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11 June 2020

ALJ Daniel Waite
Milwaukee Hearing Office
Sent via e-mail message to __ and __

RE: Hearing No. 20602969MW
On behalf of claimant __ __, SSN ending in __

Dear Judge Waite:

As indicated at the hearing, below are arguments contending that the state law ban on eligibility discriminates against the disabled and that the state law ban on eligibility mandates SSDI recipients then be eligible for PUA benefits. I have included an additional argument concerning your authority to rule on these issues at this time.

The state law exclusion for regular unemployment benefits for SSDI recipients is discriminatory.

Wisconsin's unemployment law declares that an individual is completely ineligible for regular or state unemployment benefits if they receive SSDI benefits in any week of the same month. Wis. Stat. § 108.04(12)(f). Wisconsin makes SSDI recipients ineligible regardless of their actual ability to work. Id.

SSDI benefits are only available to disabled individuals who can no longer enjoy substantial gainful activity because of their disability. *See* 42 USC § 423(f) and 20 CFR §§ 404.1571-6 (setting forth various criteria for determining whether an individual is engaged in substantial gainful activity and thus eligible or ineligible for SSDI benefits) and 42 USC § 423(d)(2)(A). That limitation does not mean that SSDI recipients can no longer work.

So, because SSDI benefits are only available to the disabled, Wisconsin is denying regular unemployment to SSDI recipients because of their status as disabled individuals.

Wis. Stat. §§ 108.062(18) and (19) indicate that compliance with federal requirements is of paramount importance and that provisions that conflict with federal requirements may be waived. "Consistently with applicable state and federal law," an appeal tribunal may affirm, reverse, or modify an initial determination. Wis. Stat. § 108.09(3)(b). Wis. Stat. § 108.13(5) allows the Department to make deductions from claimants' benefit amounts "for any purpose permitted by federal law." Conversely, deductions that are NOT permitted under federal law are NOT allowed.

The US Department of Labor has indicated that state unemployment systems are subject to federal discrimination law. As explained in UIPL 02-16 (1 Oct. 2015) (available at https://wdr.doleta.gov/directives/corr_doc.cfm?docn=4233):

> The nondiscrimination laws that apply to state UI agencies prohibit discrimination based on both disparate treatment — intentionally treating members of protected groups differently based on their protected status — and disparate impact — the use of policies or practices that are neutral on their face, but have a disproportionate impact on members of some protected groups.[3]

> [3] If a policy appears to result in a disproportionate impact on a protected class, the policy or practice could be considered discriminatory, depending on whether the grant recipient can articulate a "substantial legitimate justification" for the challenged practice. To prove a "substantial legitimate justification," the recipient must show that the challenged policy was "necessary to meeting a goal that was legitimate, important, and integral to the [recipient's] institutional mission." Elston v. Talladega County Bd. Of Educ., 997 F.2d 1394, 1413 (11th Cir. 1993). If the recipient can make such a showing, the next question would be whether there are any effective alternative practices that would result in less disproportionality or whether the justification proffered by the recipient is actually a pretext for discrimination. *See* Department of Justice Title VI legal manual at http://www.justice.gov/crt/title-vi-legal-manual. [now available at https://www.justice.gov/crt/case-document/file/925531/download]

UIPL 02-16 at 4.[1] Discrimination based on disability (among other bases) in state unemployment programs is explicitly prohibited. 29 USC § 2938(a)(2) and 29 USC §§ 3248(a)(1) and (2). State unemployment programs are explicitly identified as entities subject to these non-discrimination laws. 29 USC § 3151(b)(1)(B)(xi).

Federal regulations explicitly state that denying a disabled person the benefits of a federal-supported program or affording unequal or ineffective or separate participation in that program or otherwise limiting the participation of the disabled in that program constitutes discrimination against the disabled. *See* 29 CFR § 37.7(a) and 29 CFR § 38.12(a).

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1 The statutory explanation for this ban is "to prevent the payment of duplicative government benefits for the replacement of lost earnings or income." Wis. Stat. § 108.04(12)(f)(1m). The actual impact of this prohibition, however, does NOT meet a legitimate, important, and integral goal of the unemployment system.

