NO. 102150-0

SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL WEISMAN,

PETITIONER,

V.

STATE OF WASHINGTON, DEPARTMENT OF EMPLOYMENT SECURITY, ET AL.,

RESPONDENTS.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The unpublished Court of Appeals decision involves the straightforward application of the plain language of the Treasury Offset Program, 26 U.S.C. § 6402, to the specific, uncontested facts of this case. *Weisman v. Dep't of Emp. Sec., et al.*, No. 83893-8-I (Wash. Ct. App. June 5, 2023) (unpublished).

Federal law authorizes states to recoup "covered unemployment compensation debt"—i.e., the erroneous payment of unemployment benefits due to an individual's "fraud or a failure to report earnings" that has become final and is past due—by having the U.S. Treasury Department offset the money from the individual's income tax refund.

Michael Weisman failed to report his earnings for two of the weeks he claimed unemployment benefits, and, as a result, the Employment Security Department (ESD) erroneously overpaid him $993 in benefits. ESD notified Weisman of the overpayments and the reasons for them, and informed him how to refund the money or appeal the determinations. When

Weisman did not pay or appeal by the deadline, the overpayments became final, and ESD referred the debt to the Treasury Department.

The Court of Appeals properly held that ESD complied with federal law and due process in recovering the benefits Weisman was not entitled to keep. It further made the unremarkable observation that "failure to report earnings" does not require an intentional misrepresentation of one's earnings for an unemployment debt to be recoverable using the Treasury Offset Program. There is no conflict with any authority, and this case does not involve a significant constitutional question or issue of substantial public interest. RAP 13.4(b)(1), (3), and (4). The Court should deny review.

II. COUNTERSTATEMENT OF THE ISSUES

1. Is the Court of Appeals holding that "failure to report earnings" does not require intentional misrepresentation

consistent with plain statutory language, legislative history, and federal guidance?

2. Did the Court of Appeals correctly conclude that ESD complied with federal law and due process when it provided Weisman notice of the impending tax refund offset, the notice mirrored all applicable provisions of federal law, and ESD afforded him 60 days to pay the debt or show the offset would be unlawful?

III. COUNTERSTATEMENT OF THE CASE

A. The SharedWork Program in 2020

In June 2020, to address a projected budget shortfall caused by the COVID-19 pandemic, the Governor directed more than 40,000 state employees to take one furlough day per week in July and one furlough day per month through the fall.[1]

[1] News Release, Gov. Jay Inslee, *Inslee Announces Cancellation of Some State Employee Raises and Need for Furloughs* (Jun. 17, 2020), https://governor.wa.gov/news/2020/inslee-announces-cancellation-some-state-employee-raises-and-need-furloughs; Directive of the Governor 20-08 (Jun. 17, 2020),

Impacted agencies were to seek an approved SharedWork plan with ESD to offset lost wages.[2]

The SharedWork Compensation Program allows employers to retain workers at reduced hours during an economic downturn, rather than instituting layoffs, and the employees can receive partial unemployment benefits. RCW 50.60.010, .030(3); WAC 192-250-010(2). The Legislature adopted Washington's SharedWork program in 1983, and ESD was well situated to process the claims. Laws of 1983, ch. 207, § 1 (codified at RCW 50.60.010). *See* Pet'rs' Reply Br. 2-5. It had previously approved and processed thousands of employers' SharedWork plans and employee claims, and in 2020 it published and updated numerous public communications to assist claimants with filing claims.[3]

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https://www.governor.wa.gov/sites/default/files/directive/20-08%20Furloughs%20and%20General%20Wage%20Increases%20%28tmp%29.pdf.

[2] *Id.*

[3] Chad Pearson, *Shared Work Program still helping more than 700 Washington businesses*, Emp. Sec. Dep't: Emp. Res.

After an employer's SharedWork plan is approved, it is then the employees' responsibility to file accurate weekly claims. RCW 50.60.030; WAC 192-250-010(4); WAC 192-250-035(2); WAC 192-140-005. The amount of benefits a SharedWork claimant can receive each week is "the percentage of reduction in the individual's usual weekly hours of work" multiplied by the person's regular weekly benefit amount if they were fully unemployed. RCW 50.60.100(1). ESD pays benefits based on the employee's report of the number of hours worked and wages earned each week, among other eligibility criteria. RCW 50.60.100; WAC 192-250-035.

(Dec. 18, 2015), https://esd.wa.gov/about-employees/shared-work-program/Article3. (700 businesses used SharedWork Program in 2015); Patricia Cohen, *This Plan Pays to Avoid Layoffs. Why Don't More Employer's Use It?*, N.Y. TIMES (Aug. 20, 2020), https://www.nytimes.com/2020/08/20/business/economy/jobs-work-sharing-unemployment.html (688 business participated between March and August 2019).

ESD provides the employer with a report of payments ESD made to its employees, and the employer must report any discrepancies to ESD. WAC 192-250-025(6).

B. Weisman Applied for Unemployment Benefits Under the SharedWork Program and Failed to Report Earnings for Two Weeks

Michael Weisman worked as a staff attorney for the Washington State Department of Health. CP 2, ¶ 3.1. He filed claims for unemployment benefits under the SharedWork Program for seven weeks in 2020. CP 3, ¶ 3.4. His "usual weekly hours of work" were 40, and his regular weekly benefit amount, had he been fully unemployed, was $790. CP 254, ¶ 5; 260-62. During the seven weeks Weisman filed claims for benefits, his usual hours were reduced by eight hours per week—or 20 percent—and he worked the other 32 hours. CP 67, ¶ 3.4; 254, ¶ 5. Thus, had he accurately reported his hours and wages, he should have been eligible for $158 of benefits each week—or 20 percent of $790.

But for two of the weeks Weisman filed claims, he reported to ESD that he worked zero hours and earned no wages, when in fact he worked 32 hours and was paid for them. CP 255, ¶¶ 7, 9; 264-73.[4] He accurately reported his hours and wages for the other five weeks. Based on Weisman's failure to accurately report his hours and wages for those two weeks, ESD paid him his full weekly benefit amount, overpaying him by a total of $993 for the two weeks. *Weisman*, slip op. at 3.

Weisman's employer submitted a Weekly Claim Correction form for one of the weeks. CP 255-56, ¶ 10; 275. Weisman signed the form, acknowledging that he had actually

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[4] For the week ending July 4, Weisman reported only that he received eight hours of holiday pay. CP 255, ¶ 7; 264-68. He otherwise reported that he worked no hours and received no wages. CP 255, ¶ 7; 264-68. As a result, ESD paid Weisman his full weekly benefit amount of $790, resulting in a $632 overpayment. CP 255, ¶ 7; 268.

