STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN UNEMPLOYMENT INSURANCE APPEALS COMMISSION

In the Matter of:

Appeal Nos. 20-028282-263102W,
20-024143-262734W

Claimant Christine M. Holifield,
SSN: [redacted]

Case No. 24375736
ALJ Lindsay Wilson

MOTION TO FILE AMICUS BRIEF

Now comes the Michigan Poverty Law Program (MPLP) and requests permission to file an amicus brief in this case, pursuant to Rule 792.1142(8). In further support of this Motion, Amicus says:

1. Rule 7.92.11423 provides that, "[w]here the parties are permitted to submit written argument pursuant to this rule and section 34 of the Act," this Commission "may consider requests for permission to submit an amicus brief from persons or organizations that are not parties" to this matter.
2. Additionally, the Commission's Notice of Matter of First Impression in this matter—Dockets 262734W and 263102W—states that the Commission "may consider amicus briefs" from nonparties.
3. The Amicus is not a party to this matter.
4. MPLP seeks permission to submit an amicus brief to ensure that eligible low-income, disabled workers can apply for and receive Pandemic Unemployment Assistance (PUA) without undue delays or unwarranted denials. It also seeks to ensure that their rights are protected under the Americans with Disabilities Act. Many disabled workers applying for unemployment benefits cannot afford to hire a private attorney and may lack the

resources or knowledge necessary to appeal a denial of benefits. In requesting leave to participate as an amicus in this case, MPLP seeks to advance the interests of low-income Michiganders and others in guaranteeing that all people receive the benefits and protections that they are owed. MPLP is committed to providing fair and equal access to the justice system for all people in Michigan.

5. MPLP's amicus brief is submitted for filing with this motion.

WHEREFORE, the Michigan Poverty Law Program respectfully requests permission to file an amicus brief in this matter.

Respectfully submitted,

Dated: April 19, 2021

/s/Lisa Ruby
Lisa Ruby (P46322)
MICHIGAN POVERTY LAW PROGRAM
15 South Washington St.
Ypsilanti, MI 48197
Phone: 734-998-6100 x617
lruby@mplp.org

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Brief of Amicus Curiae

Michigan Poverty Law Program

Lisa Ruby (P46322)
MICHIGAN POVERTY LAW PROGRAM
15 South Washington St.
Ypsilanti, MI 48197
Phone: 734-998-6100 x617
lruby@mplp.org

April 19, 2021

Counsel for Amicus
Michigan Poverty Law Program

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Michigan Poverty Law Program (MPLP) is a cooperative effort of Legal Services of South Central Michigan and the University of Michigan Law School. MPLP provides state support services to local legal services programs and other poverty law advocates. Our goals are: to support the advocacy of field programs; to coordinate advocacy for the poor among the local programs; and to assure that a full range of advocacy continues on behalf of the poor. MPLP also advocates and represents individuals in areas such as disability benefits, unemployment insurance, access to health care, low-income housing, consumer protections, predatory lending and foreclosure prevention.

STATEMENT OF QUESTIONS PRESENTED

1. Title II of the Americans with Disabilities Act (ADA) requires that State and local governments give people with disabilities an equal opportunity to benefit from all of their programs, services, and activities, including unemployment insurance. The majority of disabled workers work part-time or work as independent contractors. They are not eligible for state unemployment insurance, the precise group of workers that PUA seeks to assist. Does subjecting only this protected class of disabled individuals to additional fact-finding to determine eligibility for PUA violate the ADA?

The UIA's answer:	No.
Holifield's answer:	Yes.
MPLP's answer:	Yes

2. The CARES Act grants unemployment benefits to otherwise eligible individuals seeking only part-time employment and the self-employed, workers who are not eligible for state unemployment benefits. The Michigan Employment Securities Act does not define full-time work. There is no statutory framework for part-time and self-employed workers to attest to their ability to perform full-time work. Is the ability to work full-time an unnecessary eligibility criterion for workers applying for PUA and whose attachment to the work force is not contemplated by state law?

