

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
DOCKET NO.

KELLY MURPHY, ROSANNE)
SIMANAVAGE, JENNIFER TURCO,)
JOSHUA WEBB,)
and others similarly situated,)

Plaintiffs)

v.)

MICHAEL HARRINGTON,)
in his official capacity as)
Commissioner of the Vermont)
Department of Labor,)
VERMONT DEPARTMENT)
OF LABOR,)
Defendants.)

COMPLAINT FOR MANDAMUS – CLASS ACTION

INTRODUCTION

1. This action challenges the ongoing failure of Defendants Vermont Department of Labor (“VDOL”) and its Commissioner Michael Harrington, (collectively “Defendants”), to timely hear appeals of claimants who believe they were wrongfully denied unemployment compensation benefits, wrongfully issued termination notices and/or wrongfully issued overpayment notices in unemployment compensation cases. Defendants are statutorily required to conduct appeal hearings before a referee within thirty days of a claimant’s request for same. Yet on average, unemployed workers wait five or six months for their appeals to be heard. On information and belief, there are currently over 600 appeals that have been pending for

more than thirty days.

2. Plaintiffs Kelly Murphy, Roseanne Simanavage, Jennifer Turco, and Joshua Webb, (collectively “Plaintiffs”), on behalf of themselves and all others similarly situated, bring this class action pursuant to Vermont Rule of Civil Procedure 75 challenging Defendants’ substantial failure to administer appeals in accordance with state law.

3. This action seeks relief in the nature of mandamus, as well as declaratory and injunctive relief, to compel Defendants to properly follow the law.

4. Since March 2020, there have been significant delays and confusion at every step of the unemployment compensation benefits process.

5. Claimants who are determined to be ineligible for unemployment benefits by a claims adjudicator can appeal this decision to an appeals referee (the “First Level Appeal”).

6. Benefits are suspended during the pendency of the First Level Appeal.

7. Defendants are required to hear First Level Appeals within thirty days from the date of the appeal.

8. Data collected by the U.S. Department of Labor shows that for the third quarter of 2021, the average age of pending First Level Appeals in Vermont was 174.3 days; Vermont ranks 43rd of 53 jurisdictions in terms of timeliness in hearing First Level Appeals.¹

¹ *State Rankings of Core Measures*, United States Department of Labor, (Nov. 10, 2021), <https://oui.doleta.gov/unemploy/ranking.asp> (select “Average Age of Pending Lower Authority Appeals” and starting quarter July 2021 and ending quarter September 2021). The “Average Age of Pending Lower Authority Appeals” is the sum of the ages, in days from filing, of all pending Lower Authority Appeals divided by the number of Lower Authority Appeals.

9. Unemployed Vermont workers face crushing poverty as they wait months for their First Level Appeal hearings.

10. Requiring Plaintiffs to wait months to access benefits to which they may be entitled undermines the purpose of the unemployment compensation system—to quickly provide replacement of lost wages to workers who have lost their jobs through no fault of their own.

11. Plaintiffs seek relief in the nature of mandamus pursuant to V.R.C.P. 75 because they have a clear legal right to First Level Appeal hearings within thirty days from the date the appeal is filed, they seek enforcement of ministerial duties, and no other adequate remedy exists at law.

12. Plaintiffs also seek relief because Defendants' failure to hear First Level Appeals within thirty days from the date the appeal is filed is an arbitrary abuse of power which amounts to a virtual refusal to perform a duty imposed by law.

13. Plaintiffs seek relief because Defendants' delays in hearing First Level Appeals violates Plaintiffs' due process rights.

JURISDICTION AND VENUE

14. This Court has jurisdiction over this action pursuant to V.R.C.P. 75.

15. This Court has jurisdiction over Plaintiffs' claims under Article 4 of the Vermont Constitution.

16. Venue is proper in Vermont Superior Court, Washington Unit, Civil Division, because Defendant VDOL is a state agency located in Washington County.

