

The United States District Court District of Colorado 901 19th St, Denver, CO 80294 (303) 844-3433 Plaintiff: Joshua Abrams v. Defendant(s): Division of Unemployment Insurance, JOE BARELA JEFF FITZGERALD Etc.	FILED UNITED STATES DISTRICT COURT DENVER, COLORADO <i>8:02 am, May 09, 2025</i> JEFFREY P. COLWELL, CLERK ▲ COURT USE ONLY ▲
Joshua Abrams, Pro Se abramslive@gmail.com 720-910-4829 1881 E 112th Pl, Northglenn Colorado 80233	Case Number: 1:24-cv-03390-RMR Division: Courtroom
Plaintiff's Opposition to Defendant's Motion to Dismiss	

Plaintiff Joshua Abrams respectfully submits this Opposition to Defendants' Motion to Dismiss. Defendants' Motion misstates critical facts, selectively ignores large portions of the evidentiary record, and relies heavily on conclusory assertions unsupported by either law or fact. Their approach attempts to reduce this matter to isolated individual grievances rather than engaging with the systemic constitutional and statutory violations Plaintiff has demonstrated, affecting not only Plaintiff but thousands of similarly situated Colorado residents.

Even if Defendants' Motion superficially identifies minor procedural issues or technical defenses that could, in isolation, be argued under abstract administrative law standards, such arguments are irrelevant in light of the pervasive, continuing constitutional violations at the heart of this case. Plaintiff has shown, through both direct personal harm and substantial supporting evidence, that the Division's systems and practices systematically deprive claimants of due process, violate rights secured by the First and Fourteenth Amendments, and fail to comply with federal statutory obligations under Title II of the Americans with Disabilities Act.

Defendants' Motion to Dismiss must be denied so that this case may proceed to discovery and resolution on the merits, where the full scope of ongoing constitutional and statutory injuries can be appropriately addressed.

Eleventh Amendment and CGIA Immunity Do Not Apply

Defendants' invocation of Eleventh Amendment sovereign immunity and the Colorado Governmental Immunity Act ("CGIA") is unavailing. Plaintiff seeks only prospective injunctive relief to remedy ongoing constitutional violations relief that is expressly permitted under *Ex Parte Young*. Sovereign immunity does not bar claims for injunctive relief against state officials sued in their official capacity when enforcing federal constitutional rights.

Nor can the CGIA immunize Defendants from liability where federal rights are at stake. The Supremacy Clause prohibits states from using immunity doctrines to override obligations imposed by the U.S. Constitution. Claims alleging ongoing violations of the First and Fourteenth Amendments fall squarely within federal judicial oversight and must be heard.

Defendants' assertion that Plaintiff failed to exhaust administrative remedies does not bar this action because no adverse, appealable decision was ever issued regarding Plaintiff's 2023 integrity hold. Plaintiff was diverted into a procedurally irrelevant withdrawal appeal, rendering exhaustion impossible. The inability to appeal a non-existent decision is not a procedural failure it is the constitutional deprivation itself. Courts do not reward administrative schemes that prevent access to redress, and due process requires more than a theoretical opportunity to appeal. See *Goldberg v. Kelly* (1970).

To the extent Defendants invoke qualified immunity for the Executive Director, that defense is misplaced. The claims challenge systemic and official policies that continue to inflict constitutional harm, placing them squarely within the Ex Parte Young exception to immunity. As such, this suit is properly before the Court and must proceed to adjudication on the merits.

Defendants claim that Plaintiff's allegations are conclusory.

Plaintiff lacked access to Defendants' responses and internal records at the time of filing the amended complaint and was therefore unable to identify the precise individual actors and capacities involved. Since then, Plaintiff's March 25, 2025 Brief (Dkt. 16) and supporting filings have clearly articulated that senior officials including Defendants Barela, Fitzgerald, and Branch Manager Jeff Newcomb had actual knowledge of systemic constitutional violations and failed to take corrective action

Specific failures include (1) maintaining an inoperative phone system known to deny access to due process, (2) perpetuating policies that required claimants to reach live agents to request ADA accommodations without providing any accessible means to do so, and (3) systematically denying meaningful notice and appeal opportunities following integrity holds. These actions and omissions are traceable to identifiable individuals in their official roles and constitute violations of clearly established constitutional rights under the First and Fourteenth Amendments and federal ADA requirements, rights recognized long before the events at issue. Plaintiff's factual pleadings therefore satisfy both the plausibility standards under Iqbal/Twombly and the Tenth Circuit's requirement for alleging personal involvement in ongoing constitutional violations, precluding dismissal at this stage.

