



**Thursday, December 5, 2019**

## **UIA Lawsuit Gets Green Light From Courts; What Will Whitmer Do?**

**Governor Gretchen Whitmer** faces one of the biggest decisions of her nearly year in office now that the courts have cleared the way for the plaintiffs who sued the state more than four years ago over its wrongful conclusion they committed fraud to obtain unemployment benefits to fight their case on the merits.

The Court of Appeals ruled unanimously Thursday against the state's motion to dismiss *Bauserman v. Unemployment Insurance Agency* (**COA Docket No. 333181**) and held the case can continue into discovery.

The first big decision the state must make is whether to appeal this decision to the Supreme Court.

Such a decision, however, would invite scorching criticism that Ms. Whitmer has decided to follow the same legal path as former Governor Rick Snyder before her, to the fight the case – and its possible massive payout that could run into the many hundreds of millions of dollars – tooth and nail. Mr. Snyder and then Attorney General Bill Schuette, whose assistant attorneys general represented the UIA in the case, took heavy criticism for trying to get the lawsuit dismissed on a technicality.

The next big decision is whether to initiate settlement talks with the plaintiffs. So far, that has not happened.

If there is no appeal and no quick settlement, the next stop for this landmark case is the Court of Claims, where the plaintiffs after more than four years of legal wrangling with the state can finally began the process of discovery and deposing witnesses.

Another question is who makes the call for the state. UIA Director Steve Gray has conflicted himself out of the case because he did some work for the plaintiffs when he ran a clinic at the University of Michigan to help persons wronged by the unemployment system. A message left with Ms. Whitmer's press office was not immediately returned.

Asked if the UIA would appeal and if the Department of Attorney General and UIA are interested in initiating settlement negotiations, Department of Attorney General spokesperson Kelly Rossman-McKinney said only that the department is "reviewing the ruling with our client."

There is a long, tortured history to the case. The plaintiffs filed a class-action lawsuit in 2015 after a massive fiasco in the Unemployment Insurance Agency that caused more than 37,000 people to be wrongly found to have committed fraud to obtain unemployment benefits. With the law at the time that required those found to

have committed fraud to pay back the benefits plus interest plus penalties equal to four times the benefits they received, most owed tens of thousands of dollars and saw their wages garnished.

The state had implemented in 2013 an automated system where a computer solely determined whether fraud occurred. The state brought back human involvement in those decisions in the summer of 2015 as the scandal mushroomed.

Initially, the Court of Claims ruled against the state's motion to dismiss. Then the Court of Appeals sided with the state and dismissed the case, holding the lawsuit was not filed in compliance with the requirement that cases be filed with the Court of Claims within six months of the event giving rise to the claim. Finally, earlier this year, the Supreme Court overturned the Court of Appeals and held the lawsuit was filed on a timely basis.

The Supreme Court, though, remanded the case to the Court of Appeals to decide the state's assertion that the plaintiffs did not allege justifiable constitutional tort claims.

In a unanimous decision dated Thursday, the Court of Appeals held the plaintiffs did in fact have legitimate constitutional tort claims.

"In our opinion, the agency's use of the MiDAS system to allegedly disqualify plaintiffs from receipt of unemployment benefits, accuse them of fraudulent receipt of unemployment benefits and to engage in a concerted system of unlawfully imposing penalties, interest and intercepting the financial resources of the plaintiffs can be aptly characterized as an established practice of state governmental officials such that it amounts to a custom supported by the force of law," **Judge Karen Fort Hood** wrote in an opinion signed by **Judge Patrick Meter**. "Accordingly, we reject the agency's assertion that plaintiffs' claims in this regard are legally deficient, given that the allegations plaintiffs advance, if proven to be correct, amply demonstrate that plaintiffs' constitutional rights were violated as a result of the agency's use of its policy or custom in administering the unemployment benefit system."

**Judge Michael Gadola** issued a separate concurring opinion.

Further, the court said the case meets the test of whether a damage remedy can be inferred in the case.

"The absolutely 'egregious nature' of the agency's alleged actions in this case may have led to the undermining of the due process rights of thousands of innocent citizens across this state at a particularly vulnerable time in their lives, having lost their gainful employment for one reason or another," Ms. Hood wrote. "Consequently, if plaintiffs' allegations are borne out in the course of this litigation, this would be a case where a judicially inferred damage remedy is appropriate to safeguard the constitutional protections that we as a citizenry in a democracy hold inviolate. In simple terms, the alleged disturbing facts of this lawsuit would call out for such a remedy."

There also is a federal lawsuit on the same topic brought by different plaintiffs. That case is now in discovery.

Senate **Minority Leader Jim Ananich** (D-Flint) called for the plaintiffs to get their day in court.

"These wrongful accusations of fraud have ruined people's lives," he said in a statement. "Since 2013, countless victims have reached out to my office with stories of going into debt, having to declare bankruptcy,

and losing their homes. We have been working for years to address the fallout of this mismanaged and disastrous program of the previous administration. What Gov. Snyder's agency did to these families is downright criminal."

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