Under this eligibility ban, employers still pay unemployment taxes on the wages paid their disabled employees. And, the unemployment trust fund accrues additional monies because these disabled employees are ineligible for the unemployment benefits due them for their work. As such, the trust fund is being rebuilt off of the labor of the disabled, in direct contradiction of the concerns and objectives of unemployment law, as stated in Wis. Stat. § 108.01(1):

> The burdens resulting from irregular employment and reduced annual earnings fall directly on the unemployed worker and his or her family. The decreased and irregular purchasing power of wage earners in turn vitally affects the livelihood of farmers, merchants and manufacturers, results in a decreased demand for their products, and thus tends partially to paralyze the economic life of the entire state. In good times and in bad times unemployment is a heavy social cost, directly affecting many thousands of wage earners. Each employing unit in Wisconsin should pay at least a part of this social cost, connected with its own irregular operations, by financing benefits for its own unemployed workers. Each employer's contribution rate should vary in accordance with its own unemployment costs, as shown by experience under this chapter.

Here, the claimant is disabled and began receiving SSDI benefits soon after she applied for them around the same time she began part-time work with an employer. When the pandemic forced her employer to shut down its operations and lay off its staff, the claimant filed for unemployment benefits.[2] That claim was denied, because Wisconsin under its law explicitly makes SSDI recipients ineligible for unemployment benefits. Their status as SSDI recipients is what triggers the eligibility ban in Wisconsin, and SSDI recipients only have that status because they are disabled.

Wisconsin is the only state to have a ban of this type.[3] Wisconsin is directly classifying all SSDI recipients as ineligible for regular unemployment benefits because their disabilities are significant enough to make them eligible for SSDI benefits. There is no way around the conclusion that this ban is directly discriminatory against the disabled. Perversely, the nature of this ban only increases with the severity of the disability at issue and, as evident here and in countless other SSDI-unemployment cases, has no rational connection to an actual ability to work or the goals of unemployment law itself (*see* n.1, *supra*.). Rather than preventing an actual duplication of benefit payments through an offset (as done in Minnesota, discussed below), Wisconsin has made all SSDI recipients completely ineligible for unemployment benefits solely because of their status as SSDI recipients, a status they only have because they have a disability severe enough to qualify for SSDI benefits. As such, Wis. Stat. § 108.04(12)(f) is facially discriminatory.

The appeal tribunal should find that the prohibition against SSDI recipients receiving regular unemployment benefits discriminates against the disabled and so cannot be enforced. As a result, the claimant is eligible for regular unemployment benefits, if otherwise qualified.

If the state law exclusion for regular unemployment benefits remains, SSDI recipients are explicitly eligible for PUA benefits.

For some time now, the Department has maintained that SSDI recipients are ineligible for PUA benefits. The Department's explanation for this denial of eligibility has shifted among multiple explanations that failed to satisfy claimants or legislators making inquiries into this matter. Media reports on this issue led the Department to produce a new explanation in an e-mail chain dated May 28th and 29th (enclosed) that has been provided to me by the media.

This e-mail chain begins with a message from Ms. Banicki to US Dep't of Labor staffers asking for an opinion on the eligibility of SSDI recipients for PUA benefits.[4] After describing the statutory text in Wis. Stat. §§ 108.04(12) and (12)(f) as well as the $500 weekly income cap and 32 hours of weekly work cap on eligibility in Wis. Stat. §§ 108.05(3)(c) and (3)(dm), respectively, she goes on to mention a provision in the Cares Act about application of DUA ("Disaster Unemployment Assistance") regulations to PUA provisions,[5] how 20 CFR § 625.11 allows for state law provisions for regular unemployment benefits to continue to apply in the

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2 She has also filed a claim for PUA benefits that I request the appeal tribunal take administrative notice of.

3 As noted below, North Carolina does not make SSDI recipients ineligible for regular unemployment benefits based solely on their status as SSDI recipients. Rather, North Carolina classifies SSDI recipients as being unable to work because they are applying for or receiving SSDI benefits. The "logic" of this type of prohibition is not at issue here.

4 It appears from this message that earlier claims from the Department to its senior staff, legislators, and the public about receiving an opinion from the US Dep't of Labor were "mistaken."

case of DUA benefits, and how 20 CFR § 625.13(a)(6) allows for a pro-rated offset for DUA benefits during the week when a person receives certain other benefit payments, including SSDI benefits. Ms. Banicki then asks:

> We had been reading the above laws together to mean that a person who is receiving SSDI, worker's compensation permanent total disability or temporary total disability for a whole week, or $500 or more weekly in wages is ineligible for UI and, therefore, also ineligible for PUA. However, Secretary Frostman believes the correct interpretation could be that because those individuals are ineligible for regular UI, they may be eligible for PUA (assuming they are available for work but for one of the COVID-19 related reasons).
>
> We are asking for confirmation whether an individual who is receiving SSDI, worker's compensation permanent total disability or temporary total disability for a whole week, or $500 or more weekly in wages may be eligible for PUA.