Defendants' Blocked Processes Violate the First and Fourteenth Amendments

Plaintiff's core constitutional grievance arises from Defendants' systemic restriction of access to administrative remedies through artificially narrow appeal processes. As documented in Plaintiff's March 25, 2025 Brief (Dkt. 16) and supported by Defendants' own exhibits, the Division of Unemployment Insurance only permits appeals to be initiated following the issuance of a formal, appealable determination. If a claimant's grievances such as the underpayment of benefits, as in Plaintiff's case is not reflected in an issued determination, the claimant is categorically barred from appealing or petitioning for correction, no matter how meritorious or well-founded the grievance.

This structural flaw violates both the First Amendment right to petition the government for redress of grievances and the Fourteenth Amendment guarantee of due process. The appeals system exists in theory but not in functional practice for underpayment disputes and other non-standard errors, leaving claimants trapped without a means to contest wrongful deprivation of entitled benefits.

When Plaintiff, after exhausting all informal avenues, attempted to initiate an appeal by appealing an available withdrawal determination (the only appealable action artificially available), the administrative law judge explicitly stated that he could only adjudicate the withdrawal issue and had no jurisdiction to address Plaintiff's underpayment grievance. Thus, even diligent efforts by the claimant could not access judicial review or redress, proving the exhaustion of administrative remedies was not merely impracticable; it was constitutionally foreclosed by the Division's own defective systems. Responsibility for these systemic barriers rests with the following named individuals in their official capacities:

- Joe Barela, Executive Director of the Colorado Department of Labor and Employment, who oversees the entire unemployment system's structure and bears ultimate responsibility for constitutional compliance.
- Jeff Fitzgerald, Director of the Division of Unemployment Insurance, who is directly responsible for the design, operation, and enforcement of appeal procedures and eligibility determinations.
- Jeff Newcomb, Branch Manager for Customer Services, who oversees claimant communications and system accessibility, including the appeal initiation process through MyUI+ and phone lines.
- David Kimball, Call Center Operations Manager, whose declarations confirm that call centers lack sufficient capacity and callback functions, further impeding appeal access.
- Brandon McClure, Program Manager for MyUI+, for ensuring the online portal allows for necessary procedural rights, including appeal access and communication.

None of these officials, despite clear notice of systemic failures through audits, media reports, claimant complaints, and internal metrics, implemented effective reforms to ensure that claimants like Plaintiff could access appeal rights guaranteed by law and the Constitution. Their continued operation of defective procedures that block meaningful appeal access constitutes a knowing, ongoing violation of established First and Fourteenth Amendment protections.

Thus, Plaintiff's allegations are neither conclusionary nor speculative; they are based on specific administrative practices, admitted systemic deficiencies, and clear constitutional standards.

Dismissal is inappropriate where systemic unconstitutional conditions are sufficiently pleaded and directly traceable to identifiable state actors in their official capacities.

Plaintiff's ADA Title II Claims Are Properly Pleaded and Independently Violate Federal Law

Defendants assert that to establish a Title II ADA claim, Plaintiff must show: (1) he is a qualified individual with a disability; (2) he was excluded from participation in a public service or program; and (3) the exclusion was due to his disability. Plaintiff satisfies all three elements, based on undisputed evidence and Defendants' own sworn admissions.

Plaintiff is a Qualified Individual with a Disability. Plaintiff's disability is undisputed. Plaintiff documented his disabilities during interactions with Defendants between 2023 and 2025, including through uploaded materials and written references to his need for accommodation, and again throughout this litigation. Defendants have never contested Plaintiff's status as a qualified individual with a disability within the meaning of Title II of the ADA (42 U.S.C. § 12131(2)).

