


Exhibit B

CLERK'S NOTICE	DOCKET NUMBER 2085CV00937	Trial Court of Massachusetts The Superior Court 
CASE NAME: Marrero, Jefrie et al vs. Jeffers, Director Of Dept Of Unemployment Assist., Richard		Dennis P. McManus, Clerk of Courts
TO: Leigh A Woodruff, Esq. Community Legal Aid 405 Main St WORCESTER, MA 01608		COURT NAME & ADDRESS Worcester County Superior Court 225 Main Street Worcester, MA 01608
<p style="text-align: center;">You are hereby notified that on 03/02/2021 the following entry was made on the above referenced docket:</p> Endorsement on Motion for Preliminary Injunction (#10.0): Other action taken Allowed in part. See memorandum of decision. Notices mailed 3/2/21 Judge: Ritter, Hon. William J		
DATE ISSUED 03/02/2021	ASSOCIATE JUSTICE/ ASSISTANT CLERK Hon. William J Ritter	SESSION PHONE#

BACKGROUND

I. Unemployment Insurance Benefits

Congress enacted the unemployment insurance system in 1935 as part of the Social Security Act, 42 U.S.C. § 501 et seq., to provide short-term relief for displaced workers. See *California Dep't of Human Res. Dev. v. Java*, 402 U.S. 121, 122-123, 130-131 (1971). Unemployment insurance provides temporary cash benefits to workers who have become unemployed through no fault of their own and are capable of and actively seeking further employment. See G. L. c. 151A, §§ 24-25. See *Reep v. Commissioner of Dep't of Emp't & Training*, 412 Mass. 845, 847 (1992). While the unemployment system was created at the federal level, each state administers its own unemployment program. See 42 U.S.C. § 501. See *Java*, 402 U.S. at 125. To that end, DUA administers the statutory program in Massachusetts. G. L. c. 151A, § 1 et seq. The statute is to be construed liberally for the purpose of lightening the burden on unemployed workers and their families. G. L. c. 151A, § 74. The objective of the unemployment insurance program is to get “money into the pocket of the unemployed worker at the earliest point that is administratively feasible.” *Java*, 402 U.S. at 135.

When an individual is separated from employment and files a claim for unemployment benefits, DUA requests information from the individual’s former employer regarding the circumstances of the separation. See G. L. c. 151A, §§ 38, 39. “[A]fter making such inquiries and investigations as [DUA] deems necessary,” DUA “shall promptly determine . . . whether or not a claim is valid, and the amount, if any, of the benefits payable thereunder.” G. L. c. 151A, § 39(a). DUA “shall make every reasonable effort to give notice of such determination within thirty days after the date of filing of the claim, together with the reasons therefore, to the claimant.” *Id.* “Benefits shall be paid promptly or denied in accordance with such determination.” *Id.*

A claimant, or an employer, aggrieved by DUA's determination may appeal the determination at a hearing before an impartial hearing officer. See G. L. c. 151A, § 39(b). Further review is permitted before the board of review, the district court, and the appellate courts. See G. L. c. 151A, §§ 39-42.

II. Redetermination

DUA may reconsider a determination as to a benefit claim (also known as "redetermination")⁴ when an error has occurred, wages have been newly discovered, or the determination was based on a misrepresentation of fact. G. L. c. 151A, § 71. If DUA "reconsiders a determination under [§ 71], parties entitled to notice of the original determination shall be afforded an opportunity for an interview before the [DUA] for the purpose of presenting evidence or refuting opposing positions before such a determination can be made." *Id.* See 430 Code Mass. Regs. § 11.04 (DUA "should advise the claimant that there is additional information which may affect the claimant's claim for benefits[and] that [the claimant] will have an opportunity to present evidence or refute opposing positions before the redetermination, if any, is made" and "should mail the claimant Form 3733-Notice of Claim Discrepancy, detailing the reason for the review and the date the redetermination, if any, will be made"); § 11.06 (DUA "should schedule an interview with the claimant to take place in 14 calendar days"). Section 11.08 of the regulations contemplates that "[a]n agent, legal counsel, or advocate may accompany the claimant to the interview and may represent the claimant at the interview."

III. Recovery of Overpayments

When benefits are paid "through error," DUA "may recover" the overpayments by commencing a civil action or deducting such amounts from future unemployment payments. G. L.

