

AUG 12 2014

No. A13-0872

FILED

State of Minnesota
In Supreme Court

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,
Appellant,

vs.

GENERAL DYNAMICS ADVANCED INFORMATION SYSTEMS, INC
Respondent,

and

THOMAS V. ENGFER,
Respondent.

APPELLANT-DEPARTMENT'S REPLY BRIEF

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Argument

In his responsive brief, Thomas Engfer argues that this Court cannot review the question whether ERISA governs the General Dynamics SUB Plan (“the exemption issue”), because the issue wasn’t argued below. But this Court has, on numerous occasions, considered issues that were not raised below.¹ In this case, review is especially important because the court below has struck down a portion of a state statute without fully examining the preemption provision on which it relied. Engfer also incorrectly argues that a test articulated in a disability benefits case should be applied to unemployment compensation, giving no thought to the differences between the two benefit schemes. As discussed below, the test Engfer urges this Court to apply here effectively reads an ERISA exemption out of that statute.

1. Review of the exemption issue is proper and warranted.

This Court has the power to take any action “as the interest of justice may require.”² The general principle—that a reviewing court will not consider issues

¹ *E.g. Watson v. United Servs. Auto. Ass’n*, 566 N.W.2d 683, 687 (Minn. 1997), *State v. Adams*, 89 N.W.2d 661 (Minn. 1957) (public interest), *Valentine v. Lutz*, 512 N.W.2d 868 (Minn. 1994) (case presented unique circumstances), *In re Judicial Ditch No. 1*, 167 N.W.2d 124 (Minn. 1918) (in the interest of justice, the court will review for the first time a question of law that goes directly to the merits of the entire case), *Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 403 (Minn. 2000), *Greene v. Comm’r of Minnesota Dep’t of Human Servs.*, 755 N.W.2d 713, 725 (Minn. 2008), and *Atwood v. Holmes*, 38 N.W.2d 62, 65-66 (Minn. 1949) (failure to present to the lower court that of which it is charged with judicial knowledge does not preclude its consideration for the first time on appeal).

² Minn. R. Civ. App. P. 103.04.

or theories not raised below—is not absolute.³ The exceptions to the general principle are well-established.

One such “well-established” exception was outlined in *Watson v. United Servs. Auto. Ass’n*.⁴ There, the Court held that an appellate court may base its decision on a theory not presented below where the question raised for the first time is plainly decisive of the entire controversy on its merits and there is no possible advantage or disadvantage to either party in not having had a prior ruling by the lower court on the question.⁵ The *Watson* court also laid out additional factors which favor review of a new argument: the issue is a novel legal issue of first impression; the issue was raised prominently in briefing; the issue was “implicit in” or “closely akin to” the arguments below; and the issue is not dependent on any new or controverted facts.⁶

The exemption issue before this Court is a novel legal issue of first impression. Not only is this an issue of first impression in Minnesota, this question has not been considered by any other court in the nation. It is also ripe for Supreme Court review. The issue is not dependent on any new or disputed facts. It is undisputed that the purpose of the General Dynamics Plan is to provide

³ Had it been an ironclad rule, Engfer would not have prevailed in the Court of Appeals, because the issue of preemption was argued for the first time in the Court of Appeals, not before the unemployment law judge. Before the ULJ, Engfer only mentioned in passing that the plan was qualified under ERISA, but did not raise the issue of preemption.

⁴ *Watson* at 687.

⁵ *Id.*

⁶ *Id.* at 687-688.

laid-off workers with payments that are integrated with their state unemployment benefits; i.e. payments which will not interfere with their state benefits under state law. In light of this fact, the question whether the Plan is maintained solely to comply with state unemployment compensation laws is a purely legal one. There are no looming factual questions that the Court is not equipped to consider.

A decision on the issue will also decide the entire case on its merits. Engfer does not challenge the ULJ's decision that under the Wage Definition, the SUB payments Engfer received were "wages."⁷ It is clear that they are. Engfer only argued that the Wage Definition was preempted by ERISA. Because there is no dispute as to how the Minnesota Wage Definition applies to the General Dynamics Plan, the only questions before this court are the ones the Department laid out in its principal brief: (1) Whether ERISA governs the General Dynamics Plan; and (2) If it does, whether it preempts the Minnesota Wage Definition. If this Court finds that ERISA does not govern the Plan, it need not reach the second question: the preemption question will be moot, the Court of Appeals' decision will be reversed, and the initial ULJ decision will stand.

