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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A13-0644**

Lisa Ziemer,  
Relator,

vs.

GovDelivery, Inc.,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed December 23, 2013  
Affirmed  
Halbrooks, Judge**

Department of Employment and Economic Development  
File No. 30410545-3

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Considered and decided by Halbrooks, Presiding Judge; Ross, Judge; and Crippen,  
Judge.\*

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

## UNPUBLISHED OPINION

**HALBROOKS**, Judge

Relator challenges the determination of the unemployment-law judge (ULJ) that her settlement payment constituted, at least in part, compensation for back pay, and is therefore deductible from her unemployment benefits. Because there is substantial evidence in the record to support the ULJ's findings and because the ULJ did not err in applying the law, we affirm.

### FACTS

Relator Lisa Ziemer worked for respondent GovDelivery, Inc., as a technical operations manager earning \$2,242.31 per week from August 29, 2011, until the company terminated her employment on May 3, 2012. GovDelivery offered Ziemer two weeks of severance pay on the day of her termination, but she refused the offer because she believed she had claims of alleged discrimination. Ten days later, Ziemer established an unemployment-benefits account and began receiving \$597 per week in benefits. She sought employment from May 4 to August 8, 2012, before taking a job that paid approximately \$30,000 less per year than her GovDelivery salary.

On October 17, 2012, Ziemer signed a confidential settlement agreement with GovDelivery in exchange for a release of her claims against the company. Her settlement consisted of three parts: \$30,592.40 that was treated as W-2 income and subject to payroll taxes and deductions, emotional-distress damages that was treated as 1099 income, and attorney fees. Ziemer did not receive any portion of the settlement until November 1, 2012.

Respondent Minnesota Department of Employment and Economic Development (DEED) issued an ineligibility determination on December 11, 2012, that stated that Ziemer's benefits should have been delayed until August 8, 2012, due to payments received relating to separation from employment, and that she had therefore been overpaid \$4,776. DEED determined that the \$30,592.40 settlement payment that Ziemer received related to her "leaving employment" was not "earnings for work performed," and may have included "wages in lieu of notice, severance pay, notice pay, or a retention bonus."

Ziemer appealed the DEED determination to a ULJ, arguing that she had been paid for releasing GovDelivery from all claims, not for severance. At an evidentiary hearing, both Ziemer and GovDelivery refused to discuss their settlement negotiations or provide the ULJ with a copy of the settlement agreement. The ULJ determined that "[t]he \$30,592.40 was paid in unknown parts as severance, lost wages, and a settlement of claims." The ULJ further concluded that the preponderance of the evidence demonstrated that the \$30,592.40 "was wages and was paid because of and after separation" from GovDelivery and therefore Ziemer was ineligible to receive benefits from May 4 until August 8, 2012. As a result, she owes \$4,776 as a result of benefits overpayment. Ziemer requested reconsideration, and the ULJ affirmed. Ziemer now appeals by a petition for a writ of certiorari.

### **DECISION**

Upon appeal of a ULJ's ruling, this court may affirm, remand, reverse, or modify the ULJ's decision if the petitioner's substantial rights may have been prejudiced because

the findings, inferences, conclusion, or decision are “(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious.” Minn. Stat. § 268.105, subd. 7(d) (2012). We view the ULJ’s factual findings in the light most favorable to the decision and will not disturb them if they are supported by substantial evidence. *Godbout v. Dep’t of Emp’t & Econ. Dev.*, 827 N.W.2d 799, 801 (Minn. App. 2013). We review de novo a ULJ’s decision that an applicant is ineligible to receive unemployment benefits. *Stassen v. Lone Mountain Truck Leasing, LLC*, 814 N.W.2d 25, 30 (Minn. App. 2012).

The ULJ determined that “[b]ecause [Ziemer] was initially offered severance pay for her release of claims, the preponderance of the evidence is some of the payment was severance.” But Ziemer and DEED agree that Ziemer’s settlement payment did not constitute severance pay. “Severance pay” is not defined by statute, but we have previously stated that the term means “[a] sum of money usually based on length of employment for which an employee is eligible upon termination.” *Carlson v. Augsburg Coll.*, 604 N.W.2d 392, 394-95 (Minn. App. 2000) (quoting *The American Heritage Dictionary* 1652 (3d ed. 1992)).

There is no support in this record for the ULJ’s conclusion that part of Ziemer’s \$30,592.40 payment was severance pay, which would be based on her length of employment. And GovDelivery’s human resources director, Carrie Cisek, testified that Ziemer’s termination did not entitle Ziemer to receive any severance. Accordingly, the

ULJ erred by concluding that a portion of Ziemer's settlement should be characterized as severance. But because the ULJ also determined that part of the payment constituted back pay, this conclusion is not dispositive of Ziemer's appeal.

The ULJ noted in his decision that "the settlement agreement states that the money is, at least in part, for the loss of wages" and concluded that "[t]his would seem to indicate some was back pay." Minn. Stat. § 268.085, subd. 6(a) (2012), provides:

Back pay received by an applicant within 24 months of the establishment of the benefit account with respect to any week occurring during the benefit year must be deducted from unemployment benefits paid for that week.

If the back pay is not paid with respect to a specific period, the back pay must be applied to the period immediately following the last day of employment.

"Back pay" is defined as "a retroactive payment of money by an employer to an employee or former employee for lost wages." Minn. Stat. § 268.035, subd. 3 (2012). And "wages" are defined as "all compensation for services," including "back pay as of the date of payment." *Id.*, subd. 29(a) (2012).