The UIA's answer:	No
Holifield's answer:	Yes.
MPLP's answer:	Yes

INTRODUCTION

The goal of Pandemic Unemployment Assistance (PUA) is to provide emergency unemployment benefits to those who would be otherwise excluded, those who cannot turn to state unemployment because they are not eligible. The Agency's position in this case directly contradicts this goal and only serves to harm those whom PUA seeks to protect. While this case is about the eligibility of one woman, it ultimately impacts hundreds, if not thousands, of vulnerable Michiganders' access to federal unemployment benefits, and the right to freedom from discrimination based on disability. Appellant Christine Holifield is just one of the numerous workers facing economic uncertainty in the wake of the pandemic, individuals who have lost a source of income and are relying on new federal benefits to avoid homelessness and hunger. Unless the Commission takes the opportunity to address the egregious errors that occurred in this case, Ms. Holifield and countless others like her, workers with disabilities, will be at a greater risk of injury than their able-bodied counterparts.

This case is illustrative of the state's longstanding belief that eligibility for both Social Security Disability benefits (SSDI) and unemployment insurance is not possible. There is a misconception that to be eligible for SSDI, a claimant is not able to work at all, or at least not full-time. This idea is misguided, at best, and at worst, discriminatory. Disabled individuals can and do work while maintaining their eligibility for SSDI benefits. In *Ross*, the Agency conceded that "there is no per se disqualification for unemployment benefits on the basis of an individual's receipt of SSDI benefits."[1] Yet the ALJ's Findings of Fact here includes the statement that "the claimant is currently receiving Social Security Disability Insurance (SSDI). Based on her receipt

[1] *Ross v AcrisureP1, LLC*, unpublished per curiam opinion of the Michigan Court of Appeals, issued August 14, 2014 (Docket No. 315347).

of SSDI, the claimant is only able to work part-time."[2] Such a finding indicates a gross misunderstanding of Social Security law and how eligibility is both determined and maintained. It is one example of what results when the Agency attempts to apply a hybrid of disability and unemployment law when assessing a disabled individual's eligibility for unemployment. To subject SSDI recipients to this additional scrutiny, when the CARES Act and PUA guidance are clear that part-time workers are eligible for unemployment benefits, places an insurmountable and unjust burden on a vulnerable population that both state and federal laws have historically sought to protect.

[2] Hearing Decision, page 4.

ARGUMENT

I. The Agency's contention that recipients of SSDI must be subjected to additional scrutiny that no other group of applicants has to endure violates the American with Disabilities Act.

Assessing an SSDI recipient's ability to work full-time is as intricate as it is elaborate. It was also not a question for the thousands of disabled workers who were encouraged to apply for PUA and told, repeatedly, that the federal program would grant benefits to workers, including self-employed, gig and low-wage workers who could no longer work because of the pandemic, who did not already qualify for state unemployment benefits. Nowhere did it state that disabled individuals need not apply.

The purpose of the Americans with Disabilities Act (ADA) is to eliminate unwarranted discrimination against individuals with disabilities in order to guarantee those individuals equal opportunity.[3] Title II of the ADA prohibits State and local governments from denying qualified individuals with a disability the benefits and programs of the state.[4] The ADA defines a "qualified individual with a disability" as one who with or without reasonable modifications to rules, policies, or practices meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.[5] A public entity may not impose eligibility criteria for participation in its programs, services, or activities that either screen out or **tend to screen out** persons with disabilities, unless it can show that such requirements are necessary for the provision of the service, program, or activity.[6] Clearly the ability to apply for and receive unemployment benefits falls under the purview of the ADA, and

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[3] 42 U.S.C.S. § 12101(a)(8), (b)(1) (2002).
[4] 42 U.S.C.S. § 12132 (2002).
[5] 42 U.S.C.S. § 12131(2).
[6] The Americans with Disabilities Act, Title II Technical Assistance Manual, II-3.5100, *available at* https://www.ada.gov/taman2.html, (accessed on April 18, 2021), emphasis added.

Ms. Holifield is a qualified individual. It is not disputed that she meets the essential eligibility requirements for PUA: she is a part-time worker who lost her job due to a COVID-related reason. The only impediment to her receiving PUA is the Agency's argument that she must also attest to being able to work full-time. Any rule or policy adopted by the state that treats individuals with disabilities differently from their able-bodied cohorts, resulting in a delay or denial of unemployment benefits, is not permissible, and this policy is inclined to prevent SSDI recipients from receiving benefits to which they are entitled.

