

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1412**

Joni T. White,
Relator,

vs.

FGX International, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed July 25, 2022
Affirmed
Hooten, Judge***

Department of Employment and Economic Development
File No. 43106657-6

Joni White, St. Paul, Minnesota (pro se relator)

FGX International, Inc., Smithfield, Rhode Island (respondent employer)

Anne Froelich, Minnesota Department of Employment and Economic Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Bjorkman, Presiding Judge; Segal, Chief Judge; and
Hooten, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

HOOTEN, Judge

Relator-employee challenges an unemployment-law judge's (ULJ) determination that her weekly benefit amount should be offset by severance pay starting immediately after she became aware she would receive severance pay. Relator also contests a separate ineligibility determination from August 2020 regarding vacation pay. We affirm.

FACTS

Relator Joni White began employment with respondent FGX International, Inc. (FGX) in September 2018. White worked in sales and “earned about \$53,000 per year” with a “weekly gross wage [of] \$1030.” In April 2020, FGX placed White on an unpaid furlough because of COVID-19, and White established an unemployment benefits account with a weekly benefit amount of \$516.

On August 4, 2020, FGX discharged all sales employees and offered White \$7,210 in severance pay, equivalent to seven weeks of White's regular pay. White signed and mailed the severance agreement to FGX on August 7, 2020. “[B]ecause of a mailing error,” FGX did not receive the signed agreement until the middle of August 2020. As a result, White did not receive the first severance payment until September 3, 2020, after which she received weekly payments until October 15, 2020.

On August 18, 2020, in a separate and unrelated ineligibility determination, respondent Department of Employment and Economic Development (DEED) “found White ineligible for unemployment benefits for the week of August 9, 2020, because she reported working and earning income in excess of her weekly unemployment benefit

amount.” White claims her reported 72 hours of work and \$1,862.24 in earnings was from her receipt of her remaining vacation pay, not payment for work performed. According to DEED, White appealed this ineligibility determination a year later, in August 2021, but a ULJ dismissed the appeal as untimely and White did not request reconsideration.

On September 30, 2020, DEED notified White that she was ineligible for benefits from August 5 through September 23, 2020, because of her severance pay and that White’s ineligibility resulted in a \$1,548 overpayment to White. White appealed the ineligibility determination.

The ULJ could not reach White for the evidentiary hearing on January 4, 2021, so the ULJ dismissed White’s appeal. White requested reconsideration of this dismissal, and the ULJ affirmed the dismissal. White sought review from this court. Before the case was submitted, we remanded to the ULJ for a hearing on the merits at DEED’s request. *See White v. FGXI International, Inc.*, No. A21-0712 (Minn. App. June 23, 2021) (order).

At an evidentiary hearing on July 13, 2021, White testified about her benefits and severance pay. White claimed her ineligibility for the week of August 9 was miscalculated because of vacation pay she received from FGX and provided the ULJ with the issue number 42682487-1 in reference to this determination.

On July 19, 2021, the ULJ determined “White’s eligibility to receive unemployment benefits is delayed from August 5, 2020, through September 22, 2020,” because of the seven weeks of severance pay. The ULJ explained that Minn. Stat. § 268.085, subd. 3b (2020), states an applicant is not eligible for unemployment benefits for any week the applicant receives severance pay, and severance payments “are applied to the period

immediately following the later of the date of separation from employment or the date the applicant first becomes aware that the employer will be making a payment.” The ULJ explained that under the statute, “[t]he date the payment is actually made or received . . . does NOT affect the application of this paragraph.” Because FGX terminated White and sent her the severance agreement on the same day, August 4, the seven weeks of severance payments applied beginning August 5, regardless of when White received the payments. Based on this calculation, White received a \$1,548 overpayment. The ULJ noted White’s vacation pay issue was not properly before the ULJ because the decision regarding her vacation pay is final and was not appealed.

White requested reconsideration, but her reconsideration request did not challenge the ULJ’s legal analysis of Minn. Stat. § 268.085, subd. 3b. Instead, White focused on the ULJ’s claim that it lacked jurisdiction over White’s vacation pay issue because White believed this payment impacted the calculation of her overpayment of unemployment benefits. On reconsideration, the ULJ found the ineligibility determination both factually and legally correct and affirmed White’s ineligibility and the overpayment because the overpayment was not impacted by White’s vacation pay. This review by certiorari follows.

