

insurance benefit payments a worker could receive by \$300 a week from December 27, 2020 to September 6, 2021. See 15 U.S.C. § 9023, further amended by the American Rescue Plan Act of 2021 ("ARPA"), Pub L. No. 117-2, §§ 9011, 9013, 9016 (March 11, 2021). The CARES Act requires the U.S. Secretary of Labor to provide CARES Act Benefits through agreements with the States and specifically provides that agreements regarding the receipt of PEUC and FPUC benefits may be terminated by a state upon 30 days' written notice. 15 U.S.C. §§ 9023(a), 9025(a).

On May 13, 2021, Governor Mike DeWine announced that Ohio will end its participation in the FPUC program effective June 26, 2021.¹ As a result of this announcement, plaintiffs, who allege they are all recipients of FPUC benefits filed the instant action for Declaratory Judgment, Injunctive Relief and a Writ of Mandamus against Governor DeWine and Matt Damschroder, in his official capacity as Director of the Ohio Department of Job and Family Services. Simultaneous to the filing of the complaint, plaintiffs moved the court for a temporary restraining order and preliminary injunction. Within the motion, plaintiffs argue they are entitled to a preliminary injunction enjoining the State of Ohio from prematurely terminating their FPUC benefits.

Law and Analysis

The party requesting the preliminary injunction must show that “(1) there is a substantial likelihood that the plaintiff will prevail on the merits, (2) the plaintiff will suffer irreparable injury if the injunction is not granted, (3) no third parties will be unjustifiably harmed if the injunction is granted, and (4) the public interest will be served

¹ It is the Court's understanding that the State of Ohio is continuing to participate in PUA and PEUC benefits through the expiration of the same on or about September 6, 2021.

by the injunction.” *Procter & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267 (1st Dist.2000). Each of the forgoing elements must be established by a showing of clear and convincing evidence. *Vanguard Transp. Sys. Inc. v. Edwards Transfer & Storage Co.*, 109 Ohio App.3d 486, 790 (10th Dist.1996). Clear and convincing evidence is a degree of proof that “will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *DHSC, LLC v. Ohio Dep’t of Job and Family Servs.*, 2012-Ohio-1014, ¶40 (10th Dist.).

Substantial Likelihood of Success on the Merits – R.C. Chapter 4141

The bulk of the parties’ argument addresses the first element of an injunction – there is a substantial likelihood that the plaintiffs will prevail on the merits. Accordingly, the Court will start there. Pursuant to the complaint and motion, R.C. 4141.43(I) and R.C. 4141.45 provide the basis for the injunctive relief plaintiffs seek. R.C. 4141.43(I) provides in its entirety:

The director shall cooperate with the United States department of labor to the fullest extent consistent with this chapter, and shall take such action, through the adoption of appropriate rules, regulations, and administrative methods and standards, as may be necessary to secure to this state and its citizens all advantages available under the provisions of the ‘Social Security Act’ that relate to unemployment compensation, the ‘Federal Unemployment Tax Act,’ (1970) 84 Stat. 713, 26 U.S.C.A. 3301 to 3311, the ‘Wagner-Peyser Act,’ (1933) 48 Stat. 113, 29 U.S.C.A. 49, the ‘Federal-State Extended Unemployment Compensation Act of 1970,’ 84 Stat. 596, 26 U.S.C.A. 3306, and the ‘Workforce Innovation and Opportunity Act,’ 29 U.S.C.A. 3101 et seq.

R.C. 4141.45 states, “[a]ll the rights, privileges, or immunities conferred by sections 4141.01 to 4141.46, inclusive, of the Revised Code, or by acts done pursuant thereto, shall exist subject to the power of the general assembly to amend or repeal such sections at any time.”

In reliance on this language, plaintiffs contend the statutes mandate that defendants continue the State's participation in the FPUC program. Defendants, on the other hand, submit that the terms of the statutes do not support plaintiffs' position.

