

**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY**

RICHARD WALLS, individually,
DESIREE Del ROMANO, individually,
MIKE LATNER, individually,
TAMARA WEIMER, individually,
JAQUEZ MCCOY, individually,
MICHAEL FREAS, individually,
STEPHANIE BERGEN, individually,
HEATHER SHOWALTER, individually,
and on behalf of all others similarly situated,

Plaintiffs,

v.

Case No.: 2020 CA 792

RON DESANTIS, in his official capacity as the
GOVERNOR of the State of Florida, and the
FLORIDA DEPARTMENT OF ECONOMIC
OPPORTUNITY,

Defendants.

**DEFENDANTS, RON DESANTIS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF
THE STATE OF FLORIDA, AND FLORIDA DEPARTMENT OF ECONOMIC
OPPORTUNITY'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED
COMPLAINT FOR EMERGENCY WRIT OF MANDAMUS**

COME NOW Defendants, Ron DeSantis, in his official capacity as the Governor of the State of Florida and the Florida Department of Economic Opportunity (hereinafter "DEO"), and pursuant to Florida Rules of Civil Procedure 1.140, and 1.420 and 1.630, hereby file this Motion to Dismiss Plaintiffs, Richard Walls, Desiree Del Romano, Mike Latner, Tamara Weimer, Jaquez McCoy, Michael Freas, Stephanie Bergen, Heather Showalter, (hereinafter "Plaintiffs") Second Amended Complaint for Emergency Writ Mandamus with prejudice, and in support thereof, state as follows:

I. Procedural History.

1. On April 23, 2020, Plaintiffs filed a Complaint for Writ of Mandamus against the Defendants.

2. Defendant, DEO was served with a copy of the initial Complaint on Friday, April 24, 2020.

3. On April 23, 2020, Plaintiffs sent an Amended Complaint against the Defendants via email to an attorney at DEO that is not involved in handling this case. DEO was never formally served with a copy of the Amended Complaint. The Amended Complaint also does not appear to have been filed as it is not on the court's docket, but appears to have been filed in a separate case (Leon County Circuit Court Case No. 2020-CA-802).

4. This court held an initial case management conference on April 29, 2020; the parties and the court agreed that the Plaintiffs would be permitted to file a second amended complaint for mandamus by 6:30 p.m. on April 29, 2020, and that Defendants would respond by 5:00 p.m. on May 4, 2020. The court has scheduled a hearing on the Defendants' motion to dismiss on May 6, 2020 at 1:30 p.m.

5. On April 29, 2020 the Plaintiffs filed their Second Amended Complaint for Emergency Writ of Mandamus, which added five additional Plaintiffs to the case. The Defendants were also not served with a copy of the Second Amended Complaint for Emergency Writ of Mandamus (hereinafter the "Second Amended Complaint") by the Plaintiffs (but obtained a copy of the Second Amended Complaint from the court's file).

II. Introduction to Florida's Reemployment Assistance Process.

6. Florida's Reemployment Assistance (also referred to as unemployment compensation) is governed by Chapter 443, Florida Statutes. DEO is tasked with determining

whether unemployed individuals are eligible to receive benefits in accordance with sections 443.091, and 443.101, Florida Statutes. DEO administers the payment of benefits to eligible individuals in accordance with section 443.111, Florida Statutes. Section 443.1113, Florida Statutes was first enacted in 2009 and provided that DEO shall “to the extent funds are appropriated . . . replace and enhance the functionality provided in the . . . Reemployment Assistance Claims and Benefits Information System.” The Reemployment Assistance System is commonly referred to as the “Connect System.” Individuals applying for reemployment assistance do so through the Connect System. Recently, in response to the Covid-19 situation, an additional system, known as the “Pega System” was made available and provides an additional portal for individuals to apply for benefits. As a result of the unprecedented number of visitors to DEO’s application portals following COVID-19 closures, DEO also made access to paper applications widely available (that could be downloaded online or obtained at numerous physical locations throughout the state) that can then be mailed to DEO at no charge to the claimant.