DECISION

We may affirm a ULJ’s decision, remand for further proceedings, or reverse or modify the decision if the petitioner’s substantial rights were prejudiced because the decision violated the constitution, exceeded DEED’s statutory authority or jurisdiction, was made upon unlawful procedure, was affected by an error of law, was unsupported by

substantial evidence, or was arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d) (2020).

Neither party contests the facts. White makes two arguments on appeal; we address each argument in turn.

I. The ULJ did not err by determining White was ineligible for benefits from August 5, 2020, through September 22, 2020, because of her severance pay.

White contends the ULJ erred by confirming her ineligibility. White argues that because she did not receive unemployment benefits while she collected severance pay, there was no double payment. White explains that she did not start receiving severance pay until September 3, and she reported her receipt of severance pay to DEED beginning September 3 so DEED could adjust her benefit amount for those weeks.¹ DEED contends the ULJ did not err because under Minnesota statute, White’s severance payments are applied beginning immediately after she became aware she would receive severance pay, regardless of when she received severance pay. Therefore, White’s eligibility for unemployment was affected for the seven weeks immediately following August 4, when she was advised that she would be receiving severance pay.

“If the relevant facts are not in dispute, we apply a de novo standard of review to the ULJ’s interpretation of the unemployment statutes and to the ultimate question whether

¹ To support this argument White states, “This same thing happened to all of [her] peers in Rhode Island” and the Rhode Island state unemployment “overturned all overpayments as the employees also did not get benefits the same weeks as severance.” However, White provides no legal authority to support this contention, so we decline to address this supporting argument. *See Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994) (stating the court of appeals declines to address allegations unsupported by legal analysis or citation).

an applicant is eligible to receive unemployment benefits.” *Menyweather v. Fedtech, Inc.*, 872 N.W.2d 543, 545 (Minn. App. 2015) (citing *Irvine v. St. John’s Lutheran Church*, 779 N.W.2d 101, 103 (Minn. App. 2010); *Markel v. City of Circle Pines*, 479 N.W.2d 382, 384 (Minn. 1992)).

DEED pays unemployment benefits to applicants who meet the statutory requirements. Minn. Stat. § 268.069, subd. 1 (2020). Eligible applicants, however, may have their benefits reduced or postponed if they receive severance pay. Minn. Stat. § 268.085, subd. 3b. Applicants are “not eligible to receive unemployment benefits for any week” they received severance pay. Minn. Stat. § 268.085, subd. 3b(a). Severance payments “are applied to the period immediately following the later of the date of separation from employment or the date the applicant first becomes aware that the employer will be making a [severance] payment.” *Id.*, (b). “The date the payment is actually made or received . . . does not affect the application of this paragraph.” *Id.*

In calculating the number of weeks that are affected by the payment of severance pay, the total amount of severance is divided by the applicant’s last level of weekly pay. *Id.*, subds. 3b(d); 3(c)(1) (2020). If an applicant’s weekly severance pay “is equal to or more than the applicant’s weekly unemployment benefit amount, the applicant is ineligible for benefits for that week.” *Id.*, subd. 3b(e).

Here, it is undisputed that White’s severance payments qualify as payments that could disqualify her from benefits under statute. *See Id.*, subd. 3b(a). FGX terminated White and sent her the severance offer on the same day, August 4, so her severance payments are applied to her benefits account beginning immediately after August 4. *See*

id., subd. 3b(b). White’s severance of \$7,210, when divided by her last weekly pay amount while working for FGX, was equal to seven weeks of her regular pay from FGX. *See id.* subds. 3b(d); 3(c)(1). Because White’s weekly severance payments of \$1,030 were greater than her weekly unemployment benefit amount of \$516, White was ineligible for benefits for the seven weeks her severance payments applied to her benefits account. *See id.*, subd. 3b(e). Under Minn. Stat. § 268.085, subd. 3b, White was ineligible for benefits from August 5 until September 22, 2020, seven weeks later. Finally, the statute explicitly states, despite White’s argument that she did not receive benefits until September 3, that “[t]he date the payment is actually made or received . . . does not affect the application” of the statute. *See id.*, subd. 3b(b).