When the Court considers the meaning of a statute, the first step is to determine whether the statute is "plain and unambiguous." *State v. Hurd*, 89 Ohio St.3d 616, 618, 2000-Ohio-2 (2000). If "the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation," because "an unambiguous statute is to be applied, not interpreted." *Sears v. Weimer*, 143 Ohio St. 312 (1944), paragraph five of the syllabus. Ambiguity means that a statutory provision is "capable of bearing more than one meaning." *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, ¶ 16. Without "an initial finding" of ambiguity, "inquiry into legislative intent, legislative history, public policy, the consequences of an interpretation, or any other factors identified in R.C. 1.49 is inappropriate." *Id.*; *State v. Brown*, 142 Ohio St.3d 92, 2015-Ohio-486¶ 10. The Court "do[es] not have the authority" to dig deeper than the plain meaning of an unambiguous statute "under the guise of either statutory interpretation or liberal construction." *Morgan v. Ohio Adult Parole Auth.*, 68 Ohio St.3d 344, 347, 1994-Ohio-380 (1994). Indeed, were the Court to ignore the unambiguous language of a statute, or if find a statute to be ambiguous only after delving deeply into the history and background of the law's enactment, it would "invade the role of the legislature: to write the laws." *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, ¶ 8

Applying these principles, the Court finds that plaintiffs have not met their burden of establishing a substantial likelihood of success on the merits by clear and convincing

evidence. R.C. 4141.45 simply gives the General Assembly the power to amend or repeal the provisions of R.C. 4141.01 to R.C. 4141.46 at any time. And R.C. 4141.43(I), by its plain and unambiguous terms, is limited to:

all advantages available under the provisions of the ‘Social Security Act’ that relate to unemployment compensation, the ‘Federal Unemployment Tax Act,’ (1970) 84 Stat. 713, 26 U.S.C.A. 3301 to 3311, the ‘Wagner-Peyser Act,’ (1933) 48 Stat. 113, 29 U.S.C.A. 49, the ‘Federal-State Extended Unemployment Compensation Act of 1970,’ 84 Stat. 596, 26 U.S.C.A. 3306, and the ‘Workforce Innovation and Opportunity Act,’ 29 U.S.C.A. 3101 et seq.

The wording chosen by the Ohio General Assembly clearly does not include the CARES Act. Moreover, the Court finds that the provisions of the Social Security Act that relate to unemployment compensation are not applicable. Such provisions are not what afford the advantage that Ohio’s citizens are seeking here; rather, the FPUC extended benefits were undeniably created by the CARES Act. Moreover, the FPUC benefits are funded by the general fund of the Treasury as opposed to accounts established under the Social Security Act. See 15 U.S.C. § 9023(d)(3) (There are appropriated from the general fund of the Treasury, without fiscal year limitation, such sums as may be necessary for purposes of this subsection.) Accordingly, the FPUC benefits are wholly created and administered outside of the Social Security Act thereby abrogating any application of R.C. 4141.43(I).

Beyond the forgoing, the Court also notes that the mandate of R.C. 4141.43(I) sought to be enforced by plaintiffs is limited to the director of the Ohio Department of Job and Family Services, and specifically, his adoption of appropriate rules, regulations, and administrative methods and standards. The actions taken by Governor DeWine to terminate the State’s agreement with the Secretary of Labor with respect to FPUC benefits

do not qualify as the adoption of appropriate rules, regulations, and administrative methods and standards. In other words, the statute does not contemplate the Court's enforcement of voluntary agreements like the one at issue here.

Simply put, because the clear and unambiguous language of R.C. 4141.45 and R.C. 4141.43(I) do not place an obligation on Governor DeWine to continue participation in the FPUC program, the Court finds plaintiffs cannot meet their burden of proving a substantial likelihood of success on the merits by clear and convincing evidence. Therefore, the Court further finds that plaintiffs are not entitled to a preliminary injunction or temporary restraining order.

Finally, plaintiffs' citation to the decisions out of Arkansas, Indiana and Maryland do not operate to alter this Court's findings. Such decisions are neither binding nor persuasive. The statutes at issue in Indiana and Maryland are broader than R.C. 4141.43(I). The burden of proof for a preliminary injunction is greater in Ohio. See *Ind. High Sch. Athletic Ass'n, Inc. v. Martin*, 731 N.E.2d 1, 7 (Ind. App. 2000) (elements of preliminary injunction must be proven by more than a scintilla and less than preponderance); *Air Lift, Ltd. v. Board of County Comm'rs*, 262 Md. 368, 394 (1971) (applicant for a preliminary injunction must present strong prima facie evidence of the facts and must prove material allegations by a preponderance of the evidence); *Custom Microsystems Inc. v. Blake*, 344 Ark. 536, (2001) (the test for determining the likelihood of success is whether there is a reasonable probability of success in the litigation). And finally, the benefits being terminated are different. Accordingly, the Court declines to follow these distinguishable cases.