So, in this single e-mail message, Ms. Banicki has switched from describing SSDI benefits as a ban on eligibility to a weekly offset of regular unemployment benefits that may mean they are eligible for PUA benefits in that week.

Dep't of Labor staffers respond with three messages that "agree" with the analysis presented by Ms. Banicki and include a lengthy message in response to a public inquiry. In this lengthy response, the federal staffer states that "There is not a straight out prohibition of collecting UI benefits if you are receiving SSDI in Wisconsin; however, there is a reduction in benefits that may result in ineligibility depending on the benefit amounts under the two programs." This message goes on to explain how there is a weekly offset in many states, including Wisconsin, against the temporary unemployment benefits when a person is receiving SSDI benefits and that this same weekly offset applies to PUA benefits. According to this message, a person might or might not receive UI, DUA, or PUA benefits in a given week depending on the amount of SSDI benefits received that same week. But, this message then without explanation turns a person's SSDI benefit into an average that applies for all weeks in a month. "In your case, it appears that the amount of your deductible SSDI benefit payment as it computes to a per week basis zeros out the weekly amount of regular UI and/or PUA benefit you would otherwise be eligible for and that unfortunately makes you ineligible for benefits under either program."

Based on this confusing explanation of Wisconsin's SSDI eligibility ban as a financial offset, Assistant Deputy Secretary Williams herself posits that SSDI benefits should then be deducted from PUA benefits. The federal staffer then pivots and presents new analysis that, no, DUA regulations govern on issues where the CARES Act is silent, those DUA regulations allow for an offset against SSDI benefits, that Wisconsin state law makes SSDI recipients completely ineligible for regular unemployment, and so claimants are ineligible for PUA benefits regardless of the amount of SSDI benefits they receive.

By its own terms, this e-mail chain is perplexing. First, Wisconsin does NOT currently have an offset for SSDI benefits. The original ban on SSDI benefits was interpreted by the Commission to ban unemployment benefits during the week SSDI benefits were received. *See* Kluczynski, UI Hearing No. 14400214AP (30 May 2014). The Department subsequently rewrote

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5 *See* sec. 2102(h). A copy of Sec. 2102 of the CARES Act is enclosed.

this provision to make the ban on eligibility extend to all weeks in the month. "Retroactive SSDI" (25 June 2015) (available at https://wisconsinui.wordpress.com/2015/06/25/retroactive-ssdi/). In Wisconsin, a person receiving SSDI benefits is now ineligible for any regular unemployment if they receive even a $1 in SSDI benefits that month.

In comparison, Minnesota has by law an offset against SSDI benefits. *See* Minn. Stat. § 268.085, subd. 4a (web page explaining this offset also enclosed). As explicitly provided here, Minnesota applies an offset on a weekly basis for a person's monthly SSDI benefit if that person became eligible for SSDI benefits within his or her benefit year.

As such, there is no basis in the statutory text to claim that Wisconsin has a weekly offset of any kind.

Second, the DUA regulation at 20 CFR § 625.13(a)(6) does not apply here, since that regulation concerns an offset as provided in state law and is not in any way a complete ban on eligibility. In this e-mail chain, the Department is transforming the eligibility ban in Wis. Stat. § 108.04(12)(f) into an offset in order to incorporate this DUA regulation. But, the actual statutory text in Wis. Stat. § 108.04(12)(f) is NOT an offset, so 20 CFR § 625.13(a)(6) cannot apply here.

Finally and most importantly, there is no basis to the claim that the CARES Act is silent on the eligibility of SSDI recipients for PUA benefits.[6] A covered individual, for purposes of PUA benefit eligibility, is defined as someone who"is not eligible for regular compensation or extended benefits under State or Federal law," sec. 2102(a)(3)(A)(i), and is either:

- "otherwise able to work and available to work within the mean of applicable State law," sec. 2102(a)(3)(A)(ii(I), and has lost work for pandemic-related reasons, sec. 2102(a)(3)(A)(ii(I)(aa)-(kk)

- "otherwise would not qualify for regular unemployment or extended benefits under State or Federal law," sec. 2102(a)(3)(A)(ii(II), is "otherwise able to work and available to work within the mean of applicable State law," sec. 2102(a)(3)(A)(ii(I), and has lost work for pandemic-related reasons, sec. 2102(a)(3)(A)(ii(I)(aa)-(kk).