Similarly, for the week ending July 25, Weisman reported only that he received eight hours of sick pay. CP 255, ¶ 9; 270-73. He again failed to report that he worked for his employer that week or was paid other wages. CP 255, ¶ 9; 270-73. Consequently, ESD paid Weisman $519, resulting in a $361 overpayment for that week. CP 255, ¶ 9; 273.

worked 32 hours that week and confirmed: "I agree with the information my employer reported. I understand if I was overpaid I am liable for repayment." CP 275. For the other week, ESD issued Weisman an Issue Fact Finding form to resolve the discrepancy. CP 256, ¶ 12; 284-86. Weisman acknowledged that he also worked 32 hours that week and that if he was paid too much and it was his fault, he would have to return the money. *Id.* In a follow-up call with an ESD customer service representative, Weisman explained that he "misunderstood" the online claims system but reaffirmed that he worked and was paid for 32 hours each week in question. CP 256, ¶ 13; 289-94.

C. ESD Issued Overpayment Determinations, Which Weisman Did Not Appeal

ESD then issued Weisman two overpayment determination notices, one for each week he failed to report earnings. CP 256-57, ¶¶ 14, 16; 296-304. The notices informed Weisman that he had been overpaid benefits because "you didn't report your gross earnings when you submitted your weekly claim[s]." CP 296, 301. They stated that he was liable to repay

the benefits because he was "at fault for the overpayment." CP 296, 301. The notices specified: 1) the amounts he was paid, 2) the amounts he was actually entitled to receive, and 3) the corresponding amounts he was overpaid and had to refund. CP 299, 304.

The letters offered Weisman the option to refund the overpayments to ESD online or by mail and further stated: "You must make payments on time. If you don't, we could: Garnish your wages or bank account(s); or Withhold your income tax refund." CP 297, 302.

The notices also informed Weisman he had the right to appeal the overpayments, explained how to file an appeal, and specified the 30-day deadline by which any appeal needed to be filed. *Id*. The letters detailed what information must be included in an appeal and provided information for accessing an appeal template. CP 297-98, 302-03. Weisman has never claimed that he did not receive these notices.

Weisman did not pay the debts or appeal either determination. CP 257-58, ¶¶ 15, 17.

D. ESD Notified Weisman of Its Intent to Collect the Overpayment Debt Through the Treasury Offset Program

Because Weisman did not pay the debts or timely appeal, ESD began the process of recouping the benefits.

ESD has multiple methods of recovering unemployment debt. For debt that was the result of a claimant's "fraud or failure to report earnings," ESD uses the Treasury Offset Program. Under that program, the U.S. Treasury Department recovers past-due debt for state governments for various programs, such as child support, state income taxes, and unemployment insurance, by offsetting the debtor's federal tax refund.[5] State workforce agencies, such as ESD, are required to participate in the program to recoup eligible unemployment debt as a condition

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[5] U.S. Dep't of Treasury—Bureau of the Fiscal Serv. (last modified Nov. 30, 2022), *How the Treasury Offset Program (TOP) Collects Money for State Agencies*, https://fiscal.treasury.gov/top/state-programs.html.

for receiving federal funding. Unemployment Ins. Program Letter (UIPL) No. 02-19 (2018) at 1.[6]

The program authorizes recovery of "covered unemployment compensation debt," which is defined as: "a past-due debt for erroneous payment of unemployment compensation due to fraud ***or*** *the person's failure to report earnings which has become final under the law of a State* . . . and which remains uncollected[.]" 26 U.S.C. § 6402(f)(4) (emphasis added).

ESD sent Weisman a written "Notice of Intent to Intercept Federal (IRS) Income Tax Refund" (Intercept Notice). CP 227, ¶ 5; 231-32. The Intercept Notice explained that Weisman had an outstanding unemployment overpayment debt and that if he did not take action within 60 days, ESD would "submit your debt to the U.S. Treasury Offset Program and deduct your debt from your federal income-tax refund." CP 231. The notice further

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[6]https://www.dol.gov/sites/dolgov/files/ETA/advisories/UIPL/2018/UIPL_2-19_Acc.pdf

explained that Weisman could prevent this action if, within 60 days, he: (1) paid the balance, (2) set up a payment plan, (3) proved there was a bankruptcy stay preventing collection, or (4) sent "evidence" to Collections to support that "the debt is not past due or legally enforceable under the Treasury Offset Program because it is not based on fraud or on your failure to report earnings." CP 231-32.

Weisman did none of these things. CP 228, ¶ 7. Instead, approximately 48 days after issuance of the Intercept Notice, Weisman emailed Collections asking ESD to cancel his overpayments. He wrote, "I am writing to find out what is going on with my claim, and why I received an overpayment letter." CP 234. He claimed he "received a letter telling me I was overpaid," but that there was no explanation of "what I was paid, or not paid, or why." CP 234. He further asserted he was unable to appeal the overpayment determinations, "because ESD never provided me with any determination that I could appeal, because there was no calculation or explanation." CP 227-28, ¶ 6; 234-35.

He asked Collections to "cancel my overpayment determination" because he had "not committed any fraud or any intentional misrepresentation." *Id.*

Collections staff responded by providing him copies of the overpayment determinations, which had included all of the information about the overpayments and appeals process he claimed not to have, and informing him that if he needed further explanation on the contents of the letter, he could contact ESD's claim center or respond to the email. CP 235. The email reminded Weisman that his unemployment debt remained "active in collections." CP 227-28, ¶ 6; 235.

On the 61st day after the Intercept Notice, Weisman emailed again, stating he could not figure out how to appeal the overpayment determinations and claiming that he *had* reported his earnings, despite having previously acknowledged that he had not. CP 236 ("I did enter my gross earnings on each of those weeks. I remember doing this, of course.").

Neither of Weisman's emails included any evidence that his debt was not past due or not the result of his failure to report earnings. *See* CP 234-36.

E. Weisman Did Not Submit Evidence That the Debt Was Not Enforceable, and His Tax Refund Was Intercepted

Sixty-two days after the Intercept Notice, Weisman still had not paid his overpayment debt, set up a payment plan, shown he was in bankruptcy, or provided any evidence that his overpayment debt was not past due or was otherwise unenforceable. CP 229, ¶ 8. Accordingly, ESD referred Weisman's debt to the Treasury Department. *Id*. The Treasury then offset Weisman's federal tax refund and remitted $1,043.66 to ESD to satisfy his overpayment balance ($993 plus interest). CP 229, ¶ 10; 251.

F. Weisman Sued ESD, and the Superior Court Granted Weisman Partial Summary Judgment

Weisman sued ESD under 42 U.S.C. § 1983, alleging ESD intercepted his federal tax refund in violation of 26 U.S.C. § 6402(f)(3), 31 C.F.R. § 285.8(c)(3), and his due process rights

under the Fourteenth Amendment to the U.S. Constitution. CP 8-9. He sought declaratory and injunctive relief requiring ESD to return his seized federal tax refund, enjoining ESD from intercepting his future tax refunds, and requiring ESD to adopt, amend, or rescind rules to ensure compliance with federal law and due process. CP 9.

Weisman moved for partial summary judgment. CP 75-88. He argued that the Intercept Notice was deficient because it did not specify the type of evidence he should submit to show that his debt was not past due or was unenforceable, and that ESD violated due process by not considering the "evidence" he claimed to have submitted. CP 78-82, 311-15. Weisman sought declaratory relief and an order directing ESD to return his tax refund. CP 88.