PARTIES

17. Plaintiff Kelly Murphy is a resident of Barre, Vermont.

18. Plaintiff Roseanne Simanavage is a resident of Vermont without a permanent place to live.

19. Plaintiff Jennifer Turco is a resident of Ludlow, Vermont.

20. Plaintiff Joshua Webb is a resident of Burlington, Vermont.

21. Defendant Michael Harrington is the Commissioner of the VDOL and is charged by law with administering the unemployment compensation program in Vermont. He is sued in his official capacity.

22. Defendant VDOL is the state agency responsible for administering the unemployment compensation program in Vermont.

STATUTORY FRAMEWORK

23. The purpose of the unemployment compensation program is to provide cash assistance to unemployed workers as quickly as possible after they lose their jobs to limit the hardship experienced and stabilize the economy during downturns.

24. Vermont's unemployment compensation system is part of a joint federal-state system established by the Social Security Act during the Great Depression.

25. Federal law defines certain requirements for the unemployment compensation programs in every state.

26. Vermont has its own unemployment compensation system which operates within the framework created by Federal law. 21 V.S.A. §§ 1301–1471.

27. Vermont's unemployment compensation laws authorize Commissioner

Harrington to administer a program of unemployment compensation and specifies the Defendants' duties in said operation.

28. The federal government provides funding to states to finance the administration of their unemployment compensation laws. 42 U.S.C. §§ 501–504.

29. To receive federal funding, Vermont's unemployment compensation laws must provide for "such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1) ("When Due Provision").

30. Federal regulations interpreting the When Due Provision require that Vermont's unemployment compensation laws provide for "such methods of administration as will reasonably insure the full payment of unemployment benefits to eligible claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a).

31. To comply with the federal timeliness requirements, Vermont state law requires Defendants to promptly determine eligibility and pay benefits to eligible claimants. 13 V.S.A. § 1348(a).

32. VDOL is required to hear First Level Appeals within thirty days from the date the appeal is filed. *Id.*

33. From March 2020 until September 2021, in addition to regular state unemployment benefits, federal benefits have also been paid through the state unemployment system, including Pandemic Unemployment Assistance ("PUA"), Federal Pandemic Unemployment Compensation ("FPUC"), and Pandemic Emergency Unemployment Compensation ("PEUC").

34. PUA provided unemployment benefits to individuals who did not qualify for traditional unemployment compensation, including self-employed, independent contractors, and gig economy workers.

35. FPUC provided an additional weekly benefit to individuals who were receiving unemployment compensation benefits.

36. PEUC extended the number of weeks an individual could file for unemployment compensation benefits.

FACTS

A. The Unemployment Compensation Benefit Application Process

37. Filing for unemployment compensation benefits is a two-step process: opening an initial unemployment claim and filing weekly claim certifications.

38. Upon receipt of an initial application for unemployment compensation benefits, the VDOL reviews the claim to determine whether the claimant is eligible to receive unemployment compensation benefits.

39. When making an initial eligibility determination, the VDOL analyzes whether the claimant made sufficient wages, is able and available to work, and lost her job through no fault of her own.

40. If the claimant's eligibility for unemployment compensation benefits is unclear based on the initial application or weekly claim certification, an "issue" is created on the claim.

41. An issue can be created on a claim at the time of the initial application or after the claimant has already received benefits.

42. Claims with issues are sent to the VDOL's Adjudications Unit.

43. A claims adjudicator is assigned to conduct further fact finding.

44. The VDOL's Program Integrity Unit also reviews claims for eligibility issues.

45. The VDOL provides claimants with written notice of the claims adjudicator's determination about the claimant's eligibility for benefits ("Determination Letter").

46. If the claims adjudicator concludes that a claimant who has already received benefits is not eligible to receive unemployment benefits, the Determination Letter states that the claimant was overpaid and it usually states that the claimant must repay the overpayment to VDOL.

47. The claimant has the right to appeal the Determination Letter's eligibility determination to an appeals referee.

48. The claimant must file her appeal within thirty days from the date of the Determination Letter.

49. Benefits are suspended during the pendency of the appeal.

50. The First Level Appeal is heard by an appeals referee (also known as an Administrative Law Judge).

51. At the First Level Appeal hearing, the parties may submit evidence, provide sworn testimony, and present witnesses.

B. Defendants' Failed Response to the Economic Crisis Caused by the COVID-19 Pandemic.

52. Throughout the pandemic, Defendants have systemically failed to process claims for benefits promptly as required by law.