The only exclusions from PUA coverage are individuals who have the ability to telework or individuals who are receiving sick leave or paid leave benefits. Sec. 2102(a)(3)(B). Indeed, the Secretary for the Dep't of Labor is directed to provide PUA benefits to any individual who

> is unemployed, partially unemployed, or unable to work for the weeks of such unemployment with respect to which the individual is *not entitled* to any other unemployment compensation (as that term is defined in section 85(b) of title 26, United States Code)

Sec. 2102(b) (emphasis supplied).

So, as explicitly provided for in the CARES Act, PUA benefits are available to anyone who is ineligible for regular unemployment benefits under state law. Because Wisconsin makes SSDI recipients completely ineligible for regular unemployment benefits, by the statutory terms

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6 Noticeably, the Department's e-mail chain does not even start with how eligibility for PUA is statutorily defined. By skipping over this basic step, this "analysis" was wrong from the start.

of the CARES Act, they are eligible for PUA benefits if they meet the other requirements of this law (being able and available for work as defined in state law and suffering a loss of work connected to the pandemic).[7]

It should also be noted that the only other state that bans eligibility for regular unemployment benefits to SSDI recipients — North Carolina — has concluded that SSDI recipients will receive PUA benefits. N.C. Gen. Stat. § 96-14.9(c) declares that an "individual is not able to work during any week that the individual is receiving or is applying for benefits under any other state or federal law based on the individual's temporary total or permanent total disability." Because North Carolina has waived its work search and able and available requirements per the enclosed executive order dated 17 March 2020 and because being disabled is no different from being ill with Covid-19 (who are explicitly eligible for PUA benefits under the CARES Act), SSDI recipients are fully eligible for PUA benefits in North Carolina with no offset whatsoever.

After all, the entire point of PUA benefits was to expand eligibility to workers not normally eligible for regular unemployment benefits. As the House Ways & Means Committee explained:

> **Pandemic Unemployment Assistance Following the Model of the Disaster Unemployment Assistance program**. States would be permitted to expand eligibility to provide unemployment compensation to workers who are not normally eligible for benefits, so long as their unemployment was connected to the COVD-19 pandemic, as determined by the state and the Department of Labor. Expanded eligibility would provide benefits to self-employed individuals, independent contractors, “gig economy” employees, and individuals who were unable to start a new job or contract due to the pandemic. Individuals would apply for these temporary new federal benefits at the state UC office, and states would be fully reimbursed for the cost of benefits and administration.

"Provisions Related to Unemployment Compensation in the Senate-passed CARES Act" at 1 (available at https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/UC%20FAQ%20CARES%20Act.pdf). By denying PUA benefits to SSDI recipients who are ineligible under state law for regular unemployment, Wisconsin is subverting the whole point of PUA benefits in the first place.

An appeal tribunal has the authority to act on the issues being raised here.

The Commission has explained in Rogers v. Seek, Inc., UI Hearing No. 03404569GB (22 April 2004) that:

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7 As the ban on benefits in Wis. Stat. § 108.04(12)(f) is based on making SSDI recipients ineligible and not on their able and available status, the Department cannot now claim the disabled are precluded from receiving unemployment benefits because they are not able and available. Indeed, SSDI recipients are claiming PUA benefits because they were working and then loss work because of the pandemic. *See also* Tunisha Perkins, UI Hearing No. 11605816MW (11 January 2012) (2010 changes to the able and available regulations in Wis. Admin. Code § DWD 128.01(3)(a) added a reference to engaging "in some substantial gainful employment" and that this addition "was expressly chosen to mirror the 'disability' definition contained in the Social Security Act, 42 U.S.C. § 416'").

> Procedural Due Process requires meaningful opportunity to address an issue, and notice after a hearing has been held does not satisfy it. In addition, Wis. Admin. Code § DWD 140.06 states the procedure administrative law judges may use in order to receive evidence and render a decision on issues not listed on the Notice of Hearing. Parties must be notified at the hearing and they must not object. The commission appreciates the economy the administrative law judge was attempting to gain; that economy of course cannot supercede the requirements of Procedural Due Process.

The discrimination and PUA eligibility issues argued above were indicated by Ms. __ counsel as the issues she would contest at this hearing. There was no objection or ruling preventing these issues from being heard. Furthermore, as Mr. Rubsam's June 9th e-mail message to Ms. __ counsel indicates, the Department considers the ban on regular unemployment and the ban on PUA benefits to go hand-to-hand with each other.