ESD argued its Intercept Notice complies with federal offset law on its face because it mirrors the requirements of the federal law, affords claimants adequate process for contesting tax refund intercepts, and that those procedures were correctly

applied in Weisman's situation. CP 151-74. ESD asked the court to grant summary judgment in its favor and dismiss the case. CP 174.

The superior court granted Weisman's motion and denied ESD's, concluding that the intercept of Weisman's tax refund violated federal offset law and due process. CP 318-19. The court found that ESD's Intercept Notice violated due process because it did not inform Weisman what type of evidence to submit, and that ESD failed to consider the information in Weisman's email as "evidence," in violation of federal law. RP 31:7–34:8. The court ordered ESD to return the $1,043.66 to Weisman. CP 318.

G. The Court of Appeals Granted Discretionary Review and Reversed

The Court of Appeals granted ESD's motion for discretionary review under RAP 2.3(b)(2).

For the first time on appeal, Weisman argued that federal law requires a claimant to have intentionally or fraudulently failed to report earnings before a state can use the Treasury offset process to collect an unemployment debt. *Weisman,*

Slip Op. at 10 n.5. In an unpublished decision, the Court rejected this argument, holding that the plain language of the federal statute does not require a debtor to have engaged in misconduct when failing to report earnings. *Id.* at 10-11.

The Court further held that ESD's Intercept Notice satisfied due process and complied with federal law. *Id.* at 12-13. It observed that the fact that the Intercept Notice does not specify what type of "evidence" is acceptable to show that a debt is not past due was "to Weisman's benefit, not detriment," because it "allowed him to submit what he believed to be evidence for consideration by ESD." *Id.* at 13. However, Weisman simply did not submit *any* "evidence to consider" showing "that the debt was not based on his failure to report earnings." *Id.* at 14. Rather, "he denied the debt was based on fraud," but that is "not equivalent to submitting evidence that the debt was not based on his failure to report earnings." *Id.* Nor was it "evidence that his debt was not legally enforceable. It was merely a request to cancel his debt . . . ." *Id.* at 15.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Weisman's Petition is premised almost exclusively on his misguided argument—which he raised for the first time in the Court of Appeals—that "failure to report earnings" under federal offset law requires intentional or fraudulent conduct. The Court of Appeals properly rejected this argument. As the plain statutory language, legislative history, and federal guidance make clear, "There is no requirement that the debtor engaged in misconduct when failing to report earnings or intentionally did so." *Weisman*, slip op. at 11 (citing U.S. Department of Labor advisory letters).

The cases with which Weisman claims the Court of Appeals opinion conflicts are simply inapposite. They have no bearing on the federal offset law. There is no conflict with any authority, this case does not involve an issue of substantial public interest, and Weisman does not support with argument his claim that a significant constitutional question is involved. RAP 13.4(b)(1), (3), and (4). The Court should deny review.

A. Weisman's Overpayment Debt—and the Finding That It Resulted from His Failure to Report Earnings—Were Final

Weisman's overpayment debt qualified for recovery under the Treasury Offset Program because it was a "covered unemployment compensation debt" under federal law.

State workforce agencies use the program to satisfy "covered unemployment compensation debt." 26 U.S.C. § 6402(f)(1). Federal law defines "covered unemployment compensation debt" as "a past-due debt for erroneous payment of unemployment compensation due to fraud *or the person's failure to report earnings which has become final under the law of a State* . . . and which remains uncollected." 26 U.S.C. § 6402(f)(4) (emphasis added). The fact that Weisman had an "erroneous payment of unemployment compensation" is undisputed. Because that erroneous payment was due to Weisman's "failure to report earnings which [had] become final under the law of [the State]," it was a "covered unemployment

compensation debt" and was, therefore, eligible for recovery under the Treasury Offset Program.

Under the Employment Security Act, Title 50 RCW, if a claimant fails to appeal a benefits determination within 30 days, it is "conclusively deemed to be correct" and is, therefore, "final" under Washington law. RCW 50.32.020; 26 U.S.C. § 6402(f)(4). When ESD issues an overpayment determination, it "set[s] forth the reasons for and the amount of the overpayment." RCW 50.20.190(1). A person can appeal, which "shall be deemed to be an appeal *from the determination which was the basis for establishing the overpayment*[.]" RCW 50.20.190(3) (emphasis added). ESD's rule provides that a hearing on a timely overpayment appeal can address: 1) the reason for the overpayment, 2) the amount of the overpayment, 3) the finding of fault or nonfault, and 4) the reason a waiver was allowed or denied. WAC 192-220-060(1)(a)-(d). But, if no appeal is taken within 30 days, "the determination of liability shall be deemed conclusive and final." RCW 50.20.190(3); RCW 50.32.020.

Thus when a claimant does not appeal an overpayment determination, both the amount *and* reason for the overpayment become "final under the law of a State" under the federal offset statute. 26 U.S.C. § 6402(f)(4)(A). Importantly, "An unappealed final order from the [state agency] precludes the parties from rearguing the same claim." *Marley v. Dep't of Lab. & Indus.*, 125 Wn.2d 533, 538, 886 P.2d 189 (1994).

Here, ESD issued Weisman two overpayment determinations, one for each week he was overpaid benefits. CP 256-57, ¶¶ 14, 16; 296-304. The determinations informed Weisman that he had been overpaid benefits because "you didn't report your gross earnings when you submitted your weekly claim[s]," and the overpayments could not be waived because he was "at fault for the overpayment[s]." CP 296, 301. They also detailed the amounts of the overpayments, notified Weisman he had the right to appeal the determinations, and provided the applicable appeal deadline. CP 297, 299, 302, 304.

It is undisputed that Weisman did not pay the debts or appeal the determinations within 30 days. CP 257-58, ¶¶ 15, 17. Accordingly, the debts became final under Washington law, *including* the findings that the debts were "due to [Weisman's] failure to report earnings." RCW 50.32.020; 26 U.S.C. § 6402(f)(4); *Weisman*, slip op. at 16-17. As the Court of Appeals properly noted, "by the time the debt was eligible for the intercept program it was already a final debt under the law." *Weisman*, slip op. at 16.

B. "Failure to Report Earnings" Under the Treasury Offset Program Does Not Require Misconduct or Intentional Misrepresentation

The Court of Appeals properly rejected Weisman's misguided argument that "failure to report earnings" requires the debtor to have engaged in misconduct or to have intentionally failed to report earnings. *Weisman*, slip op. at 10-11. Weisman continues to ignore that the plain language of the statute, the legislative history, and federal guidance, which all confirm that "failure to report" does not require misconduct.

One need not look past the plain statutory language to recognize that "covered unemployment debt includes past-due debts due to the misconduct of fraud or when someone simply fails to report earnings." *Weisman*, slip op.at 11. That is because the law allows recovery of unemployment debt due to "fraud *or* failure to report earnings." 26 U.S.C. §6402(f)(4)(A) (emphasis added). Under straightforward principles of statutory construction, "failure to report earnings" must mean something other than "fraud." *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 160, 3 P.3d 741 (2000) (when different words are used in the same statute, it is presumed that they are intended to have different meaning).

