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IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN AND
FOR LEON COUNTY, FLORIDA

GIA CUCCARO,
HEATHER FULOP,
LUISA COCOZELLI,
LORI BETH ERTELL,
HARRIETT RUBIN,
JAMESHA BENT,
EDWARD BRIAN SMOOT,
ASHLEY BROCKINGTON,
VICTORIA LABA, and
IVAN VARELA,

Plaintiffs,

v.

RON DESANTIS, in his official capacity as Governor of the State of Florida; FLORIDA DEPARTMENT OF ECONOMIC OPPORTUNITY; and DANE EAGLE, as Secretary of Florida Department of Economic Opportunity,

Defendants.
_____/

CASE NO.: 2021 CA 1413

ORDER DENYING TEMPORARY INJUNCTION

On August 13, 2021, this Court received this case due to a transfer of venue from the Circuit Court of Broward County, Florida. In the Plaintiffs' amended complaint, they pled on count seeking a declaratory judgment and another count seeing a writ of mandamus. The Plaintiffs also moved for a temporary injunction on an expedited basis. Time being of the essence, on August 16, 2021, this Court scheduled a preliminary injunction hearing.

At this stage, the only parties to this action are the ten named Plaintiffs and the three named Defendants.

On August 25, 2021, the Court heard testimony from six Plaintiffs (Gia Cuccaro, Luisa Cocozelli, Lori Beth Ertell, Harriett Rubin, Jamesha Bent, and Victoria Labarbera), William Currie-the corporate representative for the Florida Department of Economic Opportunity (DEO), and Andrew Settner. The Court admitted eight exhibits into evidence (Plaintiffs' Exhibits 1-5; Defendants' Exhibits 1-3) and weighed the witnesses' credibility.

The Court has reviewed the Plaintiffs sixth request for judicial notice and the Defendants' objection to it. The Court sustains the objection and declines to take judicial notice of the print-outs the Plaintiffs attached to their request.

This Court has considered the evidence, weighed the credibility of the witnesses, and considered the oral and written arguments of counsel and the applicable law.

The Plaintiffs presented well, were forthright, and they detailed the difficult circumstances they are facing. The Plaintiffs relayed the hardships they have experienced due to the reduction of their unemployment benefits. The Court finds that all 10 Plaintiffs have made their best effort to find work. In fact, two Plaintiffs have started jobs since the lawsuit was filed. Each Plaintiff is financially vulnerable and the reduction in their weekly benefits has exacerbated their financial woes. Their lack of resources requires them to make daily trade-offs regarding life necessities.

William Currie testified for the Defendants. The Court found him to be knowledgeable on the issues, credible, and truthful.

Plaintiffs' witness, Andrew Settner, is a consultant who works for a progressive think tank in Washington, D.C. He testified that the month after unemployed Floridians stopped receiving FPUC benefits, the state's unemployment rate increased one-tenth-of-one-percent. He also admitted that Florida's labor force grew that month.

The unemployment rate only tracks the number of people who are actively seeking employment. A state's unemployment rate can increase if enough people who previously

were not seeking employment join the job market. If employers are hiring, an influx of new job seekers often results in more people being hired. Mr. Settner was forthright, but his testimony lacked both detail and context.

The Judge's Role

My job requires me to determine and follow the law. For good reasons, our state's constitution separates the powers of government and my role as judge is to call balls and strikes, impartially, no matter which team is pitching or at bat.

Notwithstanding my ruling, this Court empathizes with the Plaintiffs and every unemployed Floridian. I sincerely hope they find employment and that their life circumstances improve quickly.

This Court finds and rules as follows:

Applicable Federal and State Law

1. The United States of America and the State of Florida are sovereign republics.

2. Congress sets the public policy of our nation by enacting laws. Likewise, the Florida legislature sets the public policy of this state by enacting statutes.

3. Congress has the power to provide for the general welfare of the United States. Article 1, Section 8, U.S. Constitution.

4. Congress enacted a nationwide employment security program that mandates a minimum floor of benefits that each state must provide to its eligible unemployed citizens.