White’s case is analogous to *Menyweather*. In *Menyweather*, there was no dispute that Menyweather received severance pay after being terminated, the severance pay totaled six weeks’ worth of Menyweather’s wages, and the weekly severance amount exceeded his weekly unemployment benefit amount. 872 N.W.2d at 546. As is the case for White, the only dispute in *Menyweather* was “when Menyweather should be ineligible for unemployment benefits.” *See id.*

The ULJ determined Menyweather was ineligible for six weeks immediately following termination. *Id.* Menyweather argued he was eligible for benefits during that six-week period but became ineligible after he receive the lump-sum severance six weeks after termination. *Id.* We determined “the plain language” in Minn. Stat. § 268.085, subd. 3(b), “easily resolved” the dispute as the legislature determined a lump-sum severance payment must be applied to an applicant’s benefits account immediately following the later

of the termination date or the date the applicant knew of the severance pay. *Id.* Menyweather was terminated and made aware of the severance pay on the same date—December 5, 2014—and we determined his severance pay was deducted from his benefit account immediately after December 5. *Id.* We stated that the legislature confirmed this interpretation of the statute by including in the statute the date that the severance payment is made does not affect application of the statute, so it was “irrelevant that Menyweather received his lump-sum severance payment on January 19, 2015.” *Id.* We affirmed the ULJ’s determination that Menyweather was ineligible for benefits during the six-weeks immediately following his termination. *Id.*

Given the unambiguous statutory language and our explanation of the application of Minn. Stat. § 268.085, subd. 3b, in *Menyweather*, we determine the ULJ did not err by determining White was ineligible for benefits from August 5 through September 22, 2020, because of her receipt of seven weeks’ worth of severance pay from FGX.

II. The ULJ did not err by determining that White’s ineligibility for benefits during the week White received vacation pay was not properly before the ULJ.

White argues she should have been eligible for benefits the week she received the balance of her vacation pay, August 9 through 15, and the weekly benefit DEED deducted “should be added back in” because Emergency Executive Order 20-29 suspended the delay of benefits during weeks when applicants received vacation pay. *See* Emerg. Exec. Order No. 20-29 (EEO 20-29), *Amending Executive Order 20-05 to Expedite State Unemployment Insurance Benefits During the COVID-19 Peacetime Emergency* (Apr. 6, 2020). EEO 20-29 suspended strict compliance with Minn. Stat. § 268.085, subd. 3, “which

delays unemployment benefits for any week an applicant is receiving, has received, or will receive vacation pay, sick pay, or personal time off (PTO) pay.” *Id.* at 2. White seems to believe that because of EEO 20-29, she should be reimbursed for any unemployment benefits she was denied during the week of August 9, when she received her vacation pay.

DEED contends White’s argument about her vacation pay is not properly before this court. DEED first argues that there was an ineligibility determination on August 18, 2020, based on White’s receipt of vacation pay during the week of August 9, but White did not timely appeal that determination. Alternatively, DEED contends that even if this issue were properly before this court, the issue is moot because of the application of White’s severance payments for the same week, thereby making her ineligible for benefits.

The record for this case does not contain any formal documentation on the August 18, 2020, ineligibility determination DEED made about White’s vacation pay. However, in her August 2021 reconsideration request, White mentioned her vacation-time payout, stating that “Issue Id-42682487-1 stated that [she] was ineligible for payment,” that she discussed this with the ULJ during her July 13 evidentiary hearing, but the ULJ stated the issue was not within her jurisdiction. In her reconsideration request, White argued the issue “needs to be looked at under some part of unemployment jurisdiction” because money should not have been deducted from her account. She also argued that while the impact of her vacation pay may be considered a separate issue, it was not actually separate because it was “listed as part of the overpayment on document 152475682.” On reconsideration, the ULJ explained that “White reported working 72 hours and earning \$1,862.24. On August 18, 2020, [DEED] found White ineligible for unemployment benefits for the week

of August 9, 2020, because she reported working and earning income more than her weekly unemployment benefit amount.”