⁴ Redetermination is defined as "[r]econsideration of a determination of an unemployment insurance claim pursuant to [] G. L. c. 151A, § 71." 430 Code Mass. Regs. § 11.03.

c. 151A, § 69(a). This requires, however, “that there has been a final decision as defined in section 69D.” When there is “a determination of overpayment,” a decision is final when “an opportunity for an interview and all appeal rights have been exhausted or not taken within the time allowed by law.” G. L. c. 151A, § 69D.

IV. Plaintiffs’ Unemployment Insurance Claims

Each of the plaintiffs filed unemployment claims after separating from their employment in a manner entitling them to unemployment benefits. However, at some point each plaintiff had benefit payments withheld for a period of approximately three to four months.⁵ Four of the plaintiffs received notices of disqualification, informing them that they would have to repay benefits. At least one of those plaintiffs had benefit payments offset by overpayment deductions. Although at various times some of the plaintiffs received questionnaires from DUA seeking further information, none of the plaintiffs received a Form 3733 from DUA or the opportunity for an interview before benefit payments stopped. Each of the plaintiffs’ cases were eventually resolved. Unfortunately, the plaintiffs’ cases often required the intervention and assistance of counsel.

LEGAL STANDARD

To prevail on a motion for preliminary injunction, a plaintiff must show (1) a likelihood of success on the merits of its claim, (2) that the plaintiff will suffer irreparable harm without the requested injunctive relief, and (3) that the harm, without the injunction, outweighs any countervailing harm to the defendant that would result from the defendant being enjoined. *Packaging Indus. Grp., Inc. v. Cheney*, 380 Mass. 609, 617 (1980). Where a party seeks to enjoin governmental action, as is the case here, it must also show that injunctive relief will either promote

⁵ Two of the plaintiffs, Marrero and Pabon-Ortiz, experienced two separate job losses during the relevant periods of time. Initially, both plaintiffs did not receive any benefits for their 2020 employment separations, instead receiving notices of disqualification due to purported issues with earlier employment separations for which they had already received benefits.

or at least not adversely affect the public interest. See *Tri-Nel Mgt., Inc. v. Board of Health of Barnstable*, 433 Mass. 217, 219 (2001). “A preliminary injunction is an extraordinary remedy never awarded as of right,” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008), and “should not be granted unless the plaintiffs [make] a clear showing of entitlement thereto.” *Student No. 9 v. Board of Educ.*, 440 Mass. 752, 762 (2004).

DISCUSSION

I. Likelihood of Success on the Merits

Plaintiffs have shown a likelihood of success on the merits that DUA’s practices, including failing to provide the necessary notice and opportunity for an interview before making redeterminations, withholding benefit payments for months, and prematurely attempting to recover overpayments, violate applicable statutory law and regulations.

a. Determination

First, DUA states that “[a]s a practical matter, DUA frequently pays benefits without the need to issue a ‘determination’” and explains that there are instances where there are no “issues” to adjudicate. Opp’n at 5-6. It states that, “in order to expedite claims where there is no basis to investigate eligibility, no ‘determination’ is made or issued.” Opp’n at 6. This practice conflicts with § 39(a)’s explicit requirement that DUA “shall promptly *determine*” the validity of a claim and any resulting benefits to be paid. G. L. c. 151A, § 39(a) (emphasis added). DUA is required to “make every reasonable effort” to give the claimant notice of its determination and reasoning “within thirty days after the date of filing of the claim” and to pay such benefits “promptly.” *Id.* The plain language of § 39(a) does not allow for payment of claims without the necessary determination; rather, it explicitly contemplates that benefits are paid *after a determination is made*. See G. L. c. 151A, § 39(a) (“Benefits shall be paid promptly or denied in accordance with

such determination.”). Recognizing that a determination is to be made before benefits are to be paid, the statute requires DUA to “mak[e] such inquiries and investigations as [it] deems necessary” before “promptly” determining the validity of a claim and related benefits and making such payments. *Id.*

DUA has been inundated with unemployment claims in the midst of the pandemic, and must balance the need to make such payments promptly with the competing concern that such payments are only being made on valid claims. In its opposition, DUA makes a vague reference to “guidance from DOL designed to temporarily ease the burden on claimants and ensure prompt payment of benefits during the COVID crisis.” Opp’n at 8. Whatever this guidance was (the court was not provided with any further information about the guidance), the language of § 39(a) is clear that DUA must make a determination by the time benefit payments commence. To the extent DUA alleges that it did not do so as to any of the plaintiffs, the court concludes that the plaintiffs would likely succeed on the merits of a claim that this practice was unlawful. However, where § 39(a) does not require DUA to make its determination or pay benefits within thirty days—rather, it requires DUA to “make every reasonable effort” to notify the plaintiff of, and thus make, its determination within thirty days of the claim being filed—the plaintiffs are unlikely to succeed on the merits to the extent they contend that § 39(a) requires DUA to make an initial claim determination or pay benefits within thirty days of a claim being filed.