The position taken by the Agency does exactly what the ADA seeks to prevent: it creates a detour to eligibility that impacts SSDI recipients much differently than those not disabled. Applicants who are not SSDI recipients, and thus not seen as disabled, are not second-guessed when they answer "Yes" to the able and available question. Their bodies and minds are viewed as being sound. The policy and practices being put forth by the Agency act as barriers, almost blockades, to access. The disparate impact on SSDI recipients is clear, regardless of intent. The ADA is applicable where a facially neutral policy or statute affects disabled individuals in a significantly discriminatory manner.[7] The Agency argues that SSDI recipients could be eligible for PUA if their answers are found to be satisfactory, but delays in state unemployment investigations lead to a *de facto* denial of benefits and irreparable harm. This unnecessary hurdle to accessing benefits mocks the clear intent of state unemployment law.

The Agency's position in this case is anathema to the drafters of Michigan unemployment law. The legislature felt so strongly about the need to protect its workers during economic downturns that it codified public policy within the Michigan Employment Security Act:

[7] *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173 (6th Cir. 1996).

> Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is a subject of general interest and concern which requires actions by the legislature to prevent its spread and to lighten its burden which so often falls with crushing force upon the unemployed worker and his family, to the detriment of the welfare of the people of this state.[8]

To single out disabled workers is to focus on a poor and economically unstable population, most of whom struggle to pay their bills each month. People with disabilities face significant labor market barriers, making flexible part-time work and self-employment viable options to supplement income. Additional and unwarranted challenges to their eligibility for PUA, a program built to assist this very group, will lead to additional economic uncertainty, hunger, and homelessness.

A. Inspecting SSDI recipients under the guise of fact-finding is illegal, unwarranted and wrong.

PUA was enacted to protect individuals who would not otherwise be eligible for state unemployment benefits, people like Ms. Holifield. Yet the Agency argues that despite being a self-employed, part-time worker, the exact type of worker that PUA was created to protect, she must attest that she is able to work full-time. The ALJ erroneously concluded that because Ms. Holifield is a recipient of SSDI, she is only able to work part-time. This sheds light on the rationale behind the policy being asserted: disabled individuals need not apply. There is no other group being targeted and questioned in this manner.

Ability to work is only part of the disability assessment conducted within the Social Security Administration (SSA). To be found eligible for SSDI benefits, applicants must go through a five-step sequential evaluation.[9] The process is involved, intentional, and highly specialized. And it is long. Most applicants are denied, then appeal, then wait and wait and

[8] MCL 421.2
[9] 20 CFR 404.1505

wait some more. SSA statistics for the most recent year available, 2018, show that 76% of disability applications were denied.[10] For the fiscal year ending in March 2021, the average wait for an administrative hearing and decision was 266 days.[11] When finally scheduled, evidentiary hearings are robust, typically involving testimony from both medical and vocational experts.[12] Establishing disability within this system is a marathon, and no beneficiary willingly jeopardizes it. By asking SSDI recipients to attest to their ability to work full-time, after they have gone through this rigorous process, is nothing short of terrifying. The loss of SSDI cannot be risked. The threat of losing future income is visceral, the possible outcome nauseating, and for some, the fear is insurmountable. Instead, disabled PUA applicants abandon the process, afraid to avail themselves of the benefit, the benefit being given to every, single other group of part-time and self-employed workers.

Many SSDI recipients can work, and those who can are encouraged by the SSA to do so. SSDI recipients can take advantage of the Trial Work Period, a program offered by the SSA where disabled individuals can work full-time for nine months in a rolling 60-month period without losing benefits.[13] Additionally, SSDI recipients can earn up to $1,310 per month and remain eligible for disability-based benefits.[14] A final determination by the SSA that an individual is disabled does not label them as unable to work full-time. Depending on the day, many disabled individuals can work full-time. Even an Unsuccessful Work Attempt can last