Plaintiff Sought Access to a Public Service: Unemployment Benefits. Plaintiff applied for unemployment benefits, a public program administered by the State of Colorado and subject to the full protections of Title II of the ADA. Plaintiff also attempted to request ADA accommodation and was completely blocked and obstructed from knowledge and instruction of how to process or request this despite written submissions by FAX and uploaded through documents in the Claimant portal, none of which got acknowledged or replied since there was no official method or ability to reasonably navigate otherwise.

Defendants failed to comply with 28 C.F.R. § 35.106 by not informing claimants of their rights under the ADA or providing instructions on how to request accommodations, thereby compounding the systemic barriers and constituting an independent regulatory violation.
Defendants failed to designate or publicize the identity and contact information of an ADA

Coordinator as required under 28 C.F.R. § 35.107(a), depriving Plaintiff and similarly situated individuals of any meaningful avenue for addressing accommodation denials.

The Supreme Court previously ruled meaningful access to public services is required under the ADA. Requiring disabled individuals to navigate inaccessible systems while providing nondisabled individuals with intuitive digital access constitutes disparate impact discrimination, violating both the letter and spirit of federal law. The Division's lack of electronic or flexible accommodation procedures disproportionately excludes disabled claimants—particularly those with communication, cognitive, or psychiatric impairments—who are unable to reach live representatives or attend in-person appointments. This disparate impact violates Title II's requirement of meaningful access. See *Alexander v. Choate*, 469 U.S. 287 (1985).

Plaintiff Was Excluded From Meaningful Access Due to Disability-Based Barriers. Plaintiff was functionally excluded from accessing critical services needed to resolve integrity holds, appeal underpayment decisions, or request clarifications, as a direct consequence of systemic failures affecting disabled claimants:

- No Electronic Accommodation Process Exists. Defendant Jeff Newcomb (Branch Manager, Customer Services) admits in sworn testimony that accommodation requests must be made directly to live call center agents or in-person staff. No standardized, accessible electronic submission form or portal mechanism exists for disability accommodations, despite the heavy reliance on the MyUI+ portal for all other critical communications.
- Live Agent Access Required, But Impossible. Defendant David Kimball (Call Center Operations Manager) admits that the call center lacks sufficient staffing or callback capacity. With the system admitting only a tiny fraction of total daily claimants, disabled

individuals who cannot access phone queues are denied even the possibility of requesting accommodations.

- Excluded from any assistance with integrity matters, appeals, and various processes was fully denied because neither the automated phone system nor live representatives informed callers about the availability of disability accommodations, and no options for accommodations were provided during appeals, integrity checks, or ID verifications.
- Uploaded Requests Are Not Recognized. Despite Plaintiff uploading disability-related documents into the portal, Defendants affirm that uploads are not treated as accommodation requests. Thus, disabled individuals cannot invoke their rights unless they can already navigate an inaccessible system. This broken system is obvious and predictably in perpetuating federal and constitutional harm at scale.

Defendants' Motion fails to address, and thus concedes, that the Division's unemployment systems are fundamentally inaccessible to disabled claimants in violation of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132. Defendant Jeff Newcomb admitted under oath that accommodation requests must be made verbally to live call center agents or in-person staff, with no standardized electronic, portal-based, or accessible intake process available. Given that MyUI+ and overloaded phone lines are the primary access points for claimants, and that automated systems fail to inform or facilitate accommodation requests, disabled individuals like Plaintiff are effectively barred from engaging with core unemployment processes, including appeals, integrity reviews, and benefit verifications. This systemic failure denies meaningful access as required under federal law. See *Tennessee v. Lane*, 541 U.S. 509 (2004).

Plaintiff, a qualified individual with a recognized disability, was denied meaningful and timely access to unemployment benefits and appeals not by explicit exclusion, but by structural barriers that disproportionately burden disabled persons. No system prompts, no agent outreach, and no public notices advised claimants how or where to seek accommodations, leaving access contingent on navigating an inaccessible and broken call center. This lack of reasonable modifications delayed and obstructed Plaintiff's ability to resolve claims and challenges, violating the ADA. The fact that Plaintiff eventually accessed partial benefits does not cure the constitutional harm, which stems from systemic discrimination embedded in Defendants' processes. Individual Responsibility for these systemic failures lies squarely with the following individuals in their official capacities:

- Joe Barela, Executive Director, for failing to ensure constitutional and statutory compliance at the highest level.
- Jeff Fitzgerald, Director of Unemployment Insurance, for failing to establish an accessible accommodation request infrastructure.
- Jeff Newcomb, Branch Manager, for managing claimant communication processes that exclude disabled individuals.
- David Kimball, Call Center Operations Manager, for knowingly operating an inaccessible call system critical for requesting accommodations.
- Brandon McClure, Program Manager for MyUI+, for failing to integrate ADA-compliant accommodation request mechanisms into the digital portal.

