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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-668**

Bernice M. Bishop,
Relator,

vs.

Department of Employment
and Economic Development,
Respondent.

**Filed May 27, 2008
Affirmed
Hudson, Judge**

Department of Employment
and Economic Development
File No. 14959 06

Bernice M. Bishop, 736 Montana Avenue East, St. Paul, Minnesota 55106 (pro se relator)

Lee B. Nelson, Katrina I. Gulstad, Minnesota Department of Employment and Economic Development, First National Bank Building, 332 Minnesota Street, Suite E200, St. Paul, Minnesota 55101-1351 (for respondent)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Collins, Judge.*

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

UNPUBLISHED OPINION

HUDSON, Judge

Relator challenges the unemployment-law judge's decision that because certain funds that she received after being laid off were separation payments and not supplemental unemployment benefits (SUB) payments, which are exempted from the definition of wages under Minn. Stat. § 268.035, subd. 29 (2006), she was not eligible to receive unemployment benefits. Because the payments received by relator were not supplemental unemployment benefits, we affirm.

FACTS

Relator Bernice M. Bishop worked as an account executive at AGFA Corporation (AGFA) from March 2002 through September 2006, until she was terminated from employment because of lack of work.

After being terminated, AGFA notified relator that she was eligible to receive "separation pay benefits" under AGFA's Supplemental Unemployment Benefit (SUB) Plan. In order to receive benefits, relator was required to sign a "Separation Agreement." AGFA's Separation Agreement and General Release provides that: "Employee . . . acknowledges and agrees that, under the terms of the Plan, an eligible employee may receive *either* (a) Severance Benefits *or* (b) Supplemental Unemployment Benefits and, where applicable, corresponding Separation Pay Benefits (collectively, 'SUB Benefits'), but not both." The agreement states that, by signing the agreement, relator agrees to give up "any right to sue the Company, or to initiate any other legal proceedings against the

Company . . . except for claims for vested pension benefits and claims such as for workers' compensation." The agreement also states that relator is required to:

release[] and discharge[] the Company; its benefit plans; its benefit plan administrators and all benefit plan fiduciaries; its officers, directors, employees, agents, shareholders, affiliates, predecessors, successors and assigns from all liability upon claims of every nature whatsoever, including, without limitation, claims of tort, breach of contract, wrongful discharge, violation of federal, state or locals laws.

Relator established an unemployment-benefits account in September 2006. In October 2006, the Department of Employment and Economic Development (DEED) issued a decision concluding that relator had received \$38,332.56 in payments from AGFA after leaving her employment. The DEED decision indicated that relator was ineligible to receive unemployment benefits for the weeks during which she received payments from AGFA under Minn. Stat. § 268.085, subd. 3 (2006).

Relator appealed the DEED decision and in November 2006, a telephone hearing was held before an unemployment-law judge (ULJ). Relator and Robert Wood, AGFA's human-resources senior manager, testified at the hearing.

Relator testified that, at the time of the hearing, she had received four weeks of separation pay. She stated that she had informed AGFA that DEED had determined that she was ineligible for benefits.

Wood testified that relator's "separation pay is paid through a su[p]plemental unemployment benefits plan. She did not receive and nor is she receiving severance pay." Wood testified that the benefits relator is receiving are "conditioned upon her retaining [and] maintaining eligibility for unemployment benefits." Wood also explained

that federal and state taxes, but not FICA, are withheld from the benefits paid under the plan. The benefits are paid out of the general operating funds of AGFA and do not come out of a separately designated account. Wood explained that relator was still receiving benefits under the plan even though she had been found ineligible for state unemployment benefits by DEED because it is AGFA's practice to continue to pay benefits under the plan until the conclusion of the appeal process. Wood testified that if, at the conclusion of the appeals process, relator was found to be ineligible for state unemployment benefits, the supplemental unemployment benefits would then be "converted" to separation pay: "[I]f an employee of AGFA or any other company covered by a [SUB] plan is found ineligible then they are paid separation pay, not supplemental unemployment benefits."

In its written decision, the ULJ concluded that the payments relator had received should be characterized as separation payments and not as supplemental unemployment benefits, and, therefore, relator was ineligible to receive unemployment benefits during that period. The ULJ first noted that:

SUB pay was initially implemented as an exception to the definition of "wages" because of the discrepancy between amounts provided by various States through their Unemployment benefits funds to applicants and to insure equality in payment for all of a class of employees separated by an employer by supplementing the unemployment benefits provided by various states. The plan was not designed as an aid to employers to avoid taxes on money disbursed from its plan or provide employers with the means to coerce or induce employees to obtain further services from employees, a waiver of rights of employees or other consideration in exchange for receipt of those SUB benefits.