7. After receiving an initial claim for benefits, DEO is required to conduct an investigation and make a determination regarding eligibility; section 443.151, Florida Statutes prescribes the procedure a claimant or employer must follow in order to appeal a determination made by DEO regarding a claim for reemployment assistance. If an appeal is filed, DEO assigns a referee to decide the issues raised, in accordance with section 443.151(4), Florida Statutes. An individual or employer that disagrees with the decision of the appeals referee may then initiate a review (i.e. a second-level appeal) to the Reemployment Assistance Appeals Commission (“RAAC”), pursuant to section 443.151(4)(c), Florida Statutes. RAAC’s decisions are then appealable to the District Court of Appeal. *See* section 443.151(4)(e), Florida Statutes.

8. Between the week ending January 4 and March 14, DEO received 60,567 initial claims for Reemployment Assistance. The normal processing time for most claimants to receive benefits was between three and four weeks from the date a claim was submitted. From March 15, 2020 through May 4, 2020, following statewide COVID-19-related business closures, DEO received over 1,781,636 initial claims (of which DEO has confirmed that 1,025,657 claims are unique). As of May 4, 2020, DEO has processed 731,182 of the unique claims and paid benefits to 452,526 individuals. Significant progress has recently been made to process the extraordinary number of claims submitted to DEO during March and April, 2020. Indeed, individuals that submitted eligible claims through DEO's new Pega system have on average received payment within 10 days, less than half the average payment processing time prior to March 15 and the onslaught of COVID-19 applications. Current data reflecting the status of claims can be viewed at <http://lmsresources.labormarketinfo.com/covid19/index.html>. The website and data is available to the public and the Defendants request the Court take judicial notice of the information. *See* section 90.204, Florida Statutes.

III. Writ of Mandamus Procedure.

9. Mandamus is a harsh and extraordinary remedy. *See Slaughter v. Harrell*, et al., 245 So.2d 126 (Fla. 1st DCA 1971). It is only available to enforce a legal right that has already been clearly established, but not to establish a legal right. *Id.* The complaining party must demonstrate a clear legal right to the performance of the particular duty sought to be enforced. *Id.*

10. When a trial court receives a petition for a writ of mandamus, it must first determine whether the petition is facially sufficient. *See Williams v. State of Florida*, 189 So.3d 909 (Fla. 2nd DCA 2016). The court should immediately dismiss a petition for writ of mandamus if it is not

facially sufficient. *Id.* A party petitioning for a writ of mandamus must establish (1) a clear legal right to performance of the act requested, (2) an indisputable legal duty of defendants, and (3) no adequate remedy at law. *Radford v. Dwight Brock*, Clerk of the Circuit Court, et al., 914 So.2d 1066 (Fla. 2nd DCA 2005). Plaintiffs must also establish that a defendant has committed a breach by failing to perform an indisputable legal duty. *Newell v. Moore*, 767 So. 2d 1240 (Fla. 1st DCA 2000). A defendant in a mandamus action may file a motion to dismiss and the court must dismiss the case if the allegations as pled are insufficient to state a cause of action. *S.J. v. Thomas*, 233 So.3d 490 (Fla. 1st DCA 2017). Only if the complaint is sufficient, may the court issue an order to show cause to the defendant. *Id.*; *see also* Fla. R. Civ. Pro. 1.630.

11. In ruling on a motion to dismiss, a trial court is limited to the four corners of the complaint, including all exhibits attached thereto. *Marshall v. Amerisys, Inc.*, 943 So. 2d 276 (Fla. 3d DCA 2006). While the court must assume all facts alleged in the complaint to be true, it is not required to accept mere statements of opinion or conclusions unsupported by specific facts. *Brandon v. Pinellas Cnty.*, 141 So. 2d 278, 279 (Fla. 2d DCA 1962).