These officials knew or should have known that failing to provide accessible avenues for accommodation violated Title II obligations. Their failure to act is not a mere technical oversight. It is ongoing systemic discrimination in violation of federal law. The existence of performance reports and public data show these issues were well known and prioritization of call statistics and 'money saved' in denying claims as the primary focus with no plan or action to address the known constitutional issues.

Beyond standing alone as ADA violations, these failures also magnify the First and Fourteenth Amendment violations already detailed. Disabled claimants are not merely inconvenience they are wholly blocked from exercising their rights to petition the government and receive procedural due process. The combination of inaccessible appeal systems and denial of accommodation rights creates a multilayered constitutional deprivation that demands immediate judicial correction. Plaintiff has not only plausibly stated but overwhelmingly substantiated claims of ADA Title II violations, constitutional injury, and systemic administrative failure, each sufficient to survive dismissal.

Relief Arising from Constitutional Violations

While Plaintiff's Amended Complaint includes limited claims for monetary relief, such damages stem directly from the proven constitutional violations committed by Defendants. Under 42 U.S.C. § 1983 and established precedent, monetary compensation is appropriate where a plaintiff suffers tangible harm including financial, emotional, or physical injury flowing from unlawful deprivations of constitutional rights. The Supreme Court has repeatedly affirmed that individuals sued in their personal capacities for unconstitutional acts are not shielded by Eleventh Amendment immunity. These claims are distinct from and fully compatible with Plaintiff's prospective injunctive claims against Defendants in their official capacities. Backpay is sought only as equitable relief to redress continuing deprivation of statutory benefits, not as retrospective damages, and monetary damages are pursued solely against individual defendants in their personal capacities under 42 U.S.C. § 1983.

Plaintiff's request for back pay is not a claim for retrospective damages but a form of equitable relief necessary to remedy the ongoing constitutional and statutory deprivation of

benefits. See *Milliken v. Bradley*, 433 U.S. 267 (1977). To the extent monetary relief is sought, it is pursued only against individual Defendants in their personal capacities under 42 U.S.C. § 1983 not against the state or its agencies.

Plaintiff's request for backpay relating to unpaid unemployment benefits particularly those wrongfully delayed from 2023 constitutes a permissible form of injunctive relief, not retrospective damages. Plaintiff seeks an administrative correction of unlawful agency conduct that continues to inflict harm today by undermining his economic stability, housing security, and ability to meet basic needs. The requested relief directly remedies the agency's ongoing violations and aims to restore Plaintiff to the position he would have occupied had Defendants complied with constitutional and statutory requirements.

Even if the Court determines that Plaintiff's supplemental state-law claims seeking separate monetary damages must be severed or addressed later, the constitutional claims stand independently. The Court retains full jurisdiction to order immediate injunctive relief to cure the systemic due process and ADA violations detailed in the record. Judicial economy, fundamental fairness, and the ongoing irreparable harm already suffered weigh strongly in favor of granting the requested relief now, avoiding unnecessary future litigation and further compounding of the damages already inflicted.

Exhaustion is excused because Defendant failed to issue an appealable decision rendering all further remedies unavailable. Plaintiff has demonstrated extraordinary diligence in exhausting administrative remedies, pursuing self-representation in federal court, and assembling a comprehensive evidentiary record. These efforts further support the propriety of ordering full relief including restoration of back pay and constitutional compliance at this stage to make

Plaintiff whole and to vindicate the rights of similarly situated claimants suffering parallel harms.