53. Defendants are failing to hear First Level Appeals within thirty days

from the date the appeal is filed.

54. Starting on or around July 2020, the vast majority of claimants who filed timely First Level Appeals did not receive an appeal hearing within thirty days from the date of the appeal.

55. Data collected by the U.S. Department of Labor shows that, for the quarter ending September 30, 2021, the average age of pending First Level Appeals was 174.3 days.²

56. The delays in scheduling First Level Appeal hearings are increasing;

- a. From July 1, 2020 to September 30, 2020, the Average Age of Pending Lower Authority Appeals was 76 days;
- b. from October 1, 2020 to December 31, 2020, the Average Age of Pending Lower Authority Appeals was 78.6 days;
- c. from January 1, 2021 until March 31, 2021, the Average Age of Pending Lower Authority Appeals was 129.8 days;
- d. from April 1, 2021 until June 30, 2021, the Average Age of Pending Lower Authority Appeals was 173.4 days.³

57. On information and belief, Defendants transmit an automated email to claimants upon receipt of a claimant's e-mail appeal.

58. The automated e-mail typically states: "Please note that due to the large number of appeals being received, processing is taking longer than usual. Hearings are

² *State Rankings of Core Measures*, United States Department of Labor (Nov. 10, 2021), <https://oui.doleta.gov/unemploy/ranking.asp> (select "Average Age of Pending Lower Authority Appeals"). On information and belief, the USDOL data does not include PUA appeals.

³ *Id.*

being scheduled in the order in which the appeal is received. Currently the appeals backlog for scheduling is greater than 90 days.”

59. As of the time of this filing, the VDOL’s website states: “the average time from appeal submission to a hearing before an administrative law judge is roughly 90-120 days.”⁴

60. Plaintiffs’ counsel, Vermont Legal Aid, Inc., has been attempting to resolve this issue with the Defendants through correspondence and meetings since January 5, 2021.

61. In July of 2021, Defendants represented to Vermont Legal Aid, Inc. that they expected the delays in hearing First Level Appeals would be significantly shorter by the end of September 2021.

62. The length of the delays in hearing First Level Appeals did not decrease by the end of September 2021.

63. As of September 22, 2021, 762 First Level Appeals cases were awaiting a hearing. *See* Exhibit 1.

64. As of September 24, 2021, VDOL had not yet scheduled First Level Appeals in cases that were filed in April, May, June, July, August, or September 2021.

Id.

65. As of the time of this filing, First Level Appeal hearings are heard approximately six months after the date the appeal is filed.

66. Absent judicial intervention, Defendants’ failure to hear First Level

⁴ Vermont Department of Labor, *Appealing UI Claim Determinations*, <https://labor.vermont.gov/unemployment-insurance/appealing-ui-claim-determinations> (last visited Nov. 29, 2021).

Appeals within thirty days from the date of the appeal will continue.

C. Plaintiffs

a. Plaintiff Kelly Murphy

67. Plaintiff Kelly Murphy had her own business selling AFLAC insurance as an independent contractor until March of 2020.

68. Plaintiff Murphy was forced to close her business in March of 2020 because she could not conduct face-to-face meetings when the COVID-19 pandemic began.

69. Plaintiff Murphy applied for unemployment benefits on or around April 2020.

70. On or around April 2020, Plaintiff Murphy began receiving unemployment benefits from VDOL.

71. On or around July 2020, Plaintiff Murphy's benefits stopped without notice.

72. Plaintiff Murphy spoke with VDOL employees on the phone several times but was never informed what the issue was with her claim and how it could be remedied.

73. By Determination Letter dated May 10, 2021, VDOL informed Plaintiff Murphy that she was overpaid \$4,199 in PEUC benefits and \$7,800 in FPUC benefits for during the weeks between 4/4/2020 and 7/11/2020.

74. The Determination Letter informed Ms. Murphy that she would be required to repay the allegedly overpaid benefits.

75. On June 4, 2021, Plaintiff Murphy filed a First Level Appeal of this

Determination Letter with VDOL.