5. Each state can enact laws that exceed these federally imposed minimums for their unemployed citizens, and some do. However, no state can provide its unemployed citizens with less than the federally imposed minimums.

6. Florida collects unemployment compensation taxes from employers to cover the unemployment compensation benefits it must pay out as mandated by federal law.

7. The Florida legislature enacted chapter 443 of the Florida Statutes to satisfy federal law requirements regarding unemployment compensation benefits and to establish this state's public policy concerning "reemployment assistance," which it expressly defined. Section 443.036(37).

CARES Act

8. In March 2020, in response to the COVID-19 pandemic crisis, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (CARES). Among other things, CARES established three benefits programs: (1) Pandemic Unemployment Assistance (PUA); (2) Pandemic Emergency Unemployment Compensation (PEUC); and (3) Federal Pandemic Unemployment Compensation (FPUC).

9. FPUC is the only CARES program at issue in this case. Significantly, FPUC *is not* part of the nationwide employment security program codified in chapter 443.

10. Congress neither mandated the states to participate in FPUC, nor required the states to fund any part of the program by collecting local taxes from employers. Instead, Congress expressly allowed each state to opt-in or

ignore FPUC. Specifically, 15 U.S.C. Section 9023(a) contains the operative language, which reads:

> "Any state which desires to do so may enter into and participate in an agreement with the Secretary of Labor (in this section referred to as the "Secretary"). Any State which is a party to an agreement under this Section may, upon thirty days written notice to the Secretary, terminate such agreement."

11. On March 28, 2020, Governor Ron DeSantis delegated the authority for DEO to opt Florida into FPUC (Defendants' Exhibits 1, page 12). In response, DEO and its Secretary followed through (Defendants' Exhibit 1). Afterward, the United States paid FPUC benefits to eligible unemployed Floridians.

12. Initially, the United States paid FPUC benefits of $600 per week to persons receiving state unemployment compensation benefits. However, Congress set an expiration date for FPUC and the program expired. Afterward, Congress reinstated FPUC but reduced the weekly payout from $600 to $300. By operation of law, the FPUC program is set to expire again on September 6, 2021.

13. A state must provide the United States Secretary of Labor with thirty days written notice to opt out of FPUC. On May 25, 2021, Florida fulfilled this requirement (Defendants' Exhibit 2). Florida opted out of FPUC effective June 26, 2021 (Defendants' Exhibit 2).

This Lawsuit

14. Plaintiffs maintain that the Defendants violated chapter 443 by opting out of FPUC, and that Florida must participate in FPUC for as long as benefits are available.

15. Defendants disagree and assert that they have exercised executive branch discretion in full compliance with chapter 443. They maintain that the Plaintiffs have misconstrued the law.

16. Here, each party invokes the separation of powers.

17. "The powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches .... " Article 2, Section 3 of the Florida Constitution.

18. The Plaintiffs contend that due to the Defendants' failure to enforce chapter 443 as written, the executive branch has exercised legislative power.

19. In contrast, Defendants deny this allegation and respectfully argue that the Court cannot grant the Plaintiffs' motion without rewriting chapter 443, which would be judicial exercise of legislative power.

20. Only one of these positions is correct and it's my job to determine which one and to follow the constitution.

21. The Court will resolve this dispute by construing the relevant parts of chapter 443. Did the legislature command the state to participate in non-mandatory federal programs like FPUC? Otherwise, did the legislature

authorize the executive branch to exercise discretion regarding non-mandatory federal programs?

22. All parts of the statute must be given effect, and the Court should avoid a reading of the statute that renders any part meaningless. See Heart of Adoptions v. J.A., 963 So.2d 189, 199 (Fla. 2007).

23. Moreover, "all parts of a statute must read together in order to achieve a consistent whole." Borden v. East-European Ins. Co., 921 So.2d 587, 595 (Fla. 2006) (quoting Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So.2d 452, 455 (Fla. 1992) (emphasis omitted)).