Document 152475682 was referenced in the initial severance-pay ineligibility determination, from which this appeal is derived. White references this document in her reconsideration request to show how this appeal and the impact of her vacation pay are intertwined. This document contained a chart that showed the amount of money that would be deducted from White’s benefits account for the weeks her severance payments were applied. White contends that this document shows that the overpayment included unemployment benefits paid during the week of August 9, when she received her vacation pay, and that unemployment was properly paid during that week because of the effect of the Emergency Executive Order 20-29.

As the ULJ explained in her September 27 reconsideration decision, White is incorrect about what is depicted in Document 152475682. The first line in the chart states \$611.54 was deducted from White’s account the week of August 2 through August 8. The ULJ explained, “For the week of August 2, 2020, White received severance in excess of her weekly benefit amount [of \$516] (even prorated to start mid-week).” The second line in the chart states \$1019.23 was deducted from White’s account each week from August 9 through September 19. The ULJ explained that “[f]or the weeks of August 9, 16, 23, 30, and September 6 and 13, [White] received severance in excess of her weekly benefit amount (\$1,030 per week).” The third line in the chart states \$483.08 was deducted from White’s account the week of September 20 through September 26. The ULJ explained, “[f]or the week of September 20, 2020, the balance of her severance (\$412) is applied.”

The ULJ then explained how the \$1,548 overpayment was calculated:

For the week of August 2, 2020, White received \$516 in unemployment benefits (\$76 paid to the IRS on her behalf for tax withholding and a net deposit of \$440). White was not entitled to receive this money. White is overpaid these benefits.

For the week of August 9, 2020, White did not receive any benefits, so she is not overpaid that week.

For the week of August 16, 2020, White received \$516 in unemployment benefits (\$76 paid to the IRS on her behalf for tax withholding and a net deposit of \$440).

For the week of August 23, 2020, White received \$516 in unemployment benefits (\$76 paid to the IRS on her behalf for tax withholding and a net deposit of \$440).

White did not receive benefits for the week of August 30, 2020.

When the weeks of August 3, August 16, and August 23 are added together, this makes a total overpayment of \$1,548.

The ULJ's detailed explanation shows that the effect of her ineligibility for the week of August 9 did not impact the overpayment calculation for two reasons. First, the money listed in the chart only references the gross severance pay White received during those weeks and does not incorporate White's vacation pay during the week of August 9. Second, White did not receive any benefits from DEED the week of August 9, 2020, when she received the vacation pay, so she is not required to reimburse any overpayment for the week of August 9. Therefore, the ULJ's determination on reconsideration was not impacted by any error relating to the calculation of White's overpayment.

However, based on White's argument, it appears she is asking this court to determine she should have received her weekly benefit amount the week of August 9

because she believes her vacation pay should not have impacted her benefits. We decline to address this issue for two reasons. First, as detailed above, White was ineligible for benefits from August 5 through September 22, 2020, because of her severance pay from FGX, so she was ineligible for benefits the week of August 9, 2020, regardless of whether she received vacation pay.

Second, based on the references to the vacation pay ineligibility determination, it appears DEED issued notice to White in August 2020, that she was ineligible for benefits the week of August 9 because of her receipt of vacation pay. DEED argued in its brief:

For context, DEED issued a determination of ineligibility on August 18, 2020, stating that White was ineligible for unemployment benefits for the week of August 9, 2020, because she had worked 32 or more hours in employment. White appealed this decision on August 8, 2021, almost a year later. The appeal was dismissed as untimely. As of today's date, DEED has not received a request for reconsideration to this issue.

Thus, it appears any ineligibility determination on the impact that vacation pay had on White's receipt of benefits is not properly before this court, as her appeal was untimely, and she failed to request reconsideration. *See* Minn. Stat. § 268.105, subd. 7(a) (stating the court of appeals review the ULJ's "decision on reconsideration" on appeal); Minn. Stat. § 268.105, subd. 1a(c) (2020) ("The [ULJ] must issue a decision dismissing the appeal as untimely if the judge decides the appeal was not filed within 20 calendar days after the sending of the determination.").

Given White's failure to timely appeal DEED's initial ineligibility determination because of her receipt of vacation pay, the ULJ did not err by determining that the issue was not properly before her.

Affirmed.