaint alleges that several of defendant's penalty and collection practices and policies are constitutionally infirm. Defendant asserts that plaintiffs do not have standing to challenge certain practices because they have not alleged that they, specifically, were impacted by the identified policies. For example, defendant represents that "no plaintiff alleges he was assessed a four times penalty on the first week payment" and "no plaintiff alleges he was charged interest on the penalties." (Defendant's supplemental brief, p 14.) In response, plaintiffs assert that their complaint alleges that they were subject to these illegal practices. (Plaintiffs' Response to Defendant's Motion, p 19.) In particular, plaintiffs note that with respect to plaintiff Williams, it has been specifically alleged that he was "assess[ed] interest on a penalty amount in violation of Section 15(a)." (Complaint, ¶¶ 114-125.) The Court concludes that it would be premature to consider this issue. Plaintiffs have specifically alleged that at least one of them was subject to one of the challenged practices. Therefore, defendant's assertion to the contrary is not entirely accurate. Moreover, this is a putative class action and discovery is continuing. "Generally, a motion for summary disposition is premature if granted before discovery on a disputed issue is complete." *Peterson Novelty, Inc v City of Berkley*, 259 Mich App 1, 24-25; 672 NW2d 351 (2003) (citations omitted). Therefore, defendant's motion to dismiss on this ground will be denied, without prejudice.

F. Private Cause of Act under the SSA, IRC and UIPL.

Finally, defendant also asserts that because no private cause of action exists for violations of the Social Security Act and Internal Revenue Code, claims alleging violations of the acts must be dismissed pursuant to MCR 2.116(C)(8). Similarly, defendant also argues that there is no private cause of action for a violation of an Unemployment Insurance Program Letter (“UIPL”).² Although plaintiffs’ amended complaint references provisions of the SSA and the IRC, and the October 1, 2015 USDOL directive, plaintiff has not specifically alleged a claim for violations of these acts and directive. Plaintiffs’ one-count complaint simply alleges that defendant’s fraud-detection system and collection and penalty procedures violate Michigan Const 1963, art 1, § 17. Moreover, plaintiff represents that they do not seek to pursue a private cause of action under either the Social Security Act or the Internal Revenue Code. (Plaintiffs’ Brief, Footnote 5.) Therefore, it is unnecessary to address this issue.

IT IS HEREBY ORDERED that Defendant’s motion to dismiss is DENIED.

Dated: May 10, 2016



Hon. Cynthia Diane Stephens
Court of Claims Judge

² According to the complaint, on October 1, 2015, the USDOL issued a UIPL indicating that states may not make determinations of overpayments and/or fraud using automated systems without the input of agency staff. Plaintiffs referenced this UIPL in their amended Complaint.