Chapter 443 of the Florida Statutes

24. Section 443.011 reads, "[t]his chapter may be cited as the 'Reemployment Assistance Program Law.'"

25. Section 443.031 is titled "Rule of liberal construction." It reads:

> "This chapter shall be **liberally construed** to accomplish its purpose **to promote employment security by increasing opportunities for reemployment and to provide, through the accumulation of reserves, for the payment of compensation to individuals with respect to their unemployment.** The Legislature hereby declares its intention to provide for carrying out the purposes of this chapter in **cooperation with the appropriate agencies of other states and of the Federal Government as part of a nationwide employment security program,** and **particularly to provide for meeting the requirements of Title III, the requirements of the Federal Unemployment**

> **Tax Act, and the Wagner-Peyser Act of June 6, 1933, entitled "An Act to provide for the establishment of a national employment system** and for cooperation with the states **in promotion of such system, and for other purposes," each as amended,** in order **to secure for this State and its citizens the grants and privileges *available under such acts.*** All doubts as to the proper construction of any provision of this chapter shall be resolved in favor or conformity with such requirements." (emphasis added).

26. Section 443.031 instructs Florida to promote employment security, the reemployment of unemployed persons, and to both collect and distribute compensation to unemployed individuals. The accumulation of funds anticipates Florida's collection of local taxes from employers to pay these benefits. Cooperation with other states and the federal government expressly relates to the national employment security program mandates by federal law under Title III, the Federal Unemployment Tax Act, and the Wagner-Peyser Act of June 6, 1933, **each as amended " in order to secure ... grants and privileges available under such acts."** The liberal construction the Legislature is commanding concerns unemployment benefits Florida is obligated by federal law to pay its eligible citizens. The closing language in the section requires proper construction of any provision of chapter 443 to be resolved "in favor of conformity with such requirements." This admonition is tied directly to the mandatory federal requirements referred to by citation in the section. Moreover, section 443.031 must be read in conjunction with section 443.036(37).

27. Section 443.036(37) defines the term "reemployment assistance," as applied throughout chapter 443. "Reemployment assistance" means:

> **"cash benefits payable to individuals with respect to their unemployment pursuant to the provisions of this chapter.** Where the context requires, reemployment assistance also means cash benefits payable to individuals **with respect to their employment pursuant to 5 U.S.C. ss. 8501-8525, 26 U.S.C. ss. 3301-3311, 42 U.S.C. s. 503. Any reference to reemployment assistance shall mean compensation payable from an unemployment fund as defined in 26 U.S.C. s. 3306(f)."** (emphasis added).

28. The legislature restricted the meaning of "reemployment assistance" to the unemployment cash benefits required by chapter 443, which includes the cash benefits Florida must pay to its unemployed citizens as mandated by federal law under titles 5, 26, and 42 of the United States Code—and nothing else. Significantly, the Florida legislature expressly cited 26 U.S.C. Section 3306(f) and incorporated it by reference into its definition.

26 U.S.C. Section 3306(f) reads in pertinent part "... **'unemployment fund' means a special fund, established under a State law** and administered by a State agency, for the payment of compensation." (emphasis added).

29. FPUC is a federal program. FPUC is **NOT** "a special fund, established under a state law and administered by a state agency." Instead, FPUC is a creature of title 15 of the United States Code. 15 U.S.C. § 9023. The money used to pay FPUC benefits is appropriated from the United States Treasury. 15 U.S.C. § 9023(d)(3). As a result, FPUC fails to meet the Florida legislature's narrow definition of "reemployment assistance." Moreover, states don't collect local taxes and accumulate money to cover FPUC benefits or costs. Instead, the federal government alone pays for FPUC.

30. Section 443.171(9)(a)1 regarding state-federal cooperation reads:

> "In the administration of this chapter, the Department of Economic Opportunity and its tax collection service provider **shall cooperate with the United States** Department of Labor to the fullest extent consistent with this chapter and shall take those actions, through the adoption of appropriate rules, administrative methods, and standards, necessary **to secure for this State all advantages available under the provisions of federal law relating to reemployment assistance."** (emphasis added).