The legislative history confirms this straightforward interpretation. Congress originally adopted the Treasury Offset Program in 2008. SSI Extension for Elderly and Disabled Refugees Act, Pub. L. No. 110-328, § 3, 122 Stat. 3567, 3570-73 (2008). At that time, the law *did* restrict recovery of unemployment compensation debts to those incurred due to

fraud only, as it defined "covered unemployment compensation debt" as "a past-due debt for erroneous payment of unemployment compensation *due to fraud* which has become final under the law of a State[.]" *Id.* at § 3(a)(f)(5)(A) (emphasis added).

But in 2010, Congress expanded the program to expressly authorize the recovery of unemployment debts due to claimants' failure to report earnings as well, by inserting "or the person's failure to report earnings" after "due to fraud" in the definition of "covered unemployment compensation debt" for erroneous payments of benefits. Claims Resolution Act of 2010, Pub. L. No. 111-291, § 801(a)(4)(A)(i), 124 Stat. 3064. The very purpose of the 2010 amendments was to expand the use of this successful federal-state debt recovery program by lifting restrictions that limited the authority to recoup unemployment compensation debt to cases involving fraud.[7]

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[7] News Release, U.S. Dep't of the Treasury—Bureau of the Fiscal Serv., *Treasury Offset Program Collects Millions in*

Consistent with common canons of construction, legislative history, and congressional intent, the U.S. Department of Labor has instructed states that the terms have separate meanings. After Congress added "failure to report earnings" as a qualifying reason to offset a person's tax refund to satisfy an unemployment debt, the Labor Department explained: "TOP may now be used to collect erroneous payments that are due either to fraud or to the persons' failure to report earnings, even if the state does not find that such failure constituted fraud." UIPL 11-11 (2011) at 2.[8] In its 2018 guidance, the Department reiterated that state workforce agencies "must use TOP to collect erroneous payments made to [unemployment compensation]

State Unemployment Compensation Debts (Mar. 31, 2011), https://fiscal.treasury.gov/news/treasury-offset-program-collects-millions-in-state-unemployment-compensation-debts.html.

[8] U.S. Dep't of Lab.: Emp. & Training Admin. Advisory Sys., Unemployment Ins. Program Letter No. 11-11 (Mar. 8, 2011), https://www.dol.gov/sites/dolgov/files/ETA/advisories/UIPL/2011/UIPL11-11.pdf

claimants that are due to fraud or to the person's failure to report earnings. This is true *even if the state does not find that the failure to report earnings constituted fraud*." UIPL 02-19 (2018) at 2.[9]

The Court of Appeals properly held that "[t]he plain language of the statute provides that covered unemployment debt includes past-due debts due to the misconduct of fraud or when someone simply fails to report earnings." *Weisman*, Slip Op. at 11. There is no need for further review of that unremarkable holding.

C. There is No Conflict Requiring Review

Given the clear statutory language and the well-documented legislative history and intent, it is unsurprising that there is, in fact, no conflict with a decision of the United States Supreme Court, as Weisman claims. *See* Pet. for Review

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[9] U.S. Dep't of Lab.: Emp. & Training Admin. Advisory Sys., Unemployment Ins. Program Letter No. 02-19 (Dec. 12, 2018) https://www.dol.gov/sites/dolgov/files/ETA/advisories/UIPL/2018/UIPL_2-19_Acc.pdf.

22-23 (citing *Williams v. Taylor*, 529 U.S. 420, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000); *Yates v. United States*, 574 U.S. 528, 135 S. Ct. 1074, 191 L. Ed. 2d 64 (2015)).

Yates v. United States merely discusses the statutory construction canons *noscitur a sociis* and *ejusdem generis*, as applied to unrelated statutes that do not even use the word "fail." *Yates*, 574 U.S. at 543-551.

And, rather than conflicting with the Court of Appeal's decision, *Williams* actually supports that "failure" does not require an intentional act. There, the Supreme Court held the word "failure" in the Antiterrorism and Effective Death Penalty Act of 1996 involves "some *omission*, fault *or* negligence on the part of the person who has failed to do something." *Williams*, 529 U.S. at 431 (emphasis added). "To say a person has failed in a duty implies he did not take the necessary steps to fulfill it." *Id.* at 432.

An "omission" includes "the act of leaving something out" or "something that is left undone, or otherwise neglected."

Black's Law Dictionary (11th ed. 2019). And here, regardless of whether he did so intentionally or not, it is uncontested that Weisman *omitted* earnings from two of his weekly unemployment claims—i.e., he did not take the necessary steps to report them, as was his duty. WAC 192-250-035(2); WAC 192-140-005.

There is no conflict for this Court's review. RAP 13.4(b)(1).

D. There Is No Issue of Substantial Public Interest

In an attempt to manufacture an issue of substantial public interest, Weisman now falsely claims that ESD seeks to use the Treasury Offset Program to recover overpayment debt "regardless of the reason for the overpayment." Pet. for Review 1-2, 12, 23, 25. ESD has *never* taken the position—and the Court of Appeals did not hold—that ESD can use the Treasury Offset Program to recover an overpayment debt incurred for any reason other than "fraud or failure to report earnings," as provided in 26 U.S.C. § 6402(f)(4)(A). As this case involves Weisman's

"failure to report earnings," the finding of which had become final under state law when Weisman did not appeal, ESD properly used the Treasury Offset Program to recoup the debt here.

One of the primary purposes of the Treasury Offset notice procedure is to allow a debtor the opportunity to present evidence showing that the final overpayment determination concluded that the overpayment was the result of something *other* than fraud or failure to report earnings—such as a finding that the claimant voluntarily quit work without good cause or was discharged from work for misconduct, where their claims initially were allowed. *See* RCW 50.20.050 (disqualification for quitting without good cause), .066 (disqualification for discharge for misconduct). Overpayments based on these reasons would make the debts ineligible for offset. *See* UIPL 11-11 (2011) ("States may not collect overpayments due to any other reason [other than fraud or failure to report], such as appeals reversals of separation issues or other adjudications.").

Weisman ignores all of this, or pretends not to understand it. Either way, the Court should decline to accept this newly-invented and misleading issue for review.

E. The Court of Appeals Properly Concluded That ESD Complied with Federal Offset Law as a Matter of Law

Finally, Weisman makes the odd suggestion in an issue statement that the Court of Appeals somehow was not authorized to make legal conclusions about the propriety of ESD's overpayment recovery process in this case. Pet. for Review 5. He does not support this issue with argument, so the Court should decline to consider it. *State v. Farmer*, 116 Wn.2d 414, 432, 805 P.2d 200 (1991) ("[I]ssues not supported by argument and citation to authority will not be considered on appeal.").

