

No. A10-496

State of Minnesota
In Court of Appeals

CLIFF VOGGE,

Relator,

vs.

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

Respondent.

RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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Legal Issue

Under Minnesota law, applicants' unemployment insurance benefit accounts expire after one year. Unemployed applicants who collect all available Minnesota benefits can then collect federally-funded extension benefits during the remainder of their benefit year. Applicants can collect these federal benefits even if their benefit year has expired, but *only* if they did not earn sufficient wages during their first benefit year to establish a second Minnesota benefit account. Those who can establish a second Minnesota benefit account must do so, even if their weekly benefits drop.

Cliff Voge earned sufficient wages during his first benefit year to establish a second Minnesota benefit account. Was Voge entitled to continue receiving federal extension benefits, even though he could establish a second Minnesota benefit account?

Unemployment Law Judge ("ULJ") Richard Croft held that Voge could not continue on federal extension benefits, as he could establish a second Minnesota account.

Statement of the Case/Statement of Facts

The Statement of the Case and the Statement of Facts have been combined for ease of understanding.

Voge worked full time for Pacioli Companies from November 2004 to June 2008.¹ His final position was as a senior financial analyst and his ending wage was \$39 per hour.² Voge worked part time for Hannon Security beginning in January 2007, and was still employed part time at the time of the hearing.³

Voge established a benefit account effective October 26, 2008.⁴ Voge's weekly benefit amount was \$566.⁵ After subtracting 55% of his earnings from his part time employment, Voge generally received \$412 per week.⁶ In October 2009, Voge's benefit year expired and he was required to file an application to establish a new benefit account.⁷

On November 6, 2009, the Department issued Voge a Determination of Benefits Account, establishing a benefit account based on Voge's wages from his part time job.⁸ Voge's new weekly benefit amount was \$198.⁹ Voge appealed this Determination, stating that he believed that he should have continued to receive federal extension benefits from his first benefit account (continuing the weekly benefit amount of \$566) instead of being required to establish a new benefit account (with a weekly benefit amount of \$198.)¹⁰ ULJ Richard Croft held a de

¹ T. 3.

² T. 4.

³ T. 3, 4.

⁴ T. 7, 8.

⁵ T. 5, 6.

⁶ T. 6, Minn. Stat. § 268.085, subd. 5(b).

⁷ T. 7-8, 9.

⁸ E-1.

⁹ E-1.

¹⁰ T-9.

novo hearing. The ULJ decided that Voge's benefit account was properly determined.¹¹ Voge filed a request for reconsideration and the ULJ affirmed.¹²

This matter now comes before the Minnesota Court of Appeals on a writ of certiorari obtained by Voge under Minn. Stat. § 268.105, subd. 7 (2009) and Minn. R. Civ. App. P. 115.

Standard of Review

When reviewing an unemployment-benefits decision, the Court of Appeals may affirm the decision, remand for further proceeding, reverse, or modify the decision if Voge's substantial rights were prejudiced because the decision of the ULJ violated the constitution, was based on an unlawful procedure, was affected by error of law, was unsupported by substantial evidence, or was arbitrary or capricious.¹³

The only issue in this case is the application of the statute to the undisputed facts. The Supreme Court in *State v. Thompson* stated that statutory interpretation and application is a question of law that the courts review de novo.¹⁴

Argument for Ineligibility

This brief centers on the fact that state and federal law, as they existed prior to July of 2010, were clear: Minnesotans could not stay on federal extension

¹¹ Appendix to Department's Brief, A5-A8.

¹² Appendix, A1-A4.

¹³ Minn. Stat. § 268.105, subd. 7(d)(3)-(6) (2009).

¹⁴ *State v. Thompson*, 754 N.W. 2d 352, 355 (Minn. 2008).

benefits if they qualified for regular benefits – in any amount - under a second Minnesota account. Because Voge’s brief is the first that raises questions about what the various state and federal benefits extensions do, and because this is an issue that is likely to arise again in the future, this brief will go into greater detail than the Department normally would in explaining the various (and inordinately complicated) statutory provisions.

1. A brief explanation of establishing and exhausting an account.

Cliff Voge established a benefit account on October 26, 2008.¹⁵ The Department then calculated his weekly benefit amount; this is generally about one-half of an applicant’s previous weekly wage, but Voge had been a high earner, and so reached Minnesota’s maximum weekly benefit amount of \$566.¹⁶ An applicant’s benefit year is 52 weeks long,¹⁷ and so Voge’s benefit account expired on October 25, 2009.

Under Minnesota law, applicants who received Minnesota standard unemployment insurance benