

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
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BY SUSAN L. CARLSON  
CLERK

No. \_\_\_\_\_

SUPREME COURT OF THE STATE OF WASHINGTON

UNEMPLOYMENT LAW  
PROJECT, MCKEEZI TAYLOR  
BARRAZA, and MARIANNE  
WHITE,

Petitioners,

v.

SUZAN LEVINE,  
COMMISSIONER FOR THE  
WASHINGTON STATE  
EMPLOYMENT SECURITY  
DEPARTMENT,

Respondent.

PETITION AGAINST STATE  
OFFICER

Petitioners bring this original action under RAP 16.2 in the nature of a petition for a writ of mandamus, alleging as follows:

**I. INTRODUCTION**

1.1. Mandamus should lie from this Court to compel Employment Security Department (“ESD”) Commissioner Suzan “Suzi” LeVine to comply with her duty to process and provide *prompt* payment of benefits to Washington’s unemployed. The Commissioner has forestalled and, in some cases, outright halted unemployment benefits to legitimate, qualified claimants to verify identities. However, the request to verify identity has

resulted in many claimants providing (often through unsecured channels) multiple copies of social security cards, passports and driver's licenses due to ESD's inability to respond to claimants in a timely manner. Commissioner LeVine has a duty to process and promptly pay claimants. She lacks express authority to defy this duty. *See infra* ¶ 3.17.

1.2. 2020 has been a tumultuous year. COVID-19 remains a constant threat and source of fear. Those who lost work or were without work when the pandemic arrived are among the hardest hit. Based on ESD's failures generally, and ESD's irresponsible response to addressing the fraud activity specifically, claimants are unfairly prejudiced to their peril. Qualifying claimants are unemployed through no fault of their own and unemployment benefits are a lifeline for people in financially dire situations. The situation is now even more dire for the many who are overdue receipt of their benefits. The procedural nightmare at ESD is an affront to dignity.

1.3. Those harmed by the Commissioner's failure to comply with her duty to process and provide prompt payment of benefits include Petitioners McKeezi Taylor Barraza and Marianne White. In addition, there are hundreds of other unemployed claimants throughout Washington who have contacted Petitioner Unemployment Law Project when benefits they were receiving became frozen. Benefits froze because *ESD* fell victim to a fraud ring. The Court has before it a related matter. *See Hamal Strand v.*

*Commissioner LaVine*, No. 98606-1. The hundreds of other unemployed claimants also faced allegations of overpayment and threats of garnishment. ESD has punished qualifying claimants and forced them to wait weeks for ESD to process their unemployment claim. ESD has failed to adequately communicate with claimants.

1.4. Mandamus is the only plain, speedy, adequate remedy available at law. RCW 7.16.040. This Court's consideration is urgently needed because withholding unemployment benefits cuts off the only source of income and, thereby, *sustenance* for many across our state.

## II. PARTIES AND JURISDICTION

2.1. Petitioner Unemployment Law Project ("ULP") is a statewide, not-for-profit law firm that advises and represents Washington State workers who, after losing their jobs, are denied unemployment benefits in hearings and appeals. ULP has offices in Seattle and Spokane, Washington, and assists unemployed workers across the state.

2.2. Petitioner McKeezi Taylor Barraza is unemployed due to COVID-19. He resides in Seattle, Washington.

2.3. Petitioner Marianne White is unemployed due to COVID-19. She resides in Burien, Washington.

2.4. Respondent Suzan Levine is the Commissioner for the Washington State Employment and Security Department.

2.5. This Court has original jurisdiction over a petition seeking a writ of mandamus against state officers, including the Commissioner for the Washington State Employment and Security Department. WASH. CONST. art. IV, § 4 and RCW 7.16.160.

### III. BACKGROUND

#### **Employment Security During a Global Pandemic**

3.1 We are in a global pandemic and filings for unemployment are at an all-time high. ESD reports that between March 7 and May 30, 2020, a total of 1,152,516 distinct individuals filed for unemployment benefits in Washington. ESD paid out over \$4.9 billion in benefits. About 28% of individuals who have filed an initial claim have not been paid.<sup>1</sup>

3.2 The federal CARES Act established a \$150 billion “Coronavirus Relief Fund” for state, local and tribal governments to use to cover any costs related to COVID-19 that had not been previously budgeted for and were incurred between March 1 and December 30, 2020. 42 U.S.C. § 801. Washington received an estimated \$2,953,000,000 based on its population.<sup>2</sup>

3.3 The CARES Act provides those who file for unemployment (and receive at least \$1 as a weekly benefit) with an additional \$600 weekly for

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<sup>1</sup> <https://esd.wa.gov/newsroom/initial-unemployment-insurance-claims-for-week-of-may-24-30-2020>.

<sup>2</sup> Center on Budget and Policy Priorities: Fact Sheet, <https://www.cbpp.org/research/how-much-each-state-will-receive-from-the-coronavirus-relief-fund-in-the-cares-act>.

the weeks between March 29 to July 31, 2020. 15 U.S.C. § 9023 (Federal Pandemic Unemployment Compensation). The Cares Act also extends unemployment insurance for an extra 13 weeks to those who have exhausted their regular unemployment benefits, 15 U.S.C. § 9025 (Pandemic Emergency Unemployment Compensation), and expands unemployment insurance eligibility to self-employed workers, freelancers, independent contractors, and part-time workers impacted by the pandemic, 15 U.S.C. § 9021 (Pandemic Unemployment Assistance).<sup>3</sup>

3.4 Governor Jay Inslee through executive proclamation also relieved some of the burdens associated with seeking unemployment benefits during this difficult time. *See, e.g.*, Proclamation 20-21.3 (suspending statutes/rules relating to a one-week waiting period to collect unemployment insurance), 20-30.3 (suspending statutory job search requirements for applicants seeking unemployment insurance), 20-49.4 (Protecting CARES Act stimulus payments, as well as state and federal unemployment payments, from bank account garnishments). He also alleviated some of the burdens associated with unemployment. *See, e.g.*, Proclamation 20-19.2 (moratorium on evictions). His actions are commendable.

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<sup>3</sup> A total of 2,045,863 initial claims have been filed during the pandemic: 1,280,711 regular unemployment insurance, 409,566 Pandemic Unemployment Assistance and 355,523 Pandemic Emergency Unemployment Compensation. *See* <https://esd.wa.gov/newsroom/initial-unemployment-insurance-claims-for-week-of-may-24-30-2020>.

3.5 Around May, ESD fell victim to a fraud ring. With the assistance of federal law enforcement, Washington recovered over \$300 million and is expected to recoup millions more.<sup>4</sup> The scale of the theft was likely between \$550 million and \$650 million.<sup>5</sup>

3.6 On May 11, ESD launched “Operation 100%” to “get all eligible Washingtonians their benefits as quickly as possible. The baseline is set at those who have applied by May 1, 2020.” ESD’s target metric was: (1) by May 22, 2020, to substantially reduce the adjudication queue; (2) by June 15, 2020, to pay or resolve 100% of all claims in adjudication submitted to ESD by May 1, 2020; (3) by July 1, 2020, to reach ESD’s typical adjudication processing time of 21 days.<sup>6</sup>

3.7 On June 2, 2020, ESD posted an update on the imposter fraud on its Facebook page. See <https://www.facebook.com/WashingtonESD/>. As of June 5, 2020, over 5,200 individual comments were submitted in response, petitioning their government for answers. See also Barraza Dec., ¶ 21.

3.8 On June 4, 2020, Commissioner LeVine held a press conference. <https://www.tvw.org/watch/?clientID=9375922947&eventID=202006102>

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<sup>4</sup> Debbie Cockrell & Josephine Peterson, *State makes gains against false jobless claims but troubles persist for many seeking aid*. The News Tribune (May 28, 2020), <https://www.thenewstribune.com/news/business/article243036236.html>.

<sup>5</sup> Paul Roberts, *Washington’s unemployment fraud may have hit \$650 million; state recovers \$333 million*. The Seattle Times (June 4, 2020), <https://www.seattletimes.com/business/economy/washingtons-unemployment-fraud-may-have-hit-650-million-state-recovers-333-million/>.

<sup>6</sup> <https://esd.wa.gov/unemployment/adjudication>.

[3&autoStartStream=true](#). She provided updates on the fraud investigation and Operation 100%, and she shared heartbreaking stories.

### **Worker's Rights**

3.9 In 1935, Congress passed the Social Security Act, which proposed a federal unemployment insurance program in response to the states' inability to provide public assistance to the unemployed during the Great Depression. Social Security Act of 1935, 42 U.S.C. §§ 301-1397f (2000) (Wagner-Peyser Act).<sup>7</sup> Two years later, we “accept[ed] the provisions of the Wagner-Peyser Act of the Congress of the United States” when our legislature enacted what we now call the Employment Security Act (ESA). See LAWS OF 1937, ch. 162 (statement of legislative intent); see also RCW 50.12.180 (concerning state-federal cooperation).

3.10 The ESA is to be liberally construed in favor of the unemployed worker:

Whereas, *economic insecurity due to unemployment is a serious menace* to the health, morals and welfare of the people of this state; involuntary unemployment is, therefore, a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to *lighten its burden which now so often falls with crushing force upon the unemployed worker and his family*. Social security requires protection against this greatest hazard of our economic life. This can be provided only by application of the insurance

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<sup>7</sup> At the time Congress enacted the Social Security Act, it was estimated that there would normally be a 2-week waiting period with 4 weeks as the outer limit. See Hearings on S. 1130 Before the Senate Comm. on Finance, 74th Cong., 1st Sess. 1319, 1321 (1935).

principle of sharing the risks, and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing powers and limiting the serious social consequences of poor relief assistance. The State of Washington, therefore, exercising herein its police and sovereign power endeavors by this act to remedy the widespread unemployment situation which now exists and to set up safeguards to prevent its recurrence in years to come. The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own, and that this act shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum.

LAWS OF 1937, ch. 162, § 2 (emphasis added); accord RCW 50.01.010.

3.11 In 1970, the United States Supreme Court established that the termination of a person's welfare benefits demanded procedural due process protections, finding that welfare benefits are a statutorily created entitlement and thus a property interest. *See Goldberg v. Kelly*, 397 U.S. 254, 261-62 & n.8, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (finding that the termination of an entitlement created by statute "involves state action that adjudicates important rights" and stating that welfare benefits are "more like 'property' than a 'gratuity'"). The Commissioner has a fiduciary duty to claimants.



3.12 “Unemployment benefits provide cash to a newly unemployed worker ‘at a time when otherwise [they] would have nothing to spend,’ serving to maintain the recipient at subsistence levels without the necessity of [their] turning to welfare or private charity.” *California Dep’t of Human Res. Dev. v. Java*, 402 U.S. 121, 131-32, 91 S. Ct. 1347, 28 L. Ed. 2d 666 (1971) (alterations added).

3.13 In 1971, pursuant to 42 U.S.C. § 503 (Section 303 of the Social Security Act), the United States Supreme Court held that in order to ensure that a claimant does not have to resort to relief, unemployment benefit payments must be promptly initiated. *See California Dep’t of Human Res. Dev.*, 402 U.S. at 130 (concluding “that the word ‘due’ in § 303(a)(1), when construed in light of the purposes of the Act, means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions.”).

3.14 Washington is subject to the requirements of 42 U.S.C. § 503. *See* RCW 50.12.180.

3.15 In 1984, then Thurston County Superior Court Judge Gerry Alexander ordered ESD be restrained and enjoined pending benefit payments of “continued claim recipients” and failing to provide “adequate notice and opportunity to be heard” to continued claim recipients when the

department questions their eligibility for benefits. Appendix A (*O'Brien, et al. v. ESD*, No. 83-2-00818-0 (1984)).

3.16 In 1987, the agency adopted emergency and then permanent regulations consistent with the court's order<sup>8</sup> and the next year the court dismissed the case by stipulation, while entering an injunction that "shall remain permanently in effect," which provides that the ESD Commissioner, "[their] agents, employees, *successors in office* and all persons acting in concert or participation with any of them, will continue refraining from suspending unemployment benefits without adequate notice and an opportunity to be heard of continued claim recipients who mail their continued claims to the Department." Appendix B at ¶¶ 3.2 and 4.1 (*O'Brien, et al. v. ESD*, No. 83-2-00818-0 (1988)) (emphasis added).

3.17 The legislature prescribes the Commissioner's duties and powers. *See* RCW 50.12.010 (discussion of fraud limited to detection and investigation and authorizing the commissioner to receive criminal history record associated with an investigation for fraud); *see also* RCW 50.24.020 (compromises final unless showing of fraud); RCW 50.24.190 (no limitations period in case of fraud). *But see* RCW 50.20.160 (providing for redetermination of a claimant's benefits in case of fraud). The legislature

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<sup>8</sup> *But see, e.g.*, former WAC 192-12-005 (adequate notice and opportunity to be heard defined) (repealed by WSR 99-08-073, effective 5/6/99).

also recognized “eliminating face-to-face contact may increase the potential for fraud.” LAWS OF 1998, ch. 161, § 1.

3.18 The Commissioner “may waive an overpayment if the commissioner finds that the overpayment was not the result of fraud, misrepresentation, willful nondisclosure, or fault attributable to the individual and that the recovery thereof would be against equity and good conscience.” RCW 50.20.190(2); *see also Belling v. Employment Security Department*, 191 Wn.2d 925, 933-36, 427 P.3d 611 (2018).

#### **Some Problems at ESD Impacting Worker’s Rights**

3.19 The people of our state who are impacted by the efforts of industry to comply with Governor Inslee’s plan to stop the spread of the COVID-19 virus should not be devastated by the ESD’s ineffectiveness, inaction, and continuous violations of due process. *See DeVeaux Hill Dec.*, ¶ 10 (Marianne White’s employer).

3.20 The ESD launched a new website that changed access to the unemployment benefit system in January 2017. In person and paper applications are no longer allowed. All applicants were required to file for benefits online or call the toll-free number. *Tirpak Dec.*, ¶ 4.

3.21 The ULP reports that since March 2020, its claimants have been unable to reach anyone with the ESD’s toll-free number since it is always

busy. Some have called hundreds of times. Others can get through and then the system hangs up on them. Tirpak Dec., ¶¶5-6.

3.22 Under normal circumstances, if the claimant is denied benefits, a written notice with the reason for the denial is sent to the claimant with hearing rights included. If the claimant files a hearing request, the hearing date is scheduled in about two weeks. Tirpak Dec., ¶ 11.<sup>9</sup>

3.23 Washington’s workers reasonably rely on ESD efficiently providing them with their benefits. *See, e.g.,* Barraza Dec., ¶ 22. But ESD has failed to process and promptly pay many legitimate claims throughout this crisis, including before the wave of fraudulent and apparently fraudulent claims. Tirpak Dec., ¶¶ 10, 12.

3.24 From the perspective of the unemployed worker, it is often a mystery why claims have been held up. In many cases, months-long adjudication processes are triggered by relatively minor issues like inaccurate reports from employers or inconsistencies in ESD’s user interface. Barraza Dec., ¶ 24; White Dec., ¶ 20.

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<sup>9</sup> The Department of Labor has timeliness (first payment promptness) standards for states administering unemployment benefits programs: at least 87% of first payments being processed within 21 days of the last day of first compensable week. *See* U.S. Government Accountability Office. (2016, May). *Unemployment Insurance: States’ Customer Service Challenges and DOL’s Related Assistance*, at 37-38. (Publication No. GAO-16-430) (Appendix II: Unemployment Insurance (UI) Performance Measures and Acceptable Levels of Performance).

3.25 On June 4, 2020, the Commissioner said, “[H]ow long people have been waiting in adjudication ... is unacceptable.” TVW, *supra* ¶ 3.8, at 33:05-33:11; ER 801(d)(2).

3.26 ESD announced it would take steps to address the fraudulent activity. These steps include: “Holding payments for 1-2 days to validate all claims as authentic”; “Hiring more fraud investigators and staff to answer questions on the fraud hotline”; and “Making changes to our system that will require some customers to verify or provide certain information.”<sup>10</sup> ESD’s promise that benefit payments would be delayed up to two days due to the fraud investigation has not been kept. Tirpak Dec., ¶ 8; *see also* Barraza Dec., ¶ 22.

3.27 ESD is telling claimants to send copies of birth certificates, social security cards, and passports via unsecured email. This request by ESD puts unemployed workers’ identities at risk. Tirpak Dec., ¶ 7.<sup>11</sup>

3.28 In addressing the fraud, ESD threw thousands of workers back into the adjudication process, and in some cases inexplicably halted their

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<sup>10</sup> <https://esd.wa.gov/newsroom/update-on-imposter-fraud>.

<sup>11</sup> Further, not every person has a photo ID and, therefore, there is an inherent lack of equal ability to confirm identity. *See* ACLU: Oppose Voter ID Law Fact-Sheet, <https://www.aclu.org/other/oppose-voter-id-legislation-fact-sheet>. *See also, e.g.*, ACLU: Rates of Possession of Accepted Photo Identification, Among Different Subgroups in the Eligible Voter Population, Milwaukee County, Wisconsin, [https://www.aclu.org/sites/default/files/field\\_document/062-10-exhibitjexpertreport.pdf](https://www.aclu.org/sites/default/files/field_document/062-10-exhibitjexpertreport.pdf); (Expert Report Submitted on Behalf of Plaintiffs in *Frank v. Walker*, Civil Action No. 2:11-cv-01128(LA)).

payments, giving these workers no promise of when—or if—they will be paid. *See, e.g.,* Barraza Dec., ¶ 24.

3.29 After ESD rolled out its new fraud-prevention measures, many legitimate applicants *who were already approved and receiving benefits* suddenly saw their payments cut off through no fault of their own.<sup>12</sup> Claimants are receiving fraud notices and other notices from the ESD without appeal rights attached. Tirpak Dec., ¶ 12.

3.30 Employers who intend to hire their workers back after COVID-19 also rely on an effectively operating unemployment compensation system. DeVeaux Hill Dec., ¶ 9 (“I have paid into unemployment security and payroll taxes and I expect unemployment security to be working.”).

3.31 People all over Washington State are suffering severe hardship due to delays and denials by ESD. The delays in providing these workers the unemployment benefits they are owed and on which they depend for daily existence have reached crisis levels.

### **Petitioner ULP**

3.32 Petitioner ULP advises and represents Washington State workers who are denied unemployment benefits in hearings and appeals. ULP

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<sup>12</sup> Working Washington, a social welfare organization, succinctly described the situation at issue as “Washington State’s Response to Unemployment Fraud Is Victimizing Workers with Delays, Threats, & Intense Financial Strain” and is collecting data. *See* <http://www.workingwa.org/esd-fraud>.

advises and represents claimants from all regions of the state. Appeal hearings are scheduled on telephone conference calls. Tirpak Dec., ¶¶ 2, 3.

3.33 ULP has received hundreds of calls every week from claimants who are having their unemployment benefits suspended due to the fraud investigation. Tirpak Dec., ¶ 7.

3.34 ULP also has been receiving calls from hundreds of claimants who have provided their identity information and who have been waiting for over two weeks for action by ESD.

**Petitioner McKeezi Taylor Barraza**

3.35 Petitioner McKeezi Taylor Barraza was laid off from Japonessa located in Seattle on March 15, 2020. Barraza Dec., ¶ 2. Mr. Barraza applied for benefits on March 16 and he was deemed ineligible for not meeting the 680 hours required to receive benefits. *Id.* ¶ 3. On April 8, 2020, he resubmitted his claim for Pandemic Unemployment Assistance relief and he was approved on April 20. *Id.* ¶ 4-5. However, he was not paid for two weeks. *Id.* ¶ 6.

3.36 On May 16, 2020, Mr. Barraza received a notice that he may have been overpaid and to explain why he was not overpaid with documentation. *Id.* ¶ 8. This was very confusing for Mr. Barraza because he already sent every piece of supporting documentation necessary. *Id.* ¶ 9. On May 24, he received a work search directive. *Id.* ¶ 13.

3.37 On May 26, 2020, Mr. Barraza was asked to prove his identity. Mr. Barraza attempted to upload a copy of his social security card and WA driver's license but got an error message. He finally emailed his document. *Id.* ¶ 15-16. The next day he was notified via e-services that his identification was pending and being adjudicated. He was worried because hundreds of folks on Facebook were saying they haven't been paid after sending in their identification documents. *Id.* ¶ 16.

3.38 On June 1, 2020, Mr. Barraza was denied financial assistance from DSHS because it claimed he was receiving benefits. *Id.* ¶ 20.

3.39 On June 2, 2020, Mr. Barraza told ESD that he was worried he would not be paid for two to three weeks and he was told ESD was only holding payments for two days. *Id.* ¶ 22. It's been longer, and this has been stressful. *Id.* ¶ 23.

#### **Petitioner Marianne White**

3.40 Facts about Petitioner Marianne White is a full-time manager of Beer Star, a tap room located in Burien, WA. White Dec., ¶2. She has worked at Beer Star since 2018. *Id.* She was laid off on March 16, 2020 due to COVID-19 and Governor Inslee's stay at home order. White Dec., ¶ 4.

3.41 Ms. White's employer told her that she could return to work when the business reopened. *Id.* ¶ 4; DeVaux Hill Dec., ¶ 11 (Ms. White's employer intends to hire back his staff). On March 17, 2020, Ms. White



applied for unemployment benefits and Standby because she plans to go back to her job. White Dec., ¶ 7-8. After several denials, Ms. White was finally approved on April 22 for benefits payable March 29 to December 26. *Id.* ¶¶ 9-15. On April 23, she was approved for Standby. *Id.* ¶ 16.

3.42 On May 25, 2020, Ms. White received an email from ESD asking her to provide proof of identity; Ms. White provided a copy of her identification and social security number online with e-services. *Id.* at ¶ 18. She did not get paid for the week of May 24 or May 31 and has remained in pending status. She tried to file a claim on May 31 but was asked to complete a brand-new application that advised her she needed to look for work. *Id.* ¶ 22. Ms. White is eligible for unemployment benefits and she does not have any other source of income. She is relying on these funds to pay for housing, food, utilities, and care for her three children. *Id.* ¶ 30.

#### **IV. DEMAND FOR JUDGMENT**

4.1 The Commissioner has failed to process and promptly pay unemployment benefits “when due” in accordance with 42 U.S.C. § 503.

4.2 Benefits to which claimants are entitled have been suspended without notice or a hearing in violation of the due process clauses of the Fourteenth Amendment to the United States Constitution and, the more protective of claimant dignity, Article I, Section 3, of the Washington State Constitution.

4.3 The Commissioner has failed to adhere to the permanent injunction entered in *O'Brien, et al. v. ESD*, No. 83-2-00818-0 (1988) (Appx. B).

4.4 The Commissioner lacks authority to halt unemployment benefits to legitimate claimants, even if there are fraudulent claims. The Commissioner has exercised authority she does not have by halting paying unemployment benefits to prevent fraudulent activity.

4.5 Mandamus will lie under the facts stated herein.

## **V. RELIEF REQUESTED**

WHEREFORE, Petitioners ask this Court for the following relief:

5.1 Order the Commissioner “to report to the Court” and “all steps that have been taken and will be taken” to ensure due process is protected and prompt payment of unemployment benefits is made. *Cf.* Order on Motion, *Colvin et al. v. Inslee*, No. 98317-8 (April 10, 2020) (requiring the Department of Corrections to submit reports to the Court between briefing);

5.2 Order that the Commissioner take all actions necessary to process and ensure prompt payment of unemployment benefits pursuant to 42 U.S.C. § 503 and ESD’s fiduciary duty to claimants;

5.3 Order that the Commissioner provide claimants the required due process and refrain from cutting off benefits to claimants without providing notice and opportunity for hearing pre-termination of benefits;