12. For the reasons contained herein, the Plaintiffs' Second Amended Complaint fails to state a facially sufficient cause of action for mandamus and should be dismissed with prejudice. The Court should decline to issue an order to show cause to the Defendants.

IV. Plaintiffs have not alleged a clear legal right to performance of the act requested (i.e. unemployment benefits).

13. Plaintiffs allege that their legal rights include the right to “apply for benefits, be deemed qualified for benefits, and to receive benefits under Chapter 443.” *See Second Amended Complaint*, Paragraph 28.

14. All Plaintiffs admit in the Complaint that they have been able to apply for benefits. Plaintiffs complain that they have either not yet received benefits or were found to be ineligible

(and presumably disagree with the ineligible determination made by DEO). Plaintiffs have not alleged sufficient facts to demonstrate whether or not they are actually qualified to receive benefits under Chapter 443, Florida Statutes. Thus, Plaintiffs have not alleged a clear legal right to performance of the act requested (i.e. the right to payment of unemployment benefits).

15. Section 443.091, Florida Statutes, titled “Benefit Eligibility Conditions”, provides that an unemployed individual is eligible to receive benefits for any week only if DEO finds that an individual has met the requirements of the statute. By way of example, some of the applicable eligibility conditions include the following:

a. Section 443.091(d) requires that an individual is “able to work and is available for work;”

b. Section 443.091(g) requires that an individual has “been paid wages for insured work equal to 1.5 times her or his high quarter wages during her or his base period, except that an unemployed individual is not eligible to receive benefits if the base period wages are less than \$3,400;”

c. Section 443.091(h) requires an individual to submit “a valid social security number assigned to her or him.”

16. Plaintiffs provide minimal facts and allegations regarding their alleged prior employment and unemployment, but they have not alleged sufficient facts to demonstrate whether they are even eligible to receive benefits pursuant to Chapter 443, Florida Statutes. Further, section 443.061, Florida Statutes specifically provides that reemployment assistance and the rights created pursuant to Chapter 443, Florida Statutes do “not create a vested right in any person.” Plaintiffs have not pled sufficient facts to demonstrate that they have a clear legal right to the relief demanded.

17. Plaintiffs Walls, Ramano, Freas and Showalter allege that their claims are essentially “pending”, but they have yet to receive payment.¹ However, there is no deadline in Florida’s Statutes that establishes an exact date by which an eligible individual’s claim must be paid. If DEO determines the Plaintiffs are eligible for benefits, the benefits will be paid. DEO is not refusing or purposely delaying the payment of the Plaintiff’s claims, but rather DEO is diligently working to process the extraordinary amount of applications for reemployment assistance it has received over the past several months.

18. Plaintiffs Latner, Weimer, McCoy and Bergen allege they received “ineligible” determinations; Plaintiffs presumably disagree with this determination (although not all Plaintiffs even state that they disagree with the determination in the Second Amended Complaint). Moreover, none of the Plaintiffs allege that they have exhausted their available administrative remedies to challenge the determinations.²

19. Plaintiffs have failed to allege sufficient facts to demonstrate a clear legal right to performance of the act requested. Moreover, they have not even plead sufficient facts to demonstrate eligibility for unemployment assistance in the state of Florida. Therefore, Plaintiffs cannot establish a cause of action for mandamus. *See Butler v. City of Melbourne Police Department*, 812 So.2d 547 (Fla. 5th DCA 2002); *see also Curtis v. City of Miami Beach*, 46 So.2d 24 (Fla. 1950) (holding that a writ of mandamus cannot be issued to establish a legal right, but is used only to enforce a legal right after its establishment).

V. Plaintiffs have not alleged an indisputable ministerial legal duty that the Defendants have breached.

¹ DEO’s system reflects that two of these Plaintiffs have received benefits via direct deposit. One Plaintiff was determined to be ineligible for benefits and has appealed the determination. The additional Plaintiff’s claim is being reviewed to determine eligibility and will be processed accordingly.