Engfer is not disadvantaged by not having had a prior ruling on the exemption issue. Engfer is represented by seasoned counsel. He received, and

⁷ *Engfer* at 238.

availed, the opportunity to fully research and brief the issue in this Court.⁸ Review of the exemption issue therefore will not work an unfair surprise on any party.⁹

Nor is this an entirely new issue. The exemption issue cannot be separated from the preemption analysis, because the preemption provision itself states that only those laws which deal with plans “not exempt” from ERISA may be preempted.¹⁰ The Court of Appeals was therefore required to first decide whether the plan was exempt from ERISA, before it could decide whether ERISA preempted the state law. This was a legal question. But despite the strong presumption against federal preemption of state laws, the Court of Appeals’ majority opinion failed to examine this preliminary issue.¹¹

The Court of Appeals’ error is in clear contravention of public policy. As explained in the Department’s principal brief, by striking down a portion of the state law, the Court of Appeals substantially hampered the state’s ability to set its

⁸ Engfer was not disadvantaged in terms of the time he had to consider the issue, either, because he was on notice of the Department’s argument as soon as the Petition for Review was filed.

⁹ See *State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989) (holding that the court may, at its discretion, decide to hear new issues when the interests of justice require their consideration and addressing them would not work an unfair surprise on a party.)

¹⁰ 29 U.S.C. 1144(a)

¹¹ Judge Schellhas, in her dissent, acknowledged that if the General Dynamics Plan was maintained solely to comply with unemployment compensation laws, it would not be governed by ERISA. But, she wrote, no record evidence showed that the plan was maintained solely to comply with unemployment compensation laws. *Engfer v. Gen. Dynamics Advanced Info. Sys., Inc.*, 844 N.W.2d 236, 242 (Minn. App. 2014). But as the Department showed in its principal brief, the record permits no other conclusion than that the General Dynamics Plan is maintained solely to comply with state unemployment compensation laws.

own unemployment insurance policy, and instead put the decision of when state benefits will be paid in the hands of individual employers. The courts' power to strike down legislation must be exercised with restraint,¹² and a construction which will nullify any part of a statute is to be avoided if reasonably possible.¹³ By dismantling a state statute without thoroughly examining the entire preemption provision on which it relied, the Court of Appeals neglected the cardinal principal of statutory construction, which is "to save, not to destroy."¹⁴

The well-thought-out work of the Minnesota legislature cannot be undone simply because a legal argument was not prominently raised in a lower court. The Supreme Court has the power to, and should, review the exemption issue before it reaches the question of preemption.

2. The *Shaw* test does not fit unemployment compensation laws.

Engfer cites *Shaw v. Delta Air Lines, Inc.*¹⁵ for the proposition that a plan is "maintained solely for the purpose of complying with applicable . . . unemployment compensation laws" only if it provides benefits *required* by unemployment compensation laws.¹⁶ But *Shaw* was a disability benefits case, not

¹² *Twin City Candy & Tobacco Co. v. A. Weisman Co.*, 149 N.W.2d 698, 701 (Minn. 1967).

¹³ *Tomasko v. Cotton*, 273 N.W. 628, 631 (Minn. 1937).

¹⁴ *State v. Lanesboro Produce & Hatchery Co.*, 221 Minn. 246, 254, 21 N.W.2d 792, 796 (Minn. 1946).

¹⁵ 463 U.S. 85 (1983).

¹⁶ Respondent's brief, 13. A couple of pages later, Engfer undermines his own argument by conceding that ERISA does not govern SUB plans maintained to comply with state laws (like those in Oklahoma and Pennsylvania) which require

an unemployment compensation case. The *Shaw* Court had no opportunity to carefully consider what benefits, if any, are *required* by state unemployment compensation laws. If that question had been explored, the Court would have found that the answer is none. As pointed out in the Department's principal brief, no state requires any employer to maintain a plan to provide unemployment benefits. In fact, no state has *ever* required any employer to maintain such a plan. Instead, all states finance their unemployment compensation programs through employer taxes.¹⁷ Federal law requires states to administer their unemployment compensation programs themselves; it does not permit states to outsource that function to individual employers.¹⁸ This is what makes unemployment compensation unique among the various social insurance programs administered by states. And this is why the test used for disability insurance laws in *Shaw* is ill-fitted for unemployment compensation laws.

pre-approval of SUB plans for supplementation purposes. See Respondent's brief, 14-15. SUB benefits are not *required* by those states either. Employers in Oklahoma and Pennsylvania are under no obligation to provide SUB benefits. The pre-approval requirement in those states serves the same purpose as the Minnesota Wage Definition: to ensure that the plan meets state criteria for supplementation. If it doesn't, supplementation is not allowed and the SUB payments delay state benefits.

¹⁷ U.S. DEPARTMENT OF LABOR, EMPLOYMENT AND TRAINING ADMINISTRATION, COMPARISON OF STATE UNEMPLOYMENT LAWS, 2-3 (2014), <http://www.unemploymentinsurance.doleta.gov/unemploy/pdf/uilawcompar/2014/financing.pdf>. For a caveat, see Department's principal brief, 15 n. 62.

¹⁸ 26 U.S.C. § 3304(a). States must, at minimum, meet numerous federal requirements; they can go above and beyond the federal requirements, but cannot provide less than what is required by federal law.