We concluded in *Peterson v. Ne. Bank–Minneapolis* that a settlement payment for unspecified damages was compensation for lost wages and therefore constituted back pay. 805 N.W.2d 878, 882 (Minn. App. 2011). DEED argues that *Peterson* is dispositive of this case. We agree.

Peterson established an unemployment-benefits account and began receiving unemployment benefits after her employment was terminated. *Id.* at 879-80. Peterson brought a claim of disability discrimination against her employer, but settled and received

compensation for releasing her claims. *Id.* Peterson’s settlement consisted of three parts: unspecified damages treated as W-2 income and subject to tax withholding, emotional-injury damages treated as 1099 income, and attorney fees. *Id.* at 880. DEED issued a determination of ineligibility based on the deductibility of the unspecified damages. Peterson appealed, and a ULJ determined that the portion of the settlement for unspecified damages met the definition of wages, constituted severance pay or other payment, and was therefore deductible from her unemployment benefits. *Id.* The ULJ did not reach the issue of whether the unspecified damages constituted back pay. *Id.* at 881.

On appeal, we examined Peterson’s complaint and the manner in which her payments were reported for tax purposes. *Id.* at 882. Peterson’s complaint sought damages for emotional injury and lost wages, and the settlement agreement explicitly stated that the second portion of the settlement was compensation for emotional damages. *Id.* Reading the complaint and settlement agreement together, we concluded that the payment for unspecified damages constituted compensation for lost wages. *Id.* The fact that Peterson’s payment for unspecified damages was reported on a W-2 form supported that conclusion because “payments for back pay that constitute wages are reportable on Form W-2.” *Id.*

Here, Ziemer did not file her complaint because she settled her claims with GovDelivery prior to doing so. Therefore, the complaint is not in the record. But it is clear from the record that the second part of Ziemer’s settlement was for emotional damages and that Ziemer’s \$30,592.40 was treated as W-2 income and subject to payroll

tax and deductions. As in *Peterson*, this evidence supports the determination that the amount was compensation for lost wages and therefore deductible from Ziemer's benefits.<sup>1</sup> *See id.* at 882-83.

Ziemer insists that the settlement payment was in satisfaction of her claim for future wage loss, but the only evidence she points to is her own testimony that she now earns approximately \$30,000 less per year at her new job. The fact that Ziemer earns less than she did at GovDelivery does not prove that this portion of her settlement constituted front pay. Likewise, Ziemer's emphasis that she would not have received the settlement payment unless she released her claims does not persuade us that the \$30,592.40 constituted front pay. Settlement agreements are predicated on a release of claims. Indeed, Ziemer would not have received her emotional-distress damages or attorney fees had she not agreed to release her claims. But that fact alone does not change the nature of those payments.

Our task is not to speculate about the reasons that Ziemer and GovDelivery settled for an amount that included \$30,592.40 as W-2 income. Rather, we are to look at the record and evaluate the ULJ's decision accordingly. While the record is scarce due to the

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<sup>1</sup> Ziemer asserts that we mistakenly assumed Peterson's payment for unspecified damages was "retroactive." *See Peterson*, 805 N.W.2d at 882. She insists that to be deductible, back pay must be "a retroactive payment for wages as of the date of payment." But Minn. Stat. § 268.085, subd. 6(a) (2012), provides that even if back pay "is not paid with respect to a specific period," it is still deductible. Accordingly, Ziemer's argument does not present a "compelling reason" to overturn or limit the holding in *Peterson*. *See Leiendecker v. Asian Women United of Minn.*, 834 N.W.2d 741, 751 (Minn. App. 2013) (noting that we are bound by the doctrine of stare decisis and "will not overrule a former decision absent a compelling reason"), *review granted* (Minn. Aug. 20, 2013).

parties' mutual unwillingness to provide the ULJ with pertinent details of their settlement agreement, the evidence supports the ULJ's decision that \$30,592.40 of the settlement was compensation for back pay. Although the settlement agreement itself was not before the ULJ, there was testimony concerning some of its terms. Asked by GovDelivery's attorney whether she agreed that the settlement agreement stated that the payment was for "alleged wage loss," Ziemer responded, "Correct. I agree, that is what it states." Likewise, Ziemer's attorney asked Cisek, "[D]oes the settlement agreement provide any, does it contain the word back-pay?" she replied, "It says alleged wage loss." A response to a DEED request for information provides that the payment "was part of a settlement of claims to compensate [Ziemer] for her alleged lost wages," and GovDelivery stated in a letter to the ULJ that the payment was "for alleged lost wages." This evidence demonstrates that the unspecified portion of Ziemer's settlement was for back pay.

Ziemer's final argument is that "[t]o find that a settlement payment to a plaintiff who alleges unlawful discrimination [is] a deductible payment . . . runs afoul of the important public policies" of Minnesota unemployment laws and the Minnesota Human Rights Act. She asserts that holding the settlement payment to be deductible will deter "private litigants from pursuing anti-discrimination claims." We disagree. While Minnesota's unemployment-insurance statutes are "remedial in nature and must be applied in favor of awarding unemployment benefits," Minn. Stat. § 268.031, subd. 2 (2012), the courts have also recognized a policy prohibiting an employee from receiving a double recovery from back pay and unemployment benefits. *Robertson v. Special Sch.*

*Dist. No. 1*, 347 N.W.2d 265, 267 (Minn. 1984); *Peterson*, 805 N.W.2d at 883. These policies are not inconsistent.

The ULJ did not err by concluding that \$30,592.40 of Ziemer's settlement payment constituted compensation for back pay, and therefore it is deductible from her unemployment benefits.

**Affirmed.**