[10] Annual Statistical Report on the Social Security Disability Insurance Program, 2019. Table 61, *available at* https://www.ssa.gov/policy/docs/statcomps/di_asr/2019/sect04.html#table60 (accessed on April 18, 2021)
[11] Social Security, Hearings and Appeals, *available at* https://www.ssa.gov/appeals/DataSets/01_NetStat_Report.html (accessed on April 18, 2021)
[12] SSA Program Operations Manual DI 25015.030, *available at* https://secure.ssa.gov/apps10/poms.nsf/lnx/0425015030 (accessed on April 18, 2021)
[13] SSA Program Operations Manual DI 13010.035, *available at* https://secure.ssa.gov/apps10/poms.nsf/lnx/0413010035 (accessed on April 18, 2021)
[14] SSA Program Operations Manual Systems DI 10501.015, *available at* https://secure.ssa.gov/poms.nsf/lnx/0410501015 (accessed on April 18, 2021

up to six months and does not impact a finding of disability.[15] But when the cursor is hovered over the information box during the unemployment certification process, these helpful explanations of what ability to work actually means for SSDI recipients is nowhere to be found.

II. There is no definition of full-time work in Michigan law, it varies across industries, and has never been applied to workers who are not eligible for state unemployment insurance.

The Fair Labor Standards Act (FLSA) states that full-time work is generally to be determined by the employer.[16] The IRS definition states that a full-time employee is, for a calendar month, an employee employed on average at least 30 hours of service per week, or 130 hours of service per month.[17] Michigan unemployment law requires claimants to be able to work full-time, yet it does not define what that means.[18] In practice, the designation is necessary in the employer/employee relationship to dictate what, if any, benefits are to be provided. It also creates an understanding when someone applies for a job or places a want ad. Because state unemployment laws preclude eligibility for part-time workers or the self-employed, a strict definition of full-time does not exist in the Michigan Employment Security Act. It is not part of the statutory scheme. Simply put, the term "full-time work" is a place holder, a thing to be referenced when defining qualifying employment for state benefits. The Agency is invested in assuring that a state unemployment recipient remains attached to the workforce, and for state unemployment eligibility, that attachment is full-time. This same attachment does not exist for PUA eligibility.

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[15] SSA Program Operations Manual System DI 11010.145
[16] Fair Labor Standards Act Advisor, *available at* https://webapps.dol.gov/elaws/faq/esa/flsa/014.htm?_ga=2.25979453.1864209314.1618249759-654933895.1618249759 (accessed on April 18, 2021)
[17] Identifying Full-time Employees, *available at* https://www.irs.gov/affordable-care-act/employers/identifying-full-time-employees, (accessed on April 18, 2021)
[18] MCL 421.28(1)(c)

In contrast, under PUA, qualifying employment can be part-time work and/or self-employment. The inquiry into what is full-time work for those who are not employed in this way leads down an endless tunnel. What do we call a plumber who plumbs 20 hours per week and then bills during another 15 while watching television in her pajamas? How about a self-employed roofer who chooses not to roof in the rain when his back is acting up but can put in a 12-hour day when the sun is shining? Or the artist who sells her work at flea markets during the summer and works in her studio when inventory is low? Self-employment and part-time work mean setting your own hours and having a flexible schedule, a vastly different attachment to the workforce than exists with full-time, W-2 employment. Questions pertaining to the ability to work full-time are appropriate and quantifiable only when the qualifying attachment to the workforce is the same.

CONCLUSION AND RELIEF REQUESTED

The additional scrutiny targeted at SSDI recipients by the Agency creates a disparate impact on disabled workers seeking to qualify for PUA benefits. Ms. Holifield's attachment to the workforce is, and has been, part-time, and any inquiry into her ability to perform full-time work does not fit into the statutory scheme of the MESA. She respectfully requests that the Commission reverse the ALJ's decision.

Respectfully submitted,

/s/ Lisa Ruby
Lisa Ruby (P46322)
Michigan Poverty Law Program
Attorney for Amicus Curiae
15 S. Washington
Ypsilanti, MI 48197
734-998-6100 et. 617
lruby@mplp.org

April 19, 2021

PROOF OF SERVICE

I, Lisa Ruby, hereby certify that on April 19, 2021, I served a copy of Appellant's Motion to File Amicus Curiae and Brief of Amicus Curiae upon the parties identified below:

Unemployment Insurance Agency
3024 W. Grand Blvd.
Detroit, MI 48202
Via regular mail
Appellee

Rebecca M. Smith
Assistant Attorney General
Michigan Unemployment Insurance Agency
Labor Division
P.O. Box 30736
Lansing, Michigan 48909
Via email to SmithR72@michigan.gov

/s/Lisa Ruby
Lisa Ruby