² One of these Plaintiffs is pursuing available administrative remedies to dispute DEO’s determination and has filed an appeal. The remaining Plaintiffs allege they were all determined to be ineligible and would therefore have the same administrative appeal rights.

20. Plaintiffs' Second Amended Complaint must also be dismissed for failing to articulate any legal, ministerial duty that Defendants are not performing. *See, e.g., Newell v. Moore*, 767 So. 2d 1240 (Fla. 1st DCA 2000). Plaintiffs simply direct the Court to section 443.1113, Florida Statutes, and claim it generally establishes a "statutory obligation . . . to pay unemployment compensation benefits to residents/citizens of the State of Florida who qualify for said benefits." *Second Amended Complaint*, Paragraph 14. Plaintiffs base this conclusion entirely on an unexplained reference to section 443.031, Florida Statutes, which states, in part "[t]his 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." Nothing in Section 443.031 points to any specific, clear, or indisputable legal duty of the Governor or any executive official.

21. Although section 443.031 may provide for the liberal construction of Florida's Reemployment Assistance laws, it is not a substitute for the laws themselves. Section 443.1113, which Plaintiffs rely on completely, simply commanded DEO in 2009 to "replace and enhance the functionality" of the then-existing Reemployment Assistance information-technology system and was subsequently amended to lay out the parameters of that project. Even under the most liberal statutory interpretation, nothing in section 443.1113 comes close to establishing the duty claimed by Plaintiffs. To hold otherwise would contradict the text of the statute and impermissibly require a reading of non-existent text into the actual text of the law. *Lopez v. Hall*, 233 So. 3d 451, 453 (interpreting statutes begins with the plain language of the text).

22. Indeed, nothing in Chapter 443, Florida Statutes, establishes the ministerial duty alluded to by Plaintiffs. A duty or act is ministerial when there is no room for the exercise of

discretion, and the performance being required is directed by law. *See, e.g., Maloy v. Seminole Cty.*, 264 So. 3d 370, 372 (Fla. 5th DCA 2019); *see also Austin v. Crosby*, 866 So.2d 742 (Fla. 5th DCA 2004); *Lee County v. State Farm Mutual Automobile Insurance Company*, 634 So. 2d. 250 (Fla. 2nd DCA 1994) (County’s requirement that a notarized consent form be provided prior to the release of confidential medical records involved more than a ministerial function and mandamus was not proper). An example of a ministerial duty is a clerk’s duty to forward a notice of appeal to the appellate court. *See Allston v. State of Florida, et al.*, 685 So.2d 1312 (Fla. 2nd DCA 1996). Mandamus “will lie to require a public officer to act, but it will not lie to require a particular holding or judgment by a public officer.” *See Reese v. Baron*, 256 So.2d 70 (Fla. 3rd 1971) (citation omitted).

23. Florida’s Reemployment Assistance system is a multi-step process, spanning numerous statutes, which requires significant input from multiple parties, independent fact-finding, adjudication, and even provides for internal and external appeals. *See* section 443.091 et seq., Florida Statutes. The administration of the system as a whole—which is the incredibly broad duty alleged by Plaintiffs here—is anything but ministerial. DEO’s determinations regarding whether a claimant is eligible for the payment of benefits and the resulting payment is not ministerial in nature. DEO’s determinations involve an analysis of each claimant’s individual circumstances related to their employment and unemployment and an analysis of each individual claimant’s facts and circumstances to the applicable rules and statutes. After conducting the analysis, DEO makes a determination as to whether the claimant is eligible or ineligible for benefits. Claimants (and employers) can then challenge (through the established administrative process) the determinations made by DEO.