Substantial Likelihood of Success on the Merits – Defendants' Authority to Act

Plaintiffs additionally argue that they have a substantial likelihood of success on the merits because Governor DeWine acted outside the authority granted to him under the Ohio Constitution. Conversely, defendants argue that Governor DeWine had constitutional authority to so act.

Section 5, Article III of the Ohio Constitution says: "The supreme executive power of this State shall be vested in the governor." Although the phrase "executive power" has not been specifically defined, it appears to be well established in Ohio law that the Governor not only has the powers necessary to perform the duties specifically required of him by the Constitution and statutes, but he is also empowered to act in the interest of the state and in ways not specified, so long as his actions do not contravene the Constitution or violate laws passed by the legislature within its constitutional authority. *State ex rel. S. Monroe & Son Co. v. Baker* (1925), 112 Ohio St. 356, 371 (1925).

As discussed above, Governor DeWine's actions to terminate the State's participation in FPUC benefits are not in conflict with R.C. 4141.43(I) or R.C. 4141.45. In point of fact, R.C. 4141.45 clearly contemplates the General Assembly's authority to amend R.C. 4141.43(I). Had the General Assembly taken it upon itself to exercise such power, and amended the statute to include the CARES Act, this would be a very different decision. Without a provision in the law which would preclude Governor DeWine from terminating an agreement for FPUC benefits, this Court cannot find that plaintiffs have established by clear and convincing evidence that Governor DeWine acted outside the scope of his authority by doing so here. Therefore, the Court further finds that plaintiffs are not entitled to a preliminary injunction or temporary restraining order.

Plaintiffs' Irreparable Injury

Though the inquiry could end here, the Court would be remiss not to address the element that plaintiffs did prove by clear and convincing evidence – plaintiffs' irreparable injuries.

Plaintiff Candy Bowling used the weekly \$300.00 FPUC benefit to pay for household and medical expenses including the necessary expenses of a service animal. Bowling Aff. at ¶8. Without the FPUC compensation, Plaintiff Bowling is unable to meet these basic living expenses. *Id.* at ¶10. The same is true for Plaintiff David Willis and countless other Ohioans. And as aptly stated in plaintiffs' reply brief, any delay in the issuance FPUC benefits months or years down the road were plaintiffs to ultimately prevail does not pay for rent and food today. To be sure, this Court finds plaintiffs' loss of benefits as a result of Governor DeWine's actions to terminate the State's participation in FPUC to be a significant and irreparable injury. To argue otherwise is disingenuous.

Even with such a significant and irreparable loss, the Court is bound by the laws of the State of Ohio. In this case, said laws mandate that plaintiffs not only establish their irreparable injuries, but also the substantial likelihood of success by clear and convincing evidence. That has not occurred here.

Conclusion

As with all decisions to be made during the pandemic, this is not one that can be taken lightly. The Court is aware of, and sympathetic to, the thousands of Ohioans without work and in desperate need of any assistance available; however, the injuries suffered by said Ohioans, including plaintiffs here, are but one element for the Court's consideration on a motion for a preliminary injunction. Indeed, the Court simply cannot

legislate from the bench and overlook the clear terms of R.C. 4141.45 and R.C. 4141.43(I). Accordingly, for the reasons set forth herein, the Court finds plaintiffs' motion for a temporary restraining order and preliminary injunction is not well-taken, and hereby **DENIES** the same.

Though plaintiffs' claims for declaratory judgment and a writ of mandamus remain pending, the Court finds that pursuant to R.C. 2505.02 and Civ.R. 54(B) **this is a final appealable order; there is no just reason for delay.**

IT IS SO ORDERED.

Electronic notification to counsel of record

Franklin County Court of Common Pleas

Date: 07-29-2021

Case Title: THE STATE OF OHIO ET AL -VS- MICHAEL DEWINE ET AL

Case Number: 21CV004469

Type: DECISION/ENTRY

It Is So Ordered.

The image shows a handwritten signature in black ink that reads "Michael J. Holbrook". The signature is written over a blue circular official seal. The seal contains the text "COMMON PLEAS" at the top, "FRANKLIN COUNTY, OHIO" around the inner edge, and "IN GOD WE TRUST" and "ALL THINGS ARE POSSIBLE" around the bottom edge.

/s/ Judge Michael J. Holbrook