31. Section 443.171(9)(a)1 is bound by section 443.036(37)'s definition of "reemployment assistance." Thus, section 443.171(9) does not require Florida to participate in FPUC.

32. The Florida legislature restricted chapter 443 to a narrow definition of "reemployment assistance" that does not mandate the State's voluntary participation in FPUC or any other federal program that is not required by an act of Congress.

33. "...the mention of one thing implies the exclusion of another; *expressio unius est exclusio alterius*. Hence, where a statute enumerates the situations where it is to be operative, it is ordinarily construed as excluding from its opposition all those not expressly mentioned." Thayer v. State, 335 So.2d 815 (Fla. 1976); Ideal Farms Drainage Dist. v. Certain Lands, 19 So.2d 234 (Fla. 1944); Special Disability Trust Fund v. Motor & Compressor Co., 446 So.2d 224, 227 (Fla. 1st DCA 1984).

34. Congress did amend the Social Security Act to impose new emergency unemployment relief on the states for governmental entities and nonprofit organizations. Congress could have written the law to require each state's participation in FPUC, but it did not. Instead, Congress allowed each state to decide whether to opt into FPUC. Moreover, Congress also allowed each state to opt-out of FPUC.

35. Likewise, if the Florida legislature wanted the state to participate in every federal unemployment program offered it could have accomplished that result in one clearly sentence. Instead, our legislature painstakingly defined what constitutes "reemployment assistance." When the Florida legislature met during its 2021 session, it did not amend chapter 443 to mandate Florida's participation in CARES or any other voluntary federal unemployment programs. Nor did it call a special session to amend chapter 443 after the Defendants gave notice that the State would opt-out of FPUC. Nor has it called a special session to address the issue at any time since.

36. The Court declines to alter the language enacted in sections 443.031, 443.036(37), and 443.171. If this Court construed these sections differently than written, it "would constitute an abrogation of legislative power." City of Miami Beach v. Miami New Times, LLC, 314 So.3d 562, 566-567 (Fla. 3rd DCA 2020).

37. "Where a statute generally incorporates a federal law or regulation, to avoid holding the subject statute unconstitutional, Florida courts interpret the statute as incorporating *only the federal law in effect on the date of adoption of the Florida Statute*." (Emphasis added). Abbott Laboratories v. Mylan Pharmaceuticals, Inc., 15 So.3d 642, 655-56 (Fla. 1st DCA 2009) (Citing State v. Rodriguez, 365 So.2d 157 (Fla. 1978)). The legislature has not amended sections 443.031 and 443.171 since Congress passed the CARES Act.

38. Absent the direction provided by Abbott Laboratories and the cases cited therein, the Plaintiffs suggested construction of sections 443.031 and 443.171 would render both sections unconstitutional. The legislature cannot delegate its powers to future acts of Congress. Article 2, Section 3 of the Florida Constitution.

39. The Defendants have exercised discretion regarding the execution of chapter 443. That prerogative belongs exclusively to the executive branch.

40. Indeed, the judiciary violates the separation of powers if a court tells an administrative agency how to perform its duties. See Fish & Wildlife Conservation v. Daws, 256 So.2d 907, 917 (Fla. 1st DCA 2018); Florida Department of Children & Family Services v. J.B., 154 So.3d 479, 481 (Fla. 3rd DCA 2015).

41. Likewise, this Court must follow chapter 443 as written to fulfill its constitutional role.

42. Significantly, chapter 443 is not solely limited to the payment of unemployment benefits. Section 443.031 states that the chapter shall also be liberally construed to **"promote employment security by increasing opportunities for reemployment."** (emphasis added). Moreover, Section 443.171(4) reads that DEO shall **"promote the reemployment of unemployed workers throughout the state in every other way that may be feasible."** (emphasis added). Thus, the legislature has authorized the executive branch to exercise discretion.