But the ULJ went on to conclude that “[t]he preponderance of the evidence in the instant case is that the funds disbursed through the AGFA plan are separation payments and not SUB pay.” The ULJ explained that:

The plan as set forth in documents submitted does not fall within the exception to the definition of wages under Minnesota Statutes, section 268.035, subdivision 29. The funds are not kept in a separate fund but are instead paid out of the general funds of AGFA. The plan or system as administered through AGFA grants payments only to those employees who upon termination from employment pay or render consideration in exchange for receipt of benefits under their plan. Only those employees who sign a release agreement in which they agree to waive their rights to sue and agree to other conditions and terms set forth by the employer are eligible for benefit payments under the plan. Payment continues to be made to individuals who are held ineligible for unemployment benefits by the Department and during the pendency of an appeal.

This certiorari appeal follows.¹

D E C I S I O N

Relator argues that the ULJ erred by concluding that the payments she received after being separated from employment were severance benefits and not supplemental unemployment benefits. We disagree.

This court reviews a ULJ’s decision to determine whether a relator’s substantial rights were prejudiced because the ULJ’s findings, inferences, conclusions, or decision

¹ Respondent moved to dismiss this appeal in April 2007, because relator failed to timely serve the petition for writ of certiorari on AGFA. This court denied respondent’s motion to dismiss because AGFA did not contest relator’s eligibility to receive unemployment benefits, and therefore AGFA is not an “involved employer” under Minn. Stat. § 268.105 (2006), and relator was not required to serve AGFA with the petition for writ of certiorari.

are affected by error of law or unsupported by substantial evidence in view of the entire record. *See* Minn. Stat. § 268.105, subd. 7(d) (2006) (providing bases on which this court may reverse or modify ULJ's decision). In determining whether there is substantial evidence for a ULJ's findings, the court of appeals will view those findings "in the light most favorable to the decision." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (citation omitted).

The determination that a person is ineligible to receive unemployment compensation is a question of law, which this court reviews de novo. *Roloff v. Comm'r of Dep't of Employment & Econ. Dev.*, 668 N.W.2d 12, 14 (Minn. App. 2003), *review denied* (Minn. Nov. 18, 2003). "The unemployment compensation statute is remedial in nature and must be liberally construed to effectuate the public policy set out in Minn. Stat. § 268.03," and we have stated that "this policy urges us to narrowly construe the disqualification provisions." *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006) (quotation omitted).

This court reviews issues of statutory interpretation de novo. *Associated Builders & Contractors v. Ventura*, 610 N.W.2d 293, 298 (Minn. 2000); *see also* Minn. Stat. § 645.16 (2006) (stating that "[w]hen the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit"); *Hy-Vee Food Stores, Inc. v. Minn. Dep't of Health*, 705 N.W.2d 181, 189 (Minn. 2005) (stating that "it is unnecessary to look beyond the plain language of administrative rules where . . . their meaning is unambiguous").

Minn. Stat. § 268.085, subd. 3(a)(2) (2006), provides that an applicant for unemployment benefits is not “eligible to receive unemployment benefits for any week with respect to which the applicant is receiving, has received, or has filed for payment, equal to or in excess of the applicant’s weekly unemployment benefit amount” when that payment is in the form of

severance pay, bonus pay, sick pay, and any other payments, except earnings under subdivision 5, and back pay under subdivision 6, paid by an employer because of, upon, or after separation from employment, *but only if the money payment is considered wages at the time of payment under section 268.035, subdivision 29.*

(Emphasis added); *see also Garcia v. Alstom Signaling Inc.*, 729 N.W.2d 30, 32 (Minn. App. 2007) (applying section 268.085, subdivision 3(a)(2)). Under Minn. Stat. § 268.035, subd. 29 (2006), “wages” include:

all compensation for services, including commissions; bonuses; severance payments; vacation and holiday pay; back pay as of the date of payment; tips and gratuities paid to an employee by a customer of an employer and accounted for by the employee to the employer; sickness and accident disability payments, except as otherwise provided in this subdivision; and the cash value of all compensation in any medium other than cash.

Minn. R. 3315.0220 J (2005) provides that

[e]xcept as provided under Minnesota Statutes, section 268.04, subdivision 25(K), the term “wages” shall *not* include:

....

any payment to or on behalf of an employee under a plan or system established by an employer, which makes provisions for employees generally or for a class or classes of employees

for the supplementation of unemployment benefits under the written terms of an agreement, contract, trust arrangement, or other instrument if the plan or system provides benefits which are only supplemental to, and does not replace or duplicate any state or federal unemployment compensation. *The plan or system must provide that funds are to be used solely for the supplementation of state unemployment benefits.* Potential recipients of the plan or system must be required to file for unemployment benefits in accordance with state law. *The plan or system shall not allow the assignment of benefits or the payment of any consideration in lieu of any benefit upon the employee's withdrawal from the plan or system, or termination of employment or the termination of the plan or system.* The plan or system must not be designed for the purpose of avoiding the payment of unemployment benefit taxes on money disbursed from its plan or system.