- 5.4 Order that the Commissioner ensure timeliness of payments, adjudications, and appeals, and specifically provide a definitive maximum adjudication time;
- 5.5 Order the Commissioner to provide regular public reports to the State Auditor's Office pursuant to RCW 43.09.185;
- 5.6 Order the Commissioner to consider the dignity of claimants, for example, by avoiding inequitable methods of verifying identity;
- 5.7 Order ESD to adopt policies that prioritize promptly paying benefits to those who are eligible without subjecting them to dangerous privacy risks;
- 5.8 Order the Commissioner to exercise her RCW 50.12.040 emergency rulemaking authority and require the Commissioner to request her counsel to reevaluate existing regulations, including emergency rules, for statutory authorization. *See* RCW 50.12.150;
- 5.9 Order the Commissioner to implement a system for claimants to securely submit personal information. *See* RCW 42.56.590 (defining "personal information" for purposes of its section requiring agencies to notify persons of security breaches);
- 5.10 Provide legal assistance to claimants to the extent feasible to assist claimants in answering overbroad and underinclusive e-services questions;

- 5.11 Retain jurisdiction until ESD has adjudicated all claims for unemployed workers impacted by COVID-19;
- 5.12 Award Petitioners all costs and attorney fees under any applicable authority, including RCW 50.32.160 and the common fund doctrine;
- 5.13 All other further relief this Court deems just and proper.

DATED this 5th day of June, 2020.

THE SHERIDAN LAW FIRM, P.S.

By: *s/John P. Sheridan*

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*Attorneys for Petitioners*

**CERTIFICATE OF SERVICE**

I, Tony Dondero, certify under penalty of perjury under the laws of the State of Washington and the United States that, on June 5, 2020, I served the document to which this Certificate is attached to the party listed below in the manner shown.

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- By United States Mail
- By Legal Messenger
- By Facsimile
- By Overnight Fed Ex Delivery
- By Electronic Mail

Dated this 5th day of June 2020.

s/ Tony Dondero  
Tony Dondero,  
Legal Assistant

# Appendix A

**Unempl.Ins.Rep. (CCH) P 1061300 (C.C.H.), 1984 WL 1061300**

Unemployment Insurance Reporter - State

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[ ¶ 8000] NEW MATTERS WASHINGTON EMPLOYMENT SECURITY LAWCase-Law

Superior Court, Thurston County (Washington) | May 14, 1984  
No. 83-2-00818-0

¶ 8933 LORRAINE O'BRIEN, ET AL. V. NORWARD J. BROOKS, INDIVIDUALLY  
AND IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF ESD, AND  
ASSOCIATION OF WASHINGTON BUSINESSES, INTERVENOR-DEFENDANT.

**Claims and appeals procedure — Due process in discontinuation of benefits**

The Department's practice of 'pending' or use of issue stops, meaning a suspension of benefits to a claimant whose eligibility or qualification for benefits is questioned until the claimant reports to a local office for an interview, deprives claimants of due process. Adequate notice and an opportunity to be heard must be provided to continued claim recipients whose eligibility or qualification for benefits is questioned.

Mary Ellen Combo, Assistant Attorney General, for defendant. Robert A. Friedman, Evergreen Legal Services for plaintiffs. Richard Jessup, attorney for intervenor-defendant.

Lorraine O'Brien, et al. v. Norward J. Brooks, individually and in his official capacity as Commissioner of ESD, and Association of Washington Businesses, intervenor-defendant.

Lorraine O'Brien, et al. v. Norward J. Brooks, individually and in his official capacity as Commissioner of ESD, and Association of Washington Businesses, intervenor-defendant.

Superior Court, Thurston County (Washington). No. 83-2-00818-0. Preliminary Injunction, 5/14/84. No final order.

Mary Ellen Combo, Assistant Attorney General, for defendant. Robert A. Friedman, Evergreen Legal Services for plaintiffs. Richard Jessup, attorney for intervenor-defendant.

Majority Opinion

**Order Granting Preliminary Injunction**

**I. Hearing**

On January 20 and 23, 1984, this court heard oral argument on plaintiffs' motion for partial summary judgment, or, in the alternative, for a preliminary injunction. Plaintiffs appeared through their attorney, Robert A. Friedman, defendant through his attorney, Mary Ellen Combo, and the intervenor-defendant through its attorneys, Richard Jessup and James Henriot. At the conclusion of that hearing, the court indicated it would take the motion under advisement. On March 5, 1984, the court

issued a Memorandum Opinion denying plaintiffs' motion for partial summary judgment and granting plaintiff's motion for a preliminary injunction.

## II. Findings

The court, having considered the evidence and argument of counsel, finds:

1. Defendant's present practice of pending unemployment compensation benefits of continued claim recipients (claimants who have previously been monetarily entitled and whose initial nonmonetary eligibility have been finally determined, and have received waiting period credit or received payment for at least one week) without first providing adequate notice and an opportunity to be heard invades plaintiffs' clear legal rights under the due process clauses of [Article I, Section 3, of the Washington State Constitution](#) and the Fourteenth Amendment to the United States Constitution.

The term "pend" includes issue stops and means a suspension of unemployment benefit payments by defendants for weeks(s) claimed, until the continued claim recipient reports to a local office for an interview or otherwise responds as directed. Pend/Issue stops are used when the department has questions regarding the continued claim recipient's eligibility or qualification for benefits.