43. Two of the Plaintiffs have been hired since the lawsuit was filed.

44. The Defendants didn't violate chapter 443 by opting out of FPUC. That decision belongs to the state's Chief Executive. Ultimately, Governor DeSantis's strategy to promote reemployment by ending Florida's participation in the FPUC program is a political issue that the voters can approve or reject at the ballot box.

Temporary Injunction

45. A temporary injunction is an extraordinary remedy that should be granted sparingly. Department of Health v. Bayfront HMA Med. Ctr., LLC, 236 So.3d 466, 472 (Fla. 1st DCA 2018).

46. The purpose of a temporary injunction is to preserve the status quo while the merits of the dispute are litigated. Gawker Media, LLC v. Bollea, 129 So.3d 1196, 1199 (Fla. 2nd DCA 2014). Here, the state opted out of the FPUC program effective June 26, 2021, and the Plaintiffs did not seek injunctive relief beforehand. Thus, there is no status quo to preserve.

47. Mandatory injunctions, which require a party to act rather than to forbear, are looked upon with disfavor. See Spradley v. Old Harmony Baptist Church, 721 So.2d 735, 737 (Fla. 1st DCA 1998).

48. An injunction will not lie to forbid an action that has already happened. Wilkinson v. Woodward, 141 So. 313 (Fla. 1932); City of Jacksonville v. Naegele Outdoor Advertising Co., 634 So.2d 750, 754 (Fla. 1st DCA 1994).

49. To obtain a temporary injunction, the movant must establish four elements: (1) a substantial likelihood of success on the merits; (2) a lack of an adequate remedy at law; (3) the likelihood of irreparable harm absent the entry of an injunction; and (4) that injunctive relief will serve the public interest. Bayfront HMA Med. Ctr., LLC, 236 So.3d at 472. If the party

seeking the temporary injunction fails to prove one of the requirements, the motion for injunction must be denied. Id. The movant must prove each element with competent, substantial evidence. SunTrust Banks, Inc. v. Cauthon & McGuigan, PLC, 78 So.3d 709, 711 (Fla. 1st DCA 2012).

50. The granting of a temporary injunction rests in the sound discretion of the judge as guided by the law and the facts of the case. See Baily v. Christo, 453 So.2d 1134, 1137 (Fla. 1st DCA 1984).

The Plaintiffs Did Not Satisfy the First Element

51. The Plaintiffs seek a declaratory judgment finding that sections 443.031 and 443.171(9) required the Defendants to secure FPUC benefits for them. In their count for a writ of mandamus, the Plaintiffs contend that the Defendants failed to perform non-discretionary ministerial duties to assure their receipt of FPUC benefits.

52. Given the Court's reading of chapter 443, the Court finds that the Plaintiffs do not have a substantial likelihood of success on the merits at trial on either count.

Plaintiffs' Motion for an Injunction Comes Too Late to Make a Difference

53. As the movant, the Plaintiffs bore the burden of proof at the hearing.

54. Both sides presented testimony regarding how long it takes it would take the state to opt back into FPUC and whether the federal government would cover missed FPUC payments retroactively.

55. FPUC expires on September 6, 2021. The last day any FPUC benefits would accrue is either Saturday, September 4, 2021, or Sunday, September 5, 2021 (Defendants' Exhibit 3, Page 3).

56. DEO witness Williams Currie testified that if the Court ordered the state to opt back into FPUC, it would take at least a week, and probably longer. Plaintiffs' witness Andrew Settner estimated that it would take two to three weeks to accomplish that task.

57. Moreover, William Currie testified that even if the state and federal government entered into a new FPUC agreement, the benefits would not begin accruing immediately. Rather, "the new agreement becomes effective the week of unemployment beginning after the new agreement is signed" (Defendants' Exhibit 3, Page 7 f.).

58. Defendants' Exhibit 3 is an "Unemployment Insurance Program Letter" from the U.S. Department of Labor to the state workforce agencies. This exhibit is chock-full of bureaucratic nomenclature. After careful study, the Court reads this exhibit to mean FPUC benefits will not start accruing until the Saturday or Sunday after the state has been accepted back into the program. This translates into additional delay.