76. As of the date of this filing, Plaintiff Murphy's First Level Appeal has not been heard.⁵

77. Defendants' failure to hear Plaintiff Murphy's First Level Appeal within thirty days from the date of the appeal harmed, and continues to harm, Plaintiff Murphy.

78. Defendants' failure to hear Plaintiff Murphy's First Level Appeal within thirty days from the date of the appeal has caused Plaintiff Murphy to experience great financial and emotional stress.

b. Plaintiff Roseanne Simanavage

79. Plaintiff Roseanne Simanavage worked as a customer support employee for Maximus until June of 2020.

80. In March and April of 2020, Maximus required most of its employees, including Plaintiff Simanavage, to work remotely.

81. In June of 2020, Plaintiff Simanavage's apartment was condemned.

82. Plaintiff Simanavage was not able to find affordable housing and had to live part-time with her son and part-time with a friend.

83. On or around June 2020, Maximus informed Plaintiff Simanavage that she had to return to the office because she could not work remotely while living at other peoples' homes.

84. Plaintiff Simanavage could not return to the office because she has an autoimmune disorder.

⁵ Plaintiff Murphy's First Level Appeal hearing has been scheduled for December 9, 2021.

85. Plaintiff Simanavage's doctor informed her that she should work remotely because she was at high-risk for serious complications if she contracted COVID-19 due to her autoimmune disorder.

86. On June 3, 2020, Maximus informed Plaintiff Simanavage that she could no longer continue her employment because it would not allow her to work remotely and she could not return to the office due to her autoimmune disorder.

87. In June 2020, Plaintiff Simanavage applied for unemployment benefits with VDOL.

88. Plaintiff Simanavage received unemployment benefits until on or around May 2021.

89. By Determination Letter dated August 17, 2021, VDOL informed Plaintiff Simanavage that she had voluntarily quit her job and, therefore, was disqualified from receiving unemployment benefits for the week ending June 6, 2020⁶ and until she had earned wages in excess of six times her weekly benefit amount.

90. The Determination Letter informed Plaintiff Simanavage that the alleged overpayment was waived.

91. By a separate Determination Letter dated August 17, 2021, VDOL informed Plaintiff Simanavage that she was ineligible to receive benefits from June 6, 2020 to May 29, 2021 because she was not able and available to work due to being homeless.

92. The Determination Letter informed Plaintiff Simanavage that she would be required to repay the benefits she received during those weeks, \$12,844 in regular

⁶ The Determination Letter incorrectly stated the date as June 6, 2021.

state unemployment compensation benefits and \$11,400 in FPUC benefits, because the overpayment resulted from her nondisclosure or misrepresentation of a material fact.

93. On August 27, 2021, Plaintiff Simanavage filed First Level Appeals of both Determination Letters with VDOL.

94. As of the time of this filing, neither of Plaintiff Simanavage's First Level Appeals have been heard.

95. Plaintiff Simanavage's only sources of income are \$56/month in General Assistance benefits and \$234/month in Food Stamps/Three Squares VT.

96. Plaintiff Simanavage cannot afford to get an apartment or feed herself.

97. Defendants' failure to hear Plaintiff Simanavage's First Level Appeal within thirty days from the date of the appeal harmed, and continues to harm, Plaintiff Simanavage.

98. Defendant's failure to hear Plaintiff Simanavage's First Level Appeal within thirty days from the date of the appeal caused her financial and emotional distress.

c. Plaintiff Jennifer Turco

99. Plaintiff Jennifer Turco worked as a housekeeper at Okemo Mountain until on or around March 15, 2020.

100. Okemo Mountain shut down on March 15, 2020 due to concerns about the spread of the COVID-19 virus.

101. Plaintiff Turco applied for unemployment benefits with VDOL on or around April 2020.

102. On or around April 2020, Plaintiff Turco began receiving

unemployment benefits from VDOL.

103. On or around July 2021, Plaintiff Turco was informed that her unemployment claim was in adjudications.

104. Plaintiff Turco tried to speak with her claims adjudicator many times but she could not get through and she never received a call back.