b. Redetermination

Because DUA is required to make a determination by the time benefit payments commence, it must follow the procedure set forth in § 71 when reconsidering that determination. Section 71 requires that DUA give a claimant an opportunity for an interview before making a redetermination. Here, however, DUA withheld the plaintiffs’ benefits without the opportunity for

an interview, which was to be scheduled within fourteen days under 430 Code Mass. Regs. § 11.06. The plaintiffs also did not receive Form 3733, which the regulations state should be mailed to the claimant before redetermination. 430 Code Mass. Regs. § 11.04. Although some of the plaintiffs received questionnaires at various times, which DUA contends “fulfills [the] purpose of [the statute] far more efficiently than an interview,” Opp’n at 20, there is no indication in the statute or regulations that questionnaires somehow replace or satisfy the requirement that the claimant be given the opportunity for an interview. As a result, the plaintiffs are likely to succeed on the merits of their claim that DUA did not follow the necessary redetermination procedure.⁶

c. Withholding Benefits

DUA states that when there is an issue regarding a claimant’s continued eligibility, which is determined on a weekly basis, “[a]s a matter of federal law, the state agency need not issue payment for the week in question until it issues a determination regarding eligibility, provided the determination is timely. . . . Sometimes the question of eligibility affects a claimant’s receipt of benefits for future weeks. In such circumstances, not issuing payment for these later weeks because of the earlier eligibility issue is permissible until a timely determination is made.” Opp’n at 6. DUA does not account for the fact that, in practice and shown by the experiences of the plaintiffs in this case, it is not making timely determinations and may be violating § 303(a)(1) of the Social Security Act.

Section § 303(a)(1) of the Social Security Act, codified at 42 U.S.C. § 503(a)(1), requires that State unemployment compensation programs “be reasonably calculated to insure full payment of unemployment compensation when due.” “The basic thrust of the statutory ‘when due’ requirement is timeliness.” *Fusari v. Steinberg*, 419 U.S. 379, 387-388 (1975). In *Java*, the United

⁶ The court need not make, and is not making, any determination as to whether the use of questionnaires satisfies the purpose of the statute and regulations or otherwise comports with due process.

States Supreme Court determined that a State unemployment insurance procedure which resulted in an approximate seven-week pause in payments made to claimants already receiving benefits violated the “when due” clause. 402 U.S. at 123-124. Here, the plaintiffs experienced similar pauses or delays in benefits payments, but for a greater period of time—three to four months.⁷ The plaintiffs are therefore likely to succeed on their claim that DUA is unlawfully withholding benefit payments for extended periods of time.

d. Overpayments

Sections 69(a) and 69D make clear that DUA cannot recover overpayments until the claimant has exhausted, or the time has otherwise run on, the claimant’s opportunity for an interview and all appeal rights. DUA does not appear to have provided any substantive argument on this topic, and at least one of the plaintiffs had their benefit payments offset by overpayment deductions before exhausting the opportunity for an interview and appeal. The plaintiffs are therefore likely to succeed on their claim that DUA is not waiting for a final decision before recovering overpayments.

II. Irreparable Harm

The plaintiffs having established a likelihood of success on the merits, the court finds that the plaintiffs, and others like them, have already and will continue to suffer irreparable harm by having their unemployment benefits withheld for months, without the review and processes that the law and regulations require. “Unemployment benefits provide cash to a newly unemployed worker ‘at a time when otherwise he would have nothing to spend,’ serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity.”

⁷ The court notes that an exhibit provided by DUA, entitled “A Guide to Benefits and Employment Services for Claimants,” which DUA states is mailed to all claimants, does not mention that benefits can be withheld for multiple weeks, let alone months.