Under Engfer's reading of *Shaw*, ERISA's exemption of "plans maintained solely to comply with applicable . . . unemployment compensation laws" has no meaning, because there is no plan to which it could apply. All states had enacted their unemployment compensation laws by 1937.¹⁹ By the time ERISA was debated and enacted, then, state unemployment compensation laws had been around for approximately 40 years. And SUB plans had been around for roughly two decades when ERISA was enacted. It is inconceivable that in enacting ERISA, Congress completely ignored what it had known for decades about how unemployment compensation works, and blithely wrote in an exemption that had no practical content.

Well-settled principles of statutory construction require courts to give meaning to each word or phrase of a statute.²⁰ To give meaning to ERISA's exemption of "plans maintained solely to comply with applicable . . . unemployment compensation laws," the Court must use a test which takes into account the non-comparability of state unemployment compensation schemes to other social benefit schemes.²¹

¹⁹ U.S. Department of Labor, History of Unemployment Insurance in the United States, <http://www.dol.gov/ocia/pdf/75th-Anniversary-Summary-FINAL.pdf>.

²⁰ *A.A.A. v. Minnesota Dep't of Human Servs.*, 832 N.W.2d 816, 822 (Minn. 2013).

²¹ The Department's principal brief explains why unemployment compensation laws will always be applicable to SUB plans, and why SUB plans are by necessity "plans maintained solely to comply with applicable . . . unemployment compensation laws."

3. Engfer misunderstands the Department's preemption argument.

The Department explained in its principal brief why the operation of the Minnesota Wage Definition doesn't interfere with the operation of the General Dynamics Plan.²² Respondent's brief reveals a fundamental misunderstanding of that argument.²³

Contrary to Engfer's assertion,²⁴ not all SUB benefits are excluded from "wages" under the Minnesota Unemployment Insurance Law. SUB benefits are treated as "wages" when the SUB plan doesn't meet the criteria for supplementation under Minn. Stat. § 268.035, subd. 29. Because the General Dynamics Plan didn't meet those criteria, its SUB payments were treated as "wages." In its principal brief, the Department explained what this entails: the payments are considered "payments . . . because of, upon, or after separation" under Minn. Stat. § 268.085, subd. 3, and the Department must determine the length of time by which they would delay the individual's state benefits. It is not necessary here to repeat here how that is done. The point is that when a SUB plan does not meet the criteria in Minn. Stat. § 268.035, subd. 29, the SUB payments are treated as "wages" and as some kind of separation payment, but the Department has no authority to stop the ongoing SUB payments, nor is it Department practice to do so. The Department pays any given week's benefits

²² Department's principal brief, 23-25.

²³ Respondent's brief, 21-22.

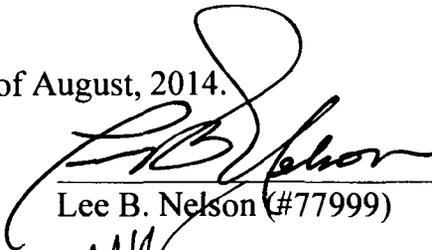
²⁴ Respondent's brief, 22.

first; only then does the person even become eligible to apply for the SUB payment for that week. It is only after all the SUB payments are exhausted that the Department can determine the period to which the SUB payments apply. While that may seem convoluted, that is the way the statute works.

Conclusion

The decision of the Court of Appeals incorrectly applied ERISA's preemption provision to strike down a state law; it should be reversed.

Dated this 11th day of August, 2014.



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AUG 12 2014

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RE: THOMAS V. ENGFER

vs.

GENERAL DYNAMICS ADVANCED INFOR. SYSTEMS
and DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT
Court File No. A13-872

Dear Ms. O'Neill:

I am enclosing for filing the Appellant-Department's Rely Brief for Supreme Court Review in this case.

Respectfully yours,

Lee B. Nelson (#77999)
Attorney for Respondent-Department

PC

Enclosure

cc: HOWARD L. BOLTER, Esq., Petitioner's Attorney
PATRICK MARTIN, Respondent's Attorney

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
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COUNTY OF RAMSEY)

Patricia Carter, being duly sworn, deposes and says that on August 11, 2014, she served the attached Appellant-Department's Reply Brief for Review upon Respondent's Attorneys by placing a true and correct copy thereof in an envelope addressed as follows:

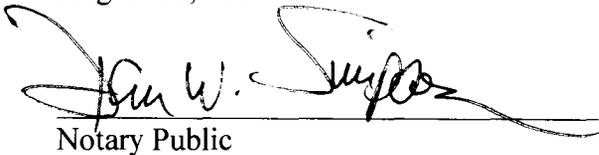
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(which is the last known address of said Petitioner's Attorney and Respondent's Attorney) and depositing the same, with postage prepaid, in the United States mail at St. Paul, Minnesota.



Subscribed and sworn to before me this
August 11, 2014


Notary Public