105. By Determination Letter August 19, 2021, VDOL informed Plaintiff Turco that she was not eligible to receive unemployment benefits for the weeks ending June 20, 2020 to August 7, 2021 because she was not able and available to work

106. The Determination Letter stated that Plaintiff Turco was required to repay the benefits she received during those weeks, \$22,800 in regular state unemployment compensation benefits and \$13,200 in FPUC benefits, because the overpayment resulted from her nondisclosure or misrepresentation of a material fact.

107. On August 31, 2021, Plaintiff Turco filed a First Level Appeal of this Determination Letter with VDOL.

108. As of the time of this filing, Plaintiff Turco's First Level Appeal has not been heard.

109. Defendant's failure to hear Plaintiff Turco's First Level Appeal within thirty days from the date of the appeal harmed, and continues to harm, Plaintiff Turco.

110. Defendant's failure to hear Plaintiff Turco's First Level Appeal within thirty days from the date of the appeal caused her financial and emotional distress.

d. Plaintiff Joshua Webb

111. Plaintiff Joshua Webb was employed as a Store Assistant at Onion

River Cooperative Inc. d/b/a City Market until April 2, 2021.

112. On April 2, 2021, Plaintiff Webb left his employment at Onion River Cooperative Inc. for health reasons, but was able to perform other work.

113. Plaintiff Webb applied for unemployment benefits with VDOL on or around April 10, 2021.

114. Plaintiff Webb's case was put into adjudications.

115. Plaintiff Webb responded promptly to the VDOL's requests for information to resolve the issue on his claim.

116. By Determination Letter dated June 5, 2021, VDOL informed Mr. Webb that he had been disqualified for benefits for the week ending April 10, 2021 under the health leaving provision of the law because he left his job due to a certified health condition which precluded the discharge of his duties.

117. The Determination Letter further informed Plaintiff Webb that he was not eligible for unemployment benefits because he was not able and available to work due to his health condition.

118. On June 24, 2021, Plaintiff Webb filed a First Level Appeal of this Determination Letter with VDOL.

119. As of the time of this filing, Plaintiff Webb's First Level Appeal has not been heard.⁷

120. Defendants' failure to hear Plaintiff Webb's First Level Appeal within thirty days from the date of his appeal harmed, and continues to harm, Plaintiff Webb.

121. Without any income or unemployment benefits, Plaintiff Webb had to

⁷ Plaintiff Webb's First Level Appeal hearing has been scheduled for December 16, 2021.

deplete his entire 401k and savings to survive.

122. Defendant's failure to hear Plaintiff Webb's First Level Appeal caused Plaintiff Webb serious mental anguish and exacerbated his mental health issues.

123. The Defendants ongoing failure to competently administer benefits and hear First Level Appeals within thirty days from the date of the appeal is creating undue stress on Plaintiffs.

124. Plaintiffs have suffered dire financial harm from the unlawful delays in the hearing of First Level Appeals.

CLASS ACTION ALLEGATIONS

125. This action is brought as a class action pursuant to Vermont Rules of Civil Procedure 23(a) and 23(b)(2) on behalf of the following class:

All individuals who: (1) experienced unemployment at some point since March 1, 2020; (2) applied for unemployment compensation benefits distributed by VDOL; (3) received an initial determination that they were not eligible for unemployment benefits or a determination that they received benefits to which they were not entitled due to alleged ineligibility; (4) filed a First Level Appeal within thirty days of the date of the determination; (5) did not have their First Level Appeal hearing held within thirty days from the date of the appeal; and (6) are still awaiting a hearing and final decision on their appeal.

126. The Defendants' failure to hear First Level Appeal within thirty days from the date of the appeal has harmed the members of the proposed class.

127. *Numerosity:* The proposed class is sufficiently numerous to render joinder impracticable. Based on VDOL reports, the class includes over 600 individuals.

Class members are dispersed across the state of Vermont. The identity of the class members is known through Defendants' records.

128. *Commonality*: There are questions of law and fact that are common to the class, including: (i) whether Plaintiffs have a clear and certain right to First Level Appeal hearings within thirty days from the date of the appeal; (ii) whether hearing First Level Appeals is a ministerial duty; (iii) whether Plaintiffs have any other adequate remedy at law; (iv) whether Defendants failure to hear First Level Appeals within thirty days is an arbitrary abuse of power; and (v) whether the delays in hearing First Level Appeals violates Plaintiffs' due process rights under Article 4 of the Vermont Constitution.