But even so, ESD sought—and was granted—discretionary review by the Court of Appeals of the order granting partial summary judgment to Weisman. On review, ESD argued that partial summary judgment was improper *not* because there were disputed issues of material fact, but because the superior court got it wrong as a matter of law. Pet'rs' Opening

Br. 24. It is well settled that when the facts are not in dispute, appellate courts can grant summary judgment in favor of the nonmoving party if that party is entitled to judgment as a matter of law. *Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992); *In re Grant*, 199 Wn. App. 119, 135, 397 P.3d 912 (2017). And here, ESD *did* ask the superior court to grant summary judgment in its favor in its response to Weisman's partial summary judgment motion. CP 159, 173-74. Weisman's argument distorts the procedural posture of this case and is not a ground for this Court's review.

V. CONCLUSION

The Court should deny the Petition for Review.

CERTIFICATION

I certify that this document contains 4988 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 1st day of September 2023.

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 1st day of September 2023, in Seattle, Washington.

Jennifer Bancroft
JENNIFER K. BANCROFT, Paralegal

FILED
6/5/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL WEISMAN,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF EMPLOYMENT SECURITY; and CAMI FEEK, Commissioner of the Washington State Department of Employment Security, in her official capacity,

Appellants.

No. 83893-8-I

DIVISION ONE

UNPUBLISHED OPINION

COBURN, J. — The Washington State Department of Employment Security (ESD) determined that Michael Weisman, a state employee, underreported the hours he worked for two weeks resulting in an overpayment of unemployment insurance benefits (UB) for which he was eligible to cover his furloughed time. ESD notified Weisman that he was overpaid, that he was liable for the overpayment and, unless he paid the debt, his tax refund could be intercepted to offset his debt. Weisman did not timely appeal the overpayment determinations, but also did not pay his debt. After ESD sent Weisman a notice of intent to intercept his tax refund, Weisman eventually filed a complaint in superior court. The court granted Weisman's motion for partial summary judgment determining that his procedural due process rights were violated because ESD did not follow federal offset law before intercepting his tax refund. ESD contends

that it did in fact follow federal offset law and provided Weisman proper notice and meaningful opportunity to be heard prior to intercepting his tax refund. We agree with ESD. Accordingly, we reverse and remand.

FACTS

The following facts are not in dispute. Michael Weisman was a staff attorney for the Washington State Department of Health (DOH), and he usually worked 40 hours a week. In June 2020, following the inception of the COVID-19 pandemic, Weisman applied for unemployment insurance benefits (UB) through an approved SharedWork plan between the ESD and DOH. SharedWork benefits are unemployment benefits intended for employees whose hours have been reduced by 10 to 50 percent. RCW 50.60.030(3). DOH required SharedWork claimants to apply for unemployment benefits each week. A SharedWork claimant is paid partial UB based on the percentage of lost work from a given work week multiplied by the individual's weekly benefit amount.

During the 7 weeks Weisman participated in the program, his employer reduced his usual 40 hours a week by 20 percent, and he worked 32 hours a week. Based on his earnings, his regular weekly benefit amount was $790 in UB. Based on that amount, he was entitled to 20 percent of that amount, or $158 in UB weekly.[1]

For the week ending July 4, Weisman reported receiving 8 hours of holiday pay and did not work any regular hours, when, in fact, he had worked 32 hours that week. Based on his report of only receiving 8 hours of holiday pay, ESD paid Weisman $790, his regular weekly UB amount instead of $158, resulting in a $632 overpayment. The

[1] Weisman also was eligible to receive up to $600 each week in benefits through the Federal Pandemic Unemployment Compensation (FPUC) program until the end of July 2020. ESD never requested a return of any FPUC dollars, which are not at issue in this appeal.

next 2 weeks, Weisman reported working 32 hours each week and was paid the $158 in UB each of those weeks.

During the week ending July 25, Weisman reported that he received 8 hours of sick pay and did not work for his employer that week, when in fact he had worked 32 hours that week. The report of only receiving 8 hours of sick pay resulted in a calculation of Weisman being entitled to the $790 regular weekly UB. But according to ESD, it paid Weisman $519[2] in UB, resulting in a $361 overpayment for that week because he should only have received the $158. In total, ESD overpaid Weisman $993 for both weeks.

In the end of July 2020, ESD sent Weisman a fact-finding letter notifying him that ESD had received information that he may have worked and received pay for at least one day between July 19 and July 25 from DOH. The letter asked him to answer several questions so that ESD can decide whether it can pay or continue to pay him UB. The letter notified Weisman that ESD may have already paid him in unemployment benefits and that if ESD had paid him too much and it was his fault, he would have to pay it back. The letter warned Weisman that if he did not pay back the overpayment, ESD could take money from his federal income-tax refund. The letter also informed Weisman "[i]f you had an overpayment and it was not your fault, you can request a waiver. If we approve your request, you won't have to pay us back." Nothing in the record indicates that Weisman requested a waiver.

[2] There is no explanation in the record why ESD paid $519 instead of the calculated $790 for week ending July 25 based on his report of getting paid only 8 hours of sick leave. Regardless, based on Weisman working 32 hours, he was only entitled to the $158 UB.

On August 5, Weisman signed an ESD weekly correction form where he agreed with DOH's reporting that he worked 32 hours for the week ending July 4. Weisman checked the box indicating, "I agree with the information my employer reported. I understand if I was overpaid I am liable for repayment."

Two days later, Weisman signed and submitted the fact-finding letter regarding week ending July 25. In the letter Weisman agreed that he had worked 32 hours and was furloughed for the other 8 hours that week.

On September 24, an ESD representative interviewed Weisman by telephone regarding his claims for week ending July 4 and July 25. Weisman explained that he was confused about the system and misunderstood the website. He confirmed that he had been paid to work 32 hours each of the weeks.

ESD then sent Weisman several overpayment determination letters. The first letter dated September 24 notified Weisman that he owed $519 to ESD because it had overpaid him $519 for the week ending July 25 when he was entitled to $0 UB. The next letter dated September 25 notified Weisman that he owed ESD $632 for the week ending July 4 because it had paid him $790 UB when he was entitled to $158. The third letter dated October 22 replaced the earlier letter about week ending July 25. It notified Weisman that he owed ESD $361 because it had paid him $519 in UB when he was actually entitled to $158.

Besides the difference in the amounts owed, paid, and the relevant weeks in question, the substance of the letters were the same. The letters explained how Weisman could make payment if he agreed with the decision and how he could appeal if he disagreed. It gave him a specific 30-day deadline to appeal and warned him that if

he failed to make payments on time ESD could garnish his wages or bank accounts, or withhold his income tax refund.

Because Weisman did not pay the debts or timely appeal, ESD sent Weisman a "Notice of Intent to Intercept Federal (IRS) Income Tax Refund" (intercept notice) on November 28. The notice informed Weisman that in order to avoid the offset of his tax refund to repay ESD, he had 60 days to: (1) pay the overpayment balance; (2) arrange an acceptable written payment plan; or (3) send evidence to support why he believed all or part of the debt was "not past due or legally enforceable under the Treasury Offset Program because it is not based on fraud or on your failure to report earnings."[3] The intercept notice directed that the supporting evidence must be sent to the provided address or email for Employment Security Collections (Collections). The notice also told Weisman to call or email collections if he had any questions.