Java, 402 U.S. at 131-132. In failing to receive timely the benefits to which they were entitled, these plaintiffs incurred credit card and other debt, jeopardized their housing due to missed rent and mortgage payments, and suffered stress-induced health problems. All of this has occurred during the “pandemic arising from COVID-19,” which “has taken a devastating toll on the Commonwealth, the United States, and the world.” *Desrosiers v. Governor*, 486 Mass. 369, 370-371 (2020). “COVID-19 and the attendant containment measures have . . . resulted in high unemployment, economic hardship, and shuttered businesses.” *Id.* at 371. In this context, there is no question that individuals like the plaintiffs will continue to be irreparably harmed by the DUA’s practices. See *Islam v. Cuomo*, 475 F. Supp. 3d 144, 152 (E.D.N.Y. 2020) (“[T]he issues that give rise to Plaintiffs’ claims far predate the current circumstances that we as a nation find ourselves [in]. The COVID-19 pandemic has served only to exacerbate the problem, and it must be remedied.”).

III. Balancing of Harms and Consideration of Public Interest

The above-mentioned harm outweighs any harm DUA might suffer from the imposition of an injunction that orders DUA to follow established statutory and regulatory processes. First, the injunction would serve the public interest by ensuring that all parties, including DUA, follow the law. Second, the injunction would ensure that unemployed individuals entitled to benefits receive them quickly, so that these individuals may care for themselves and their families. See *Java*, 402 U.S. at 132 (“Early payment of insurance benefits serves to prevent a decline in the purchasing power of the unemployed, which in turn serves to aid industries producing goods and services.”) This important public interest takes on even greater weight in the midst of the pandemic. While current circumstances may make it difficult for DUA to balance quick and efficient payment of claims with the need to ensure that only those individuals eligible for such benefits receive them

(and avoid fraudulent claims), this is the duty with which DUA has been tasked. It must follow the legal framework established by the Legislature and its own regulations in making determinations and processing claims.⁸

IV. Mootness

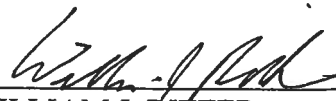
Finally, the court does not adopt DUA's position that the case is moot now that the plaintiffs have received all the benefits to which they are entitled. "[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). The plaintiffs' experiences here do not appear to be isolated instances where the applicable laws and regulations were not followed. Rather, DUA appears to admit that it does not follow the relevant statutory and regulatory procedures, as DUA asserts that it does not make determinations when benefits are paid (and thus apparently need not follow the redetermination procedures) and uses questionnaires in lieu of interviews. These practices, along with the months-long withholding of benefits and premature efforts to collect overpayments, which were experienced by the named plaintiffs, as well as by other individuals as set forth in supplemental affidavits that the court credits, appear to be occurring regularly. "The likelihood that a defendant will again violate a citizen's rights serves as a basis to enjoin future unlawful conduct." *Reproductive Rights Network v. President of Univ. of Mass.*, 45 Mass. App. Ct. 495, 500 (1998). Because it is likely that individuals will continue to suffer as a result of DUA's failure to follow the law, preliminary injunctive relief is appropriate.

⁸ The crux of this case appears to be that DUA is not following required procedures once it seeks to make a redetermination after benefit payments have already commenced. In this context, the court does not anticipate that the public's interest in the timely commencement of payments will be thwarted by the injunctive relief to be provided.

ORDER

For the foregoing reasons, it is **ORDERED** that the plaintiffs' motion for a preliminary injunction is **ALLOWED in part**. DUA is **ENJOINED** and **ORDERED** to follow the processes set forth in G. L. c. 151A, §§ 39, 69(a), 69D, and 71, and 430 Code Mass. Regs. §§ 11.04 and 11.06, including as follows:

1. DUA shall make every reasonable effort to, within thirty days after the filing of a claim, determine the validity of the claim and any amount of benefits payable thereunder, and provide notice to the claimant of such determination and the reasons for that determination.
2. If, after DUA has started paying benefits on a particular claim, an error has occurred, wages have been newly discovered, or DUA's determination as to the claim's validity was based on a misrepresentation of fact, DUA shall give the claimant an opportunity for a redetermination interview before the DUA for the purpose of presenting evidence or refuting opposing positions. DUA shall provide notice to the claimant about the review and the reasons for it, as well as notice of an interview to be scheduled within fourteen days, at which the claimant may have a representative present.
3. DUA shall not recover overpayments until there has been a final decision, which requires that the claimant has exhausted or the time has otherwise run on the claimant's opportunity for an interview and all appeal rights.



WILLIAM J. RITTER
Justice of the Superior Court

DATE: March 2, 2021