A continued claim recipient whose benefits are pended receives a message which advises him/her to report to the local office within three working days, or to respond as otherwise directed.

2. Defendant's failure to file and publish the full terms and substance of the rule for pending benefits (WAC 192-12-131) violates plaintiff's clear legal rights under [RCW 34.04.025](#) of Washington's Administrative Procedure Act which requires that the "terms or substance" of rules be filed and published in the State Register.

3. Plaintiffs have demonstrated a well-grounded fear that over several thousand persons each week have these clear legal rights invaded as a result of defendant's pend practice. The evidence shows that during three randomly selected weeks in 1983 almost eighty percent of the continued claim recipients who had their benefits pended were later found to be eligible to receive unemployment benefits for the pended weeks.

4. Defendant's pend practice causes delays of seven to ten days in the receipt of unemployment compensation benefit payments. The interruption of benefit payments deprives plaintiffs, many of whom are in necessitous circumstances, of needed income which works actual and substantial damages on them.

5. After balancing the relative interests of the parties, the court finds that the balance tips in favor of the plaintiffs. In coming to that conclusion, the court balanced the plaintiffs' interest in uninterrupted unemployment compensation benefit payments, the severe effects of delays in benefit payments upon plaintiffs and their families, the parties' and the public's interest in "... reducing involuntary unemployment and the suffering caused thereby ...," [RCW 50.01.010](#), and that almost 80 percent of the continued claim recipients who had their benefits pended were later found to be eligible to receive unemployment benefits for the weeks pended against the defendant's, intervenor's and public's interest in minimizing benefit payments to ineligible individuals, and in the fiscal integrity of the unemployment trust fund.

6. The court has jurisdiction to decide whether the defendant's practice of pending claims violates the "when due" provision of Section 303(a)(1) of the Social Security Act. However, the court finds it unnecessary to reach a decision about the violation of the "when due" provision.

## III. Order

On the basis of the foregoing findings, it is ordered:



3.1 *Enjoined.* Defendant Norward J. Brooks, in his capacity as Commissioner of the Washington State Employment Security Department, and his agents, employees, successors in office, and all persons acting in concert or participation with them, be and they are, restrained and enjoined from:

- a. Pending benefit payments of continued claim recipients as of April 16, 1984.
- b. Failing, on or after May 16, 1984, to provide adequate notice and opportunity to be heard to those continued claim recipients who are directed to report to local JSC or otherwise because defendant questions their eligibility or qualification for benefits.
- c. Implementing or enforcing WAC 192-12-131 to the extent that it permits or requires the pending of benefits for continued claim recipients.

3.2 *Bond.* The plaintiff shall file a bond in the sum of \$10.00 (ten dollars) to be used for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

#### **Appendix A**

As used in this order, the terms:

A. "Adequate notice" shall mean a written notice to a continued claim recipient containing:

1. A statement that his/her eligibility for benefits is in question.
2. An identification of the issue(s) raised.
3. A statement that the continued claim recipient has the right to report in person for a fact-finding interview regarding his/her eligibility for benefits and that he/she has the right to bring an attorney or other representative, witnesses and other documentary evidence.
4. Pursuant to [RCW 50.13.040](#) and WAC 192-15-040, a statement that the continued claim recipient is entitled to access to records or documents possessed by the agency relevant to the issue raised.
5. Identification of the specific date before which the continued claim recipient must respond as directed for the fact-finding and an explanation that a failure to respond as directed will result in a denial and overpayment of benefits. The specific date must be no earlier than reasonable mailing time plus five working days.

B. "Opportunity to be heard" shall mean the fact-finding interview held to resolve defendant's questions regarding continued claim recipient's eligibility for benefits. In considering these interviews the agency shall:

1. Prior to asking the continued claim recipient to respond to questions posed at the interview, make available all information of which it is aware that could result in denial of benefits.
2. In the event the continued claim recipient does not report in person for a fact-finding interview, but rather opts to respond as otherwise requested by the agency, then the defendant shall, prior to the response, apprise the continued claim recipient of the information of which the defendant is aware that could result in a denial of benefits.
3. Shall not deny any claim for benefits based upon information adverse to the continued claim recipient which is received after the factfinding interview or after the continued claim recipient has responded as requested without first notifying the continued claim recipient of the contents of that information and giving the recipient the opportunity to respond.

C. The term “deny” means a final, appealable decision by the defendant not to pay a claim for benefits, pursuant to [RCW 50.20.170](#) and .180.

D. The term “application for initial determination” shall be defined as set forth in [RCW 50.20.140](#).

E. The term “claim for benefits” shall be defined as set forth in [RCW 50.20.140](#).

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# Appendix B

**Unempl.Ins.Rep. (CCH) P 1707731 (C.C.H.), 1988 WL 1707731**

Unemployment Insurance Reporter - State

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[ ¶ 8000] NEW MATTERS WASHINGTON EMPLOYMENT SECURITY LAWCase-Law

Superior Court, Thurston County (Washington) | November 30, 1988  
No. 83-2-00818-0

Berschauer

¶ 8987 LORRAINE **O'BRIEN**, ET AL. V. NORWARD BROOKS, COMMISSIONER OF **ESD**, AND ASSOCIATION OF WASHINGTON BUSINESS, INTERVENOR-DEFENDANT.