On January 15, 2021, Weisman sent Collections an email addressing his concerns and asking ESD to cancel his overpayment determinations. He wrote,

> I am writing to find out what is going on with my claim, and why I received an overpayment letter.
>
> I am a state employee and was directed to file [UB] claims when we were furloughed 1 day each week in June and July, and again in late August/September under the Shared Work program. We were to receive full compensation for our lost wages plus $600/wk. So I did as we were directed. By my calculations I was underpaid, but whatever, it was something.
>
> Then I received a letter telling me I was overpaid. There was no explanation in the letter. There is no explanation how it was calculated in the letter or on the ESD web site. Or at least, I was unable to find any

[3] The intercept notice also informed Weisman that he could file IRS Form 8379, Injured Spouse Claim and Allocation, with his tax return. It further notified him that if he filed for bankruptcy, he would not be subject to offset while an automatic stay is in effect. ESD asked to be notified of such a stay by sending evidence concerning the bankruptcy.

> explanation. It was difficult for me to find out what I was paid, or not paid, or why. There are simply no answers.
>
> One day, out of the blue, I received a call from an adjudicator. This person was speaking very fast and seemed to be quite excited and upset. She kept accusing me of fraud. She was unable to explain what I had done wrong, and I of course denied the allegations. I never committed any fraud. I'll admit, however, the ESD web-based program is not suited to the Shared Work claims and its possible I may have checked a wrong box, but I honestly just don't know. I was never offered any explanation, it does not appear on the web site, and it is not in any of the letters I received.
>
> I have heard on the news recently that ESD has the discretion to cancel repayments where there is no evidence of fraud. I am requesting cancellation of my overpayment determination. I am unable to appeal because ESD never provided me with any determination that I could appeal, because there was no calculation or explanation. I have not committed any fraud or any intentional misrepresentation.

That same day, Collections generated an automatic reply email explaining that COVID-19 pandemic has caused high workloads and slowed response times to about 15-20 business days. The email also stated,

> You do not owe us any money as a result of a fraudulent claim
> You might have received a letter from us saying that you must repay benefits (called an overpayment) that we paid on the fraudulent claim in your name. You can ignore that letter! Our computer system automatically generates the letter when we deny an unemployment application. We're sorry for the anxiety it may have caused. We understand that these letters can be scary.
>
> You might still owe money for an overpayment on a legitimate claim you filed with us in the past or the future. Please respond to any requests for information we might send you about it.

Collections responded to Weisman on January 21 and provided him copies of the original determination letters that explained his overpayment and to call the claim center if he needed further explanation. The email also stated that, "[i]f you disagree with the overpayment you must file an appeal." It provided instructions on how to appeal through the ESD website. The email further alerted Weisman that his balance "is now

active in collections. Even if you are going to file an appeal you must make payment every 30 days to avoid garnishment. Also you are responsible for any penalty or interest that accrues. . ."

By January 27, 60 days after ESD issued the intercept notice, Weisman had not resolved his account to prevent the offset.

On January 28, Weisman responded to ESD's email, stating,

> The determination letters you sent state that I did not enter my gross earnings on 2 different weeks. I did enter my gross earnings on each of those weeks. I remember doing this, of course. But further evidence is that I received [unemployment insurance] payments for those weeks.

ESD replied the same day referencing its previous email and reaffirming that if he disagreed with the overpayment and he is not able to file an appeal via eServices, he could write a letter and mail or fax it to the Appeal Unit.

On January 29, because the debt satisfied the criteria for the Federal Treasury Offset Program, ESD's computer system automatically referred Weisman's debt to financial management services, which administers the Treasury Offset Program. That same day, Weisman filed an appeal of the October 22, 2020 ESD determination letter. In his explanation of why he disagreed with the determination, he wrote,

> I received determination letters that made no sense, they were inaccurate, and they were wrong. I DID provide the ESD with all the information required for my claim, for both of the weeks mentioned in the letters. I am a state employee in the SharedWork program. I filled out timesheets from my employer, Department of Health each week. That information was supposed to be shared with ESD. The letters I received kept changing the determination, and I waited for ESD to catch the error and fix the problem. But that never happened.
>
> . . . .
>
> I heard on the news that ESD was not going to seek collection of overpayments that were no fault of the claimant. But I did not find any way

> to contact ESD about this. I wrote, I called but the phone lines are now closed.
>
> I would like the collections on my claim cancelled and my claim determined to be correct. If ESD needs new information from me, I would like clear communication of what ESD needs and how I can provide it. Just let me know what you need.

In May 2021, Weisman's tax return was intercepted to pay the balance of his debt to ESD.

An administrative hearing was held on August 11. According to the Administrative Law Judge's (ALJ) findings, Weisman maintained he was not appealing the October 22 determination letter and denied filing the appeal dated January 29. The ALJ noted that under RCW 50.32.075, the 30-day deadline for an appeal may be waived if good cause for the late-filed appeal is shown, but concluded that because Weisman did not believe he had even filed a request for an appeal on January 29 there was no basis or ability to determine whether or not there was good cause to hear the appeal. The ALJ dismissed the appeal as untimely.[4] Weisman appealed to an ESD commissioner, who observed that Weisman sought recourse from the intercept letter and requested a default order be issued against ESD and wanted a hearing regarding damages. The commissioner observed,

> Given the claimant's contention that "money" has been wrongfully withheld from him, it is somewhat puzzling that, when provided the opportunity, he chose not to proceed with appeal of the October 22, 2020, Determination of overpayment. (Regarding timeliness: The claimant's testimony that he did not receive the Determination would generally provide good cause for a late filed appeal.)

The commissioner affirmed the dismissal by the ALJ. Weisman petitioned for judicial review of that decision under the Administrative Procedures Act. About two weeks later

[4] The transcript for the administrative hearing is not contained in the record. Though Weisman petitioned judicial review of the commissioners ruling, that ruling is not part of this appeal.

he also brought suit against ESD in King County Superior Court under 42 U.S.C. § 1983, alleging that ESD intercepted his federal tax refund in violation of 26 U.S.C. § 6402(f)(3), 31 C.F.R. § 285.8(c)(3), and his due process rights under the Fourteenth Amendment to the U.S. Constitution were violated. He sought an injunction and declaratory relief requiring ESD to return his tax refund, enjoining ESD from intercepting his future tax refunds, and requiring ESD to adopt, amend, or rescind rules necessary to ensure compliance with federal law and due process. The court denied Weisman's motion to consolidate his petition and complaint, but linked the cases and assigned them to the same superior court judge.