24. Even assuming, without conceding, that the broad, non-specific duty alleged by Plaintiffs exists, Plaintiffs fail to adequately allege any breach of that duty by DEO. Instead, they allege varied experiences with applying, being determined eligible or ineligible, or not receiving benefits, and then leave the Court to infer that DEO is somehow refusing or failing to take action. Plaintiffs all admit they have been able to apply for reemployment benefits, and their claims are in various stages; the Plaintiffs' complaints stem from the fact that they are not receiving benefits quickly enough or they disagree with their ineligibility determinations. However, there is no requirement in Chapter 443 that mandates DEO process and pay a claimant's unemployment benefit within a specific time frame. Not that it would save their complaint, but Plaintiffs cannot even allege that DEO's current payment processing times to eligible unemployed claimants deviate from general processing times pre-COVID-19. Indeed, many claims are currently being processed in half the time.

25. Even if Plaintiffs could allege any indisputable ministerial duty of defendants to generally administer the Reemployment Assistance program consistent with Chapter 443, Florida Statutes—which they cannot—the actions of the Governor and DEO during this state of emergency make evident that the program is being actively administered with increased fervor. On April 2, 2020, Governor DeSantis issued Executive Order 20-93, directing the agency to “procure additional capacity, software, technology and/or other resources as needed to ensure the state’s reemployment assistance call center, website and staff can accommodate the increasing volume of applications and queries.” Subsequently, DEO has added over 2,000 state employees to assist with processing of applications, procured additional web technology and over 125 contract employees to support call centers, and hired dozens of finance and administration staff to assist with claimant communications. As displayed on DEO’s real-time online workflow dashboard, *see*

lmsresources.labormarketinfo.com/covid19/index.html, DEO has already processed over 731,182 confirmed unique claims of the 1,025,657 unique claims submitted (71.3% as of May 4, 2020) totaling \$700,261,670 paid to claimants. The publicly reported thousands upon thousands of potentially ineligible, out-of-state, and fraudulent claims that have been detected by DEO (*see* website) highlight the importance of DEO's review of applications in accordance with necessary state and federal laws.

26. The allegations in the Plaintiffs' Second Amended Complaint are not indicative of inaction on the part of DEO, but rather of the active, ongoing application of the extensive, non-ministerial administrative process required by Chapter 443. Plaintiffs' Second Amended Complaint is facially insufficient for failing to adequately allege any type of ministerial duty of DEO or articulate how DEO has breached it. It should be dismissed.

VI. Plaintiffs have not pled sufficient facts to allege an inadequate remedy at law.

27. Plaintiffs have failed to allege sufficient facts to support their allegation that the Plaintiffs lack an adequate remedy at law. Plaintiffs admit they all have been able to apply for benefits but allege their claims have yet to be paid or that they were found ineligible for benefits by DEO. Plaintiffs have available administrative remedies if they wish to appeal the determinations made by DEO regarding eligibility, and therefore have adequate available remedies.

28. Plaintiffs are seeking the payment of reemployment assistance (i.e. a monetary benefit) from DEO. In addition, the Plaintiffs have filed a second case in the Second Judicial Circuit, Case No. 2020-CA-802 for negligence against DEO and are seeking monetary damages. Plaintiffs' allegations in the negligence case arise out of the exact same facts as the case at hand. Plaintiffs have not and cannot allege sufficient facts to support their allegation that they lack an

adequate remedy at law regarding their claim for mandamus in this action. *See Williams v. Schulman*, 721 So.2d 1244 (Fla. 4th DCA 1998) (when a plaintiff has a separate suit pending for money damages arising from the same claim, mandamus may not issue).

VII. Plaintiffs have failed to allege they have exhausted administrative remedies (and in fact have not exhausted their administrative remedies).

29. Plaintiffs Latner, Weimer, McCoy and Bergen allege they all received “ineligible” determinations for various reasons; Plaintiff Latner alleges he disagrees with DEO’s determination; Plaintiffs Weimer, McCoy and Bergen do not even allege that they disagree or dispute DEO’s determination regarding their eligibility.³ Plaintiffs cannot maintain a cause of action in circuit court because they are pursuing (or have available but have elected not to pursue) available administrative remedies.