**Claims and appeals procedure — Fair and impartial hearing**

The Commissioner of the Employment Security Department consents and agrees that the Commissioner, the Commissioner's agents, employees, successors in office and all persons acting in concert or participation with any of them, will continue refraining from suspending unemployment benefits without adequate notice and an opportunity to be heard of continued claim recipients who mail their continued claims to the Department. 'Continued claim recipients,' as used in this stipulation, are those claimants who have previously been monetarily entitled to benefits, whose initial nonmonetary eligibility has been finally determined, and who have received waiting period credit or received payment for at least one week. The Commissioner and the other individuals mentioned are also permanently enjoined from suspending unemployment benefits in a manner contrary to the above stipulation.

**For prior proceedings in this matter, see Wash. ¶ 8933.**

Rob Friedman, Evergreen Legal Services, attorney for plaintiffs. Teresa M. Morris, Sr. Asst. Atty. Gen., John M. Sells, Asst. Atty. Gen., attorneys for defendant. Richard A. Jessup, attorney for intervenor-defendant.

Lorraine **O'Brien**, et al. v. Norward Brooks, Commissioner of **ESD**, and Association of Washington Business, intervenor-defendant.

Lorraine **O'Brien**, et al. v. Norward Brooks, Commissioner of **ESD**, and Association of Washington Business, intervenor-defendant.

Superior Court, Thurston County (Washington). No. 83-2-00818-0, 11/30/88.

Rob Friedman, Evergreen Legal Services, attorney for plaintiffs. Teresa M. Morris, Sr. Asst. Atty. Gen., John M. Sells, Asst. Atty. Gen., attorneys for defendant. Richard A. Jessup, attorney for intervenor-defendant.

Majority Opinion

**Stipulation, Injunction and Order of Dismissal**

**I. HEARING**

1.1 *Date*: November 28, 1988.

1.2 *Purpose*: To consider Plaintiffs' and Defendant's Motions for Summary Judgment.

1.3 *Evidence*: The files and records herein together with the evidence identified in the parties' motions, the subjoined stipulation of parties, and the preliminary injunction order.

## **II. STIPULATION**

2.1 Isiah Turner, successor in interest to Defendant Norward Brooks, agrees to substitution of himself as the named Defendant.

2.2 Defendant Isiah Turner, consents and agrees that he, and his agents, employees, successors in office and all persons acting in concert or participation with any of them, will continue refraining from suspending unemployment benefits without adequate notice and an opportunity to be heard of continued claim recipients who mail their continued claims to the Department.

2.3 "Continued claim recipients," as used in this stipulation are those claimants who have previously been monetarily entitled to benefits, whose initial nonmonetary eligibility has been finally determined, and who have received waiting period credit or received payment for at least one week.

2.4 "Adequate notice" and "opportunity to be heard" as used in this stipulation are to be defined as set forth in Appendix A to Judge Gerry Alexander's May 14, 1984, Order Granting Preliminary Injunction (copy attached).

2.5 The parties agree that each will bear their own attorneys' fees and costs in this action.

2.6 The parties agree that in no way does this stipulation relate to, include, or cover the Department's policies and practices concerning its Electronic Benefits Distribution System.

## **INJUNCTION**

Based upon the foregoing stipulation and the files and records herein, and the Court deeming itself fully advised, hereby

ORDERS, ADJUDGES AND DECREES THAT:

3.1. Isiah Turner, successor in interest to Defendant Norward Brooks, is hereby substituted as Defendant in this action.

3.2 Defendant Isiah Turner, his agents, employees, successors in office and all persons acting in concert or participation with any of them, will refrain from suspending unemployment benefits without adequate notice and an opportunity to be heard of continued claim recipients who mail their continued claims to the Department.

3.3. "Continued claim recipients," "adequate notice" and "opportunity to be heard" are to be defined and understood as set forth above in the Stipulation of Parties.

3.4 This order is [in] no way relates to, includes, nor covers the Department's and Defendant Turner's policies and practices concerning the Department's Electronic Benefit Distribution System.

## **ORDER OF DISMISSAL**

Based upon the foregoing injunction, IT IS FURTHER ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

4.1 The preliminary injunction in this case is dissolved and the injunction described in paragraph 3.2 of this order shall remain permanently in effect. This case is otherwise dismissed with prejudice.

4.2 Each party shall bear its own attorneys' fees and costs.

4.3 No notice of this dismissal shall be required, pursuant to Rule 23(e), as there will be no prejudice to the class by entering the above orders.

DONE this 30th day of November, 1988. Berschauer, J.

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**THE SHERIDAN LAW FIRM, P.S.**

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