59. One reason the Plaintiffs moved for a temporary injunction was to capture any FPUC benefits that could accrue before the program ended. Nevertheless, based on Mr. Currie's testimony and Defendants' Exhibit 3, the Court finds that it's too late for a temporary injunction to do the Plaintiffs any good in that regard.

60. The Court finds that FPUC will expire before the state could opt back in, and before the Plaintiffs could accrue any benefits—*even if the Court ordered Florida to reapply today.*

61. The Plaintiffs also moved for a temporary injunction to recover FPUC benefits they missed after June 26, 2021. They seek payment of these benefits retroactively.

62. Both sides presented testimony regarding back payments. William Currie testified that the United States will not make any back payments. He based his testimony on Defendants' Exhibits 3,a., which reads in pertinent part:

> "For states that terminate the Agreement to operate some or all of these programs before September 6, 2021, no payments for the terminated programs may be made with respect to weeks of unemployment ending after the date the state terminates participation in the Agreement."

Given that the federal government alone is funding all FPUC benefits, the only source of the referenced "payments" is the United States Treasury.

63. Mr. Currie had not talked to the federal government to confirm that his understanding is correct. Notwithstanding, the quoted language was probative of the United States' position, even if poorly articulated.

64. Andrew Settner testified he thinks the federal government is making back-payments of FPUC benefits to the unemployed citizens of Indiana. He based his testimony on what he has read online and while looking through similar lawsuits. Likewise, his testimony was probative but unpersuasive.

65. One would expect that counsels' first order of business will be to thoroughly and definitively answer this question.

66. The Court does not find the testimony of either witness to be persuasive concerning the availability of retroactive FPUC benefits. These benefits may or may not be available. However, the Plaintiffs, as the movants, carry the burden of proof, and they have not established by competent and substantial evidence that retroactive FPUC benefits are available.

67. Caselaw prohibits courts from directing the executive branch to exercise its powers "in a manner that is not feasible." See Florida Fish & Wildlife Conservation Commission v. Daws, 256 So.3d 907, 925 (Fla. 1st DCA 2019).

68. Given the imminent expiration of the FPUC program, the entry of a temporary injunction would be a fruitless exercise that would not yield any beneficial results for the Plaintiffs. See State ex rel. Ostroff v. Pearson, 61 So.2d 325, 326 (Fla. 1952); Campbell v. State ex rel. Garrett, 183 So. 340 (Fla. 1938).

Conclusion

69. This Court has tracked similar lawsuits in Arkansas, Maryland, Indiana, South Carolina, Oklahoma, and Michigan. These states' unemployment compensation statutes do not mirror Florida's chapter 443, but they bear similarities because every state must comply with the same federal mandates. Other states' trial judges have granted and denied similar motions only to be reversed by their appellate courts.

70. This Court must decide the law applicable to this case in accordance with Chapter 443 of the Florida Statutes, the Florida Constitution, and Florida caselaw.

71. The Plaintiffs have failed to carry their burden to establish a likelihood of success on the merits by competent and substantial evidence.

72. The Court finds that the Defendants did not violate Chapter 443 by opting out of the FPUC program. This decision belongs solely to the state's Chief Executive. Ultimately, Governor DeSantis's strategy to promote reemployment by ending Florida's participation in the FPUC program is a political issue that the voters can approve or reject at the ballot box.

73. The Plaintiffs' suggested reading of chapter 443 also fails because it would render sections 443.031 and 443.171 unconstitutional. The Florida legislature cannot delegate its powers to Congress.

74. If the Plaintiffs otherwise qualified for injunctive relief, given the imminent expiration of the FPUC program on September 6, 2021, the entry of a temporary injunction would be a fruitless exercise that would not yield them any beneficial results. There is no status quo to preserve.

75. I have rendered this order as soon as possible, mindful that the Plaintiffs may wish to file an appeal.

76. The Plaintiffs' motion for a temporary injunction is **DENIED.**

DONE AND ORDERED on August 30, 2021.

J. Layne Smith
Circuit Judge

Copies to all counsel of record via e-service