Exhaustion is excused where no adequate or available administrative remedy exists. Here,

Defendants' failure to issue a disqualification or appealable decision rendered further process

unavailable. See *Ross v. Blake*, 578 U.S. 632 (2016); *McCarthy v. Madigan*, 503 U.S. 140 (1992)

Defendants failed to issue any appealable decision regarding Plaintiff's underpayment of benefits

in 2023. No written disqualification, denial, or determination was ever issued to trigger an

appeal, leaving Plaintiff in limbo with no notice, no explanation, and no opportunity to contest

the deprivation of his benefits.

Defendants failed to issue any disqualification or appealable decision following Plaintiff's

second integrity hold in 2023. Defendants' own exhibits confirm that a fact-finding request was

sent, but no required disqualification notice followed after seven days, in direct violation of their

own procedures. Without a formal adverse decision, Plaintiff was deprived of any opportunity to

appeal or seek timely review.

When Plaintiff attempted to engage the appeals process, he was funneled into filing an irrelevant

appeal regarding "withdrawal of application", something he clearly did not seek. Plaintiff's

appeal materials stated he was trying to address underpayment issues, but the magistrate

confined the proceeding solely to the withdrawal matter, making any further appeal futile and

irrelevant to the actual harm suffered.

The lack of appealable decisions and the obstruction of meaningful appeal pathways prevented

Plaintiff from exhausting administrative remedies through no fault of his own. This systematic

deprivation of notice and access constitutes a violation of the First and Fourteenth Amendments,

fully excusing any alleged failure to exhaust.

The constitutional violations here are specific, ongoing, and structural and systemic in scale. The First Amendment right to petition the government for redress has been systematically obstructed. Claimants are deprived of any meaningful avenue to appeal wrongful benefit denials because Defendants failed to issue timely appealable determinations, failed to maintain functional communication systems, and failed to provide accessible channels for grievances. These practices effectively foreclose claimants' ability to seek redress for violations..

Defendants have violated the Fourteenth Amendment's procedural due process guarantees by withholding public benefits without providing adequate notice, an opportunity to respond, or a meaningful hearing. Integrity holds are imposed without individualized suspicion, notice of disqualification, or any functional means to challenge the deprivation. Furthermore, Defendants violate the Equal Protection Clause by failing to provide disabled claimants with accessible methods to request accommodations, navigate appeals, or resolve benefit disputes, in violation of Title II of the Americans with Disabilities Act. These failures are not isolated mistakes but systemic practices that continue to deprive Plaintiff and similarly situated individuals of their constitutional and statutory rights.

In Conclusion : Defendants' Motion to Dismiss must be denied. Plaintiff has properly named and sued Defendants in their official capacities under well-established exceptions to sovereign immunity, specifically seeking prospective injunctive relief for ongoing constitutional and statutory violations. The record clearly demonstrates that the systemic deficiencies in Defendants' administration of unemployment benefits including failure to issue appealable decisions, denial of access to appeals, obstruction of disability accommodations, and deprivation of notice and hearing violate the First and Fourteenth Amendments, Title II of the ADA, and federal statutory mandates.

Defendants' reliance on broad immunity defenses, theoretical exhaustion doctrines, and references to abstract administrative frameworks fails to address the uncontested reality that Plaintiff and similarly situated individuals have been unlawfully denied access to critical benefits without meaningful process. Defendants' arguments do not rebut the fundamental constitutional claims already proven on the face of the pleadings and exhibits.

Discovery is warranted to further establish the systemic nature of these violations, but even now, the existing evidentiary record already substantiates the Plaintiff's claims to a degree that could support summary judgment. Continuing to delay adjudication based on facially deficient defenses would only perpetuate the very harms Plaintiff seeks to remedy. Immediate denial of the Motion to Dismiss is necessary to advance this case toward resolution and ensure that constitutional rights are no longer sacrificed under the pretense of administrative convenience.

Joshua Abrams

Date: 05-08-2025 | ☐ Petitioner/Plaintiff

Joshua Abrams, Pro Se

CERTIFICATE OF SERVICE

I certify that on 05-08-2025 a true and accurate copy of the Defendant was served on the other party by:

X_E-filed, lauren.davison@coag.gov & Stephen.woolsey@coag.gov

Joshua Abrams

☐ Petitioner/Plaintiff