30. Plaintiffs Walls, Ramano, Freas and Showalter all allege that they have been able to apply for benefits and that their claims are essentially pending, but they have yet to receive payment.⁴ Even if the claims are still pending as alleged in the Second Amended Complaint, the Plaintiffs’ complaint for a writ mandamus is premature. Plaintiffs Walls, Ramano, Freas and Showalter have not alleged they have exhausted their administrative remedies (and in fact, except for Plaintiff Freas, have not yet pursued the administrative appeal process).

31. A complaint for a writ of mandamus is premature when a Plaintiff has failed to exhaust administrative remedies. *See City of Miami Beach, et al. v. Braca*, 151 So.2d 669 (Fla. 3rd DCA 1963); *see also City of Miami Beach v. The Atheneum, Inc.*, 254 So.2d 41 (Fla. 3rd DCA

³ A review of the Connect System reveals that DEO’s initial determination was that one Plaintiff was ineligible to receive benefits. This Plaintiff has initiated an appeal of the determination and is pursuing available administrative remedies. The administrative appeal will proceed to a hearing before an appeals referee, pursuant to section 443.151, Florida Statutes. The remaining three Plaintiffs have the same administrative appeal rights.

⁴ A review of the Connect System reveals that two of these Plaintiffs have received benefits paid via direct deposit. An additional Plaintiff has initiated an appeal that is being processed accordingly.

1971). Failure to exhaust administrative remedies deprives the trial court of subject matter jurisdiction. *See Dist. Bd. of Trs. of Broward Community College v. Caldwell*, 959 So. 2d 767, 771 (Fla. 4th DCA 2007). Florida courts have consistently held that where administrative remedies are available, it is improper to seek relief in the circuit court before those remedies are exhausted. *See Bankers Ins. Co. v. Florida Residential Property & Cas. Joint Underwriting Ass'n.*, 689 So.2d 1127, 1129 (Fla. 1st DCA 1997). “As a general proposition, the doctrine of exhaustion of administrative remedies precludes judicial intervention where administrative remedies can afford the relief a litigant seeks.” *Norman v. Ambler*, 46 So.3d 178, (Fla. 1st DCA 2010).

WHEREFORE, Defendants respectfully request that this Court dismiss with prejudice the Plaintiff’s Second Amended Complaint for Writ of Mandamus, award costs as allowed by law, and grant all other relief it deems just and proper.

Certificate of Service

I hereby certify that on May 4th, 2020, a true and correct copy of the foregoing was electronically filed with the court via the court’s e-filing system and also e-mailed to the counsel or persons listed on the attached service list.

/s/ James W. Uthmeier
James W. Uthmeier, Esq.
Florida Bar No. 113156
Executive Office of the Governor
The Florida Capitol
Office of General Counsel
Room 209
400 S. Monroe Street
Tallahassee, FL 32399
Tel. (850) 717-9310
James.Uthmeier@eog.myflorida.com

/s/ Rebekah Davis
Rebekah A. Davis, Esq.
Florida Bar No. 42339
Brandon White, Esq.
Florida Bar No. 84788
Florida Department of Economic
Opportunity
107 E. Madison Street
Caldwell Building, MSC-110
Tallahassee, FL 32399
Tel. (850) 245-7150
Fax. (850) 921-3230
Rebekah.Davis@deo.myflorida.com
Brandon.White@deo.myflorida.com

DEOeservice@deo.myflorida.com

Deputy General Counsel for Governor
Ron DeSantis

Attorneys for Defendant Florida Department
of Economic Opportunity

Service List:

Gautier Kitchen
Kitchen Law Firm
103 North Meridian Street
Tallahassee, FL 32301

Marie Mattox
203 North Gadsden Street
Tallahassee, FL 32301

Cc: Honorable Angela Dempsey
2nd Judicial Circuit – Leon County
301 South Monroe Street
Tallahassee, FL 32301