Weisman moved for partial summary judgment of its complaint, arguing that ESD did not have established procedures to consider challenges to intercepts and did not allow him 60 days to present evidence before the intercept occurred. Weisman also argued that ESD violated due process by not considering evidence he submitted before the intercept took place. ESD rebutted these arguments and asked the court in ESD's response motion to grant summary judgment in its favor and dismiss the complaint in its entirety. The court granted Weisman's partial summary judgment motion finding that ESD's intercept of Weisman's tax refund violated 26 U.S.C. § 6402(f)(3), 31 C.F.R. 285.8(c)(3), and the due process clause of the Fourteenth Amendment. The court did not enter any written findings of fact, but explained orally that Weisman "very clearly" said in his January 15 email to Collections that he did not commit fraud or failed to report, the two bases for the intercept process. The court also found that the intercept notice was deficient for not describing the type of evidence that would satisfy its internal

regulations. The court also found that ESD failed to provide Weisman meaningful review by not considering his January 15 email as evidence.

The court ordered ESD to return $1,043.66 of Weisman's tax refund. A commissioner of this court granted ESD's motion for discretionary review.

DISCUSSION

This court reviews summary judgment orders de novo. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Keck, 184 Wn.2d at 370-71.

For the first time on appeal, Weisman argues that ESD can only intercept a tax refund when the failure to report earnings is *intentional* or involves misconduct.[5] Generally, we will not consider issues raised for the first time on appeal. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). Nevertheless, even if we were to consider this argument, the plain language of the statute contradicts Weisman's argument.

Federal law allows states to use the treasury department intercept process to satisfy a "covered unemployment compensation debt." 26 U.S.C. § 6402(f)(4). A covered unemployment compensation debt is a "past-due debt for erroneous payment of unemployment compensation due to *fraud or the person's failure to report earnings*

[5] At oral argument Weisman maintained that he did raise this argument below. Wash. Court of Appeals oral argument, Weisman v. Dep't of Emp. Sec., No. 83893-8-I (March 7, 2023), *video recording by* TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2023031229/?eventID=2023031229. A review of the record contradicts this claim. While Weisman may have argued below that he did not intentionally fail to report earnings, that is distinct from arguing that the offset laws requires the failure to report earnings to be intentional or involve misconduct.

which has become final under the law of a State . . . and which remains uncollected." 26 U.S.C. § 6402(f)(4)(A) (emphasis added). In cases of statutory interpretation, this court looks first to the plain language of the statute to discern the legislature's intent. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). The plain language of the statute provides that covered unemployment debt includes past-due debts due to the misconduct of fraud or when someone simply fails to report earnings. There is no requirement that the debtor engaged in misconduct when failing to report earnings or intentionally did so.[6]

We now consider whether ESD violated 26 U.S.C. § 6402(f)(3) and 31 C.F.R. 285.8(c)(3). 31 C.F.R. § 285.8(c)(3) provides the following:

> (i) Advance notification to the debtor of the State's intent to collect by Federal tax refund offset. The State is required to provide a written notification to the debtor informing the debtor that the State intends to refer the debt for collection by tax refund offset. The notice must give the debtor at least 60 days to present evidence, in accordance with procedures established by the State, that all or part of the debt is not past due or not legally enforceable, or, in the case of a covered unemployment compensation debt, the debt is not due to fraud or the debtor's failure to report earnings…
>
> . . .
>
> (ii) Determination. The State must, in accordance with procedures

[6] A Department of Labor's (DOL) March 8, 2011 advisory letter to state workforce agencies explained that the treasury offset program "may now be used to collect erroneous payments that are either due to fraud or to the persons' failure to report earnings, even if the state does not find that such failure constituted fraud." U.S. Dep't of Lab., Emp't & Training Admin. Advisory Sys., Unemployment Insurance Program Letter No. 11-11, at 2 (Mar. 8, 2011), https://wdr.doleta.gov/directives/attach/UIPL/UIPL11-11.pdf. Again in DOL's 2018 advisory to state workforce agencies, DOL stated that workforce agencies must use the treasury offset program "to collect erroneous payments made to [unemployment compensation] claimants that are due to fraud or to the person's failure to report earnings. This is true *even if the state does not find that the failure to report earnings constituted fraud*." U.S. Dep't of Lab., Emp't & Training Admin. Advisory Sys., Unemployment Insurance Program Letter No. 02-19, at 2 (Dec. 12, 2018) https://www.dol.gov/sites/dolgov/files/ETA/advisories/UIPL/2018/UIPL_2-19_Acc.pdf.

> established by the State, consider any evidence presented by a debtor in response to the notice described in paragraph (c)(3)(i) of this section and determine whether an amount of such debt is past due and legally enforceable and, in the case of a covered unemployment compensation debt, the debt is due to fraud or the debtor's failure to report earnings....

Under 26 U.S.C. § 6402(f)(3), a State may not seize a federal tax refund until it provides the debtor "at least 60 days to present evidence that all or part of such liability is not legally enforceable or is not a covered unemployment compensation debt" and "considers any evidence presented by such person. . ." ESD fulfilled the notice requirements and correctly referred the debt to the treasury offset program. ESD sent Weisman the intercept notice on November 28, 2020, and did not submit Weisman's debt to the offset program until January 29, 2021, which was 62 days later. The notice expressly notified Weisman of the limited ways he could avoid offset by acting within 60 days from the date of the notice, including the following:

> If you believe all or a part of the debt is not past due or legally enforceable under the Treasury Offset Program because it is not based on fraud or on your failure to report earnings, you must send evidence to support your position to the address or email below. We will inform you of our decision about your debt.

Weisman asserts that ESD's notice of intercept was deficient because it did not describe what type of evidence it would accept. Weisman cites to ESD's internal manual to support his claim that ESD will only consider documentation of full payment. However, in describing what the claimant can do to challenge the tax intercept, the manual states a claimant can:

> 3. Prove the debt is:
>
> a. not past due; or
> b. legally enforceable because it is not based on fraud; or
> c. their failure to report earnings.

> Proof must be documentation such as an ESC billing that reflects the [debts] are paid in full. This is not an "appeal" such as a claimant would file during the appeal period. This is merely a review of their proof for these specific situations listed. ESC will inform the client of our decision about their debt.

The manual provides that presenting documentation that reflects the debt is paid in full is one way to show a debt is not past due. It does not suggest that the only acceptable evidence to challenge whether a debt is based on a failure to report earnings is proof of full payment of the debt. The fact that the intercept notice did not define what type of "evidence" is acceptable, is to Weisman's benefit, not detriment. This allowed him to submit what he believed to be evidence for consideration by ESD.

The offset program allows states to establish its own procedures on how a debtor may present evidence. 31 C.F.R. § 285.8(c)(3) ("The notice must give the debtor at least 60 days to present evidence, in accordance with procedures established by the State"). ESD's intercept notice warned Weisman that ESD intended to collect through a federal tax-refund offset. It further explained that Weisman could avoid offset if, within 60 days, he: (1) paid the balance, (2) set up a payment plan, or (3) sent evidence to Collection's address or email that supported his belief that the debt was not past due or legally enforceable because it is not based on fraud or on failure to report earnings. The notice was not deficient.

Next, Weisman argued below and the trial court found that the January 15 email "clearly" asserted that the debt was not based on fraud or a failure to report earnings. Weisman contends that by failing to consider the January 15 email, ESD violated both 26 U.S.C. § 6402(f)(3) and 31 C.F.R. 285.8(c)(3) by refusing to consider "any" evidence. Weisman argues, and the trial court agreed, that his assertion alone should be sufficient

for consideration without having to submit additional documentation. ESD argues that a general denial without more is not evidence.