> Ms. __ appealed the denial of her claim for UI benefits. She is ineligible for each week of each month that she receives SSDI—this is well-settled. It is questionable to me what purpose her appeal serves.
>
> Please let me know whether she intends to withdraw (or please contact the hearing office to withdraw the appeal).
>
> She has also filed a claim for Pandemic Unemployment Assistance ("PUA"). Her claim for PUA will be on hold until her UI denial becomes final. Regardless, US-DOL has informed DWD that recipients of SSDI are ineligible for PUA in Wisconsin based on the state law ineligibility.

Accordingly, there is neither a legal or practical reason why these issues cannot be decided in this proceeding. As the Commission explained in Canady v. Childrens Pantry Family Resource Center Inc., UI Hearing No. 08600122MW (28 March 2008):

> As the introduction in the ET Handbook notes, SSA § 303(a)(3) requires the "opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." The introduction states that, "The criteria in this Handbook are derived from the above provisions of Federal law, and States must meet these criteria to assure that State lower authority appeals operations conform and comply with Federal law." Therefore, the ALJ must satisfy the criteria in the ET Handbook in order to meet federal conformity requirements.

Finally, the appeal tribunal should consider the consequences of delay regarding these issues in light of the onslaught of cases and appeals arising from this pandemic. Unlike other states, Wisconsin has not adjusted the scope or analysis of unemployment issues to be decided, *cf*. "Another reason why Wisconsin UI is faring so poorly: terrible job growth in 2019" (21 May 2020) (available at https://wisconsinui.wordpress.com/2020/05/21/another-reason-why-wisconsin-ui-is-faring-so-poorly-terrible-job-growth-in-2019/) (describing marked changes in how Michigan is handling its unemployment claims), and is instead simply trying to throw more personnel at the problem. But, by denying eligibility to SSDI recipients and making other policy choices, *see, e.g.*, "No PUC for you: DWD denies a federal $600 payment when there is a 'BAR'"

(29 May 2020) (available at https://wisconsinui.wordpress.com/2020/05/29/no-puc-for-you-dwd-denies-a-federal-600-payment-when-there-is-a-bar/), "Policy choices with unemployment" (13 May 2020) (available at https://wisconsinui.wordpress.com/2020/05/13/policy-choices-with-unemployment/), and "Filing problems in Wisconsin are not new" (7 April 2020) (available at https://wisconsinui.wordpress.com/2020/04/07/filing-problems-in-wisconsin-are-not-new/), the Department is magnifying its caseload problems with unnecessary appeals and litigation.

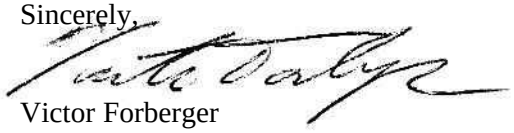
Because of the additional litigation being created by the Department by its unwillingness to follow unemployment law and instead assert policy choices that run counter to that law, appeals that took weeks will now take months. I do not expect hearings on cases appealed in May to be heard before late August or September at the earliest. Accordingly, the disabled in these cases will have gone without any unemployment benefits and likely no work for more than half a year. It is obvious that most if not all cannot continue to live solely on their SSDI benefits. That is why they were working in the first place. Now, when work has disappeared, they are going hungry and racking up debt to feed their families and pay their rent. They simply cannot wait indefinitely for the law to be corrected.

Indeed, even mail processing is breaking down at the Department. The Department and its appeal tribunals cannot simply keep administering unemployment law as if the pandemic has not occurred. Following the law is even more important now, and so the Department's policy choices to disregard the very federal and state statutes the Department and appeal tribunals are charged with following should have no sway whatsoever in these matters.

I urge you to find that Ms. __ is entitled to either regular unemployment benefits because the state ban discriminates against the disabled or that she is eligible for PUA benefits because state law makes her ineligible for regular unemployment benefits and she has lost work because of the pandemic.

Thank you.

Sincerely,



Victor Forberger
WI Bar: 1070634

enc E-mail chain between DWD and US DOL staffers dated 28-29 May 2020 (e-mail addresses and phone numbers redacted) (6 pp.)
Sec. 2101 and 2102 of the CARES Act (13 pp.)
Minn. Stat. § 268.085 (11 pp.)
Minnesota offsets, including its SSDI offset, explained (2 pp.)
N.C. Gen. Stat. § 96-14.9 (3 pp.)
N.C. Executive Order No. 118 (17 March 2020) (5 pp.)

cc Pamela McGillivray w/enc (via e-mail message to __)
Bram Sable-Smith w/enc (via e-mail message to __)
Amanda St. Hilaire w/enc (via e-mail message to __)