(Emphasis added); *see also* Minn. R. 3315.0200 (2005) (stating that the administrative rules 3315.0200 – .0220 define “wages” as used in Minn. Stat. §§ 268.03 – .24).

Here, the ULJ determined that the payments received by relator were best characterized as severance payments and not supplemental unemployment benefits because (1) the funds used for those payments were not kept in a separate fund but are instead paid out of the general funds of AGFA; (2) employees must sign a release agreement before receiving payments under the plan; and (3) payment continues to be made to individuals who are held ineligible for unemployment benefits by the department during the pendency of an appeal.

Although clearly supported by the record, the ULJ’s findings do not address the criteria set out by rule 3315.0220. Accordingly, we undertake an examination of those criteria here.

It is clear from both the testimony and documents presented to the ULJ that the payments relator received were intended to make up the difference between the amount of unemployment benefits provided by the state and relator's previous wages. And relator was required to file for unemployment benefits before receiving payments under the plan. Both of these factors are consistent with a conclusion that the payments received by relator were not wages under rule 3315.0220.

But the analysis does not end there. Rule 3315.0220 J also requires that, in order to be excluded from the definition of wages, “[t]he plan or system must provide that funds are to be used solely for the supplementation of state unemployment benefits” and that the plan or system “shall not allow the assignment of benefits or the payment of any consideration in lieu of any benefit upon the employee’s withdrawal from the plan or system, or termination of employment or the termination of the plan or system.”

1. *“Recharacterization” of payments*

Rule 3315.0220 J provides that when an employee receives payments upon termination of employment pursuant the employer’s severance plan or system, in order to be excluded from the definition of “wages,” that plan or system “must provide that funds are to be used solely for the supplementation of state unemployment benefits.” The testimony and documents that relator and AGFA presented at the hearing demonstrate that relator’s AGFA benefits are not “solely for the supplementation of state unemployment benefits.”

At the hearing, AGFA’s human-resources senior manager testified that if an employee of AGFA covered by a SUB plan is found ineligible for state unemployment

benefits, the employee still receives payments from AGFA, but these payments are called separation pay, not supplemental unemployment benefits. The parties referred to this process as “recharacterization” or “conversion.” More importantly, this “recharacterization” feature is set forth in AGFA’s SUB plan. Specifically, AGFA’s Separation Agreement and General Release provides that: “Employee . . . acknowledges and agrees that, under the terms of the Plan, an eligible employee may receive *either* (a) Severance Benefits *or* (b) Supplemental Unemployment Benefits and, where applicable, corresponding Separation Pay Benefits (collectively, ‘SUB Benefits’), but not both.” A document entitled “Your Severance Benefits An Overview of AGFA Corporation’s Severance Pay Plan,” explains the relationship between supplemental unemployment benefits and separation pay benefits under AGFA’s plan:

You may receive Separation Pay Benefits if you are no longer eligible for SUB Benefits due to reemployment with the Company, or any other employer or termination of state unemployment benefits. Your Beneficiary may be entitled to receive Separation Pay Benefits if you are receiving SUB Benefits at the time of your death.

Thus, under AGFA’s plan, if an employee is deemed ineligible to receive supplemental unemployment-benefit payments, those payments will be “recharacterized” as separation pay benefits, which are plainly not intended to supplement state unemployment benefits. As respondent DEED correctly notes, AGFA’s plan does not provide *solely* for the supplementation of state unemployment benefits. Therefore, we conclude that AGFA’s plan conflicts with the requirements of rule 3315.0220.

2. Assignment

Next, we address the provision of rule 3315.0220 J that prohibits an employer’s plan from providing for “the assignment of benefits or the payment of any consideration in lieu of any benefit upon the employee’s withdrawal from the plan or system.”

As noted above, if an employee is deemed ineligible to receive supplemental unemployment-benefit payments, those payments are “recharacterized” as separation-pay benefits. Under AGFA’s plan, those separation-pay benefits may then be assigned to the employee’s beneficiary upon the employee’s death. By permitting the assignment of those payments, this provision of AGFA’s plan also conflicts with the requirements of the rule.

Because the provisions of AGFA’s plan do not conform to the requirements for supplemental unemployment benefit plans as laid out by rule 3315.0220, the payments received by relator under AGFA’s plan are considered “wages” under Minn. Stat. § 268.085, subd. 29, and the ULJ did not err when it concluded that under Minn. Stat. § 268.085, subd. 3(a)(2), relator was ineligible to receive unemployment benefits for those weeks that she received payments under AGFA’s plan.

Affirmed.