However, we need not resolve whether a general assertion is sufficient to trigger ESD's consideration and evaluation of whether the debt was legally enforceable through the offset program. This is because, contrary to the trial court's oral findings, Weisman did not clearly assert in his January 15 email that the debt was not based on failure to report earnings.

Instead, he stated that he did not commit fraud or any "intentional misrepresentation," but admitted that the ESD web-based program was not suited to the SharedWork claims and it was possible he may have checked a wrong box. It is evident from the January 15 email that Weisman indicated the overpayment may have resulted by mistakenly underreporting his earnings because of a confusing reporting system. But questioning why he may have underreported his earnings is not equivalent to submitting evidence that the debt was not based on his failure to report earnings. Thus, we agree with ESD that it did not consider any evidence because there was no evidence to consider. Weisman did not send evidence that he paid the debt, did not arrange for payment of the debt, and, though he denied that the debt was based on fraud, he did not claim that the debt was not based on failure to report earnings.

Even if it could be argued that the January 15 email suggested that Weisman claimed the debt was not based on his failure to report earnings, the record established that Collections did consider the email. This consideration is evident by ESD resending Weisman the overpayment determination letters in response to his January 15 email. The overpayment determination letters explicitly told Weisman that the reason for the

ESD action was because "[y]ou didn't report your gross earnings when you submitted your weekly claim." The letters also explicitly laid out the benefits that ESD paid him, the amount to which he was entitled, and the amount he was overpaid. This suggests that Collections did consider the email, researched its own records, and confirmed the debt was based on Weisman's failure to report earnings. We observe that at the time Weisman sent his January 15 email, he was already aware that ESD investigated why Weisman only initially reported 8 hours of holiday pay the week ending July 4, and 8 hours of sick pay the week ending July 25, and that Weisman confirmed with ESD that he had been paid to work 32 hours each of those weeks.

Moreover, Weisman's email was not evidence that his debt was not legally enforceable. It was merely a request to cancel his debt because he had "heard" ESD was doing that for others.

We therefore conclude ESD did not violate 26 U.S.C. § 6402(f)(3) or 31 C.F.R. 285.8(c)(3).

Weisman also asserts that his due process was violated when Collections staff misdirected him to a forum without jurisdiction to consider an appeal of the intercept notice. We disagree.

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Procedural due process requires that an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation of a protected interest. State v. Beaver, 184 Wn. App. 235, 246, 336 P.3d 654 (2014). The notice must be "'reasonably calculated, under all the circumstances, to apprise interested

parties of the pendency of the action and afford them an opportunity to present their objections.'" State v Nelson, 158 Wn.2d 699, 703, 147 P.3d 553 (2006) (internal quotation marks omitted) (quoting Jones v. Flowers, 547 U.S. 220, 226, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006)).

The question is whether ESD provided Weisman proper notice and an opportunity to be heard prior to intercepting his tax refund. Weisman's focus only on the intercept notice ignores the fact that by the time the debt was eligible for the intercept program it was already a final debt under the law. He cannot assert a due process violation and have us ignore the other notices he received and opportunities he was given prior to the debt becoming final.

Congress recognized that the determination as to whether a covered unemployment compensation debt is final is under state law, not the federal offset statute, which defines "covered unemployment compensation debt" as

> a past-due debt for erroneous payment of unemployment compensation due to fraud or the person's failure to report earnings which has become *final under the law of a State* certified by the Secretary of Labor pursuant to section 3304 and which remains uncollected.

26 U.S.C. § 6402(f)(4)(A) (emphasis added). Weisman's debt was a covered unemployment debt because it was a debt that became final under Washington law. The Employment Security Act, chapter 50.32 RCW, and the Administrative Procedure Act (APA), chapter 34.05 RCW, provide the procedure to contest an unemployment benefits determination. If a claimant fails to appeal a benefits determination within 30 days, it is "conclusively deemed to be correct" and therefore final under Washington law. RCW 50.32.020.

When claimants timely appeal an overpayment, they can have a hearing on both the amount of the overpayment and the reason for overpayment. WAC 192-220-060(1)(a), (b). If a claimant files an appeal after the 30-day deadline, an appeal tribunal can waive limitations for good cause shown. RCW 50.32.075.

Before ESD intercepted Weisman's property, ESD investigated whether he did not report his earnings. ESD sent Weisman a claims correction form and fact-finding form when ESD first learned of a discrepancy between the earnings Weisman initially reported and what his employer reported. In the fact-finding form, Weisman was told that if an overpayment was not his fault he could request a waiver, and if the waiver was approved, Weisman would not have to pay ESD back. ESD interviewed Weisman over the telephone about the discrepancies and gave him another opportunity to explain. ESD confirmed with Weisman that he did not correctly report his earnings. ESD sent overpayment determination letters explaining the calculation of the overpayment and how to appeal if he disagreed. These letters specified that if he did not pay ESD back, his income tax refund could be withheld. ESD then sent the intercept notice informing him the limited ways he could avoid the offset, including submitting evidence within 60 days to be considered by Collections. When Weisman emailed Collections asserting that he was confused and wanted ESD to cancel his debt, ESD again provided the overpayment determination letters telling him how to appeal them. Weisman did file an appeal and was given an administrative hearing. At the hearing, he asserted that he did not want to challenge the overpayment determination letters even though he had the opportunity to show good cause for filing the appeal late. Collections did not misdirect Weisman in the appeal process.

In light of the above, ESD provided Weisman with proper notice and a meaningful opportunity to be heard before intercepting his tax refund.

Attorney Fees

Weisman requests attorney fees under 42 U.S.C. § 1983, which allows for reasonable attorney fees for certain constitutional claims if he prevails. Because we reverse, we deny his request.[7]

CONCLUSION

Because ESD followed federal offset law and did not violate Weisman's procedural due process rights, we reverse the trial court's order on Weisman's motion for partial summary judgment and remand for further proceedings consistent with this opinion.[8]

Coburn, J.

WE CONCUR:

Díaz, J.

Smith, C.J.

[7] The parties dispute whether a showing of prejudice is required to award damages. Weisman correctly argues that nominal damages are available when there is a procedural due process violation even if compensatory damages are unavailable. See Carey v. Piphus, 435 U.S. 247, 266, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978); Frudden v. Pilling, 877 F.3d 821, 830 (9th Cir 2017). Because we hold that ESD did not deny Weisman due process, we need not address prejudice.

[8] ESD asks that we consider its request to grant summary judgment in its favor and dismiss the case in its entirety, a request it also made below. However, the issue before us was the granting of a partial summary judgment and Weisman contends there are issues raised in the complaint that were not part of this motion. ESD does not dispute this characterization of Weisman's claims. Thus, we decline ESD's invitation to dismiss the case in its entirety.

AGO/LICENSING AND ADMINISTRATIVE LAW DIV

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