129. *Typicality*: The claims of Plaintiffs Kelly Murphy, Roseanne Simanavage, Jennifer Turco, and Joshua Webb are typical of the claims of the class in that they (1) received an unfavorable eligibility determination in a Determination Letter from VDOL; (2) filed a timely appeal of that determination; (3) did not have their First Level Appeals heard within thirty days from the date of their appeals; and (4) still have not had their First Level Appeals heard or received a final determination. Named Plaintiffs will rely on the same legal arguments to prove Defendants' liability as the rest of the class.

130. *Adequacy*: Plaintiffs Kelly Murphy, Roseanne Simanavage, Jennifer Turco, and Joshua Webb will fairly and adequately protect the interests of the proposed class. Plaintiffs' claims are identical to the claims of the class members and they have no revealed conflicts of interest with other members of the proposed class. Plaintiffs' counsel is a statewide nonprofit law firm that specializes in, among other things, public benefits law, with extensive experience representing classes.

131. *Ascertainability*: The proposed class is ascertainable because it is

defined by objective criteria: individuals who (1) experienced unemployment at some point since March 1, 2020; (2) applied for unemployment benefits distributed by the VDOL; (3) received an initial determination that they were ineligible for unemployment benefits or a determination that they received benefits to which they were not entitled; (4) filed a First Level Appeal within thirty days of the date of determination; (5) did not have their First Level Appeal hearing held within thirty days from the date of the appeal; and (6) are still awaiting a hearing and final decision on their appeal.

132. This action may be maintained under Vermont Rule of Civil Procedure 23(b)(2) as Defendants have failed to act in ways that apply generally to the entire class and, therefore, injunctive and declaratory relief is appropriate with respect to the class as a whole.

CLAIMS FOR RELIEF

Count I

REQUEST FOR RELIEF PURSUANT TO VERMONT RULE OF CIVIL PROCEDURE 75

133. Plaintiffs have a clear legal right to a hearing in their First Level Appeals within thirty days of the filing of the appeal. 21 V.S.A. § 1348(a).

134. Defendants have a corresponding ministerial duty to hear First Level Appeals within thirty days of the filing of the appeal. *Id.*

135. Defendants have failed to discharge their legal duty to hear First Level Appeals within thirty days of the filing of the appeal.

136. Defendants' failure to hear First Level Appeals within thirty days of the filing of the appeal represents an arbitrary abuse of power that amounts to a failure to

comply with their legal duties under 21 V.S.A. § 1348(a).

137. There is no legal mechanism available for claimants to seek review of the Defendants' failure to hear First Level Appeals within thirty days of the date of their appeal and, therefore, no alternative remedy exists at law.

138. Plaintiffs seek relief in the nature of mandamus requiring Defendants to comply with their statutory obligation to hear First Level Appeals within thirty days of the filing of the appeal.

Count II

ARTICLE FOUR OF THE VERMONT CONSTITUTION

139. Plaintiffs have a protected property interest in their unemployment benefits.

140. Defendants' delays in hearing First Level Appeals have denied Plaintiffs of their unemployment benefits, a protected property right, without due process in violation of Article 4 of the Vermont Constitution.

141. Defendants' delays in hearing First Level Appeals have denied Plaintiffs of their right to an adequate remedy at law as provided by Article 4 of the Vermont Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court:

- a) Certify this action as a class action under Vermont Rule of Civil Procedure 23(b)(2);
- b) Issue a Writ of Mandamus compelling Defendants to hear First Level Appeals of unemployment benefit claims within thirty days from the date the appeal is filed;

- c) Grant declaratory and appropriate mandatory, injunctive relief, including an order requiring Defendants to comply with the statutory requirement to hear First Level Appeals within thirty days from the date the appeal is filed;
- d) Order Defendants to report to the Court about their efforts and progress towards fulfilling their statutory obligation to hear First Level Appeals within thirty days from the date the appeal is filed; and
- e) Grant such other and further relief as the Court deems just and proper.

Dated in St. Johnsbury, Vermont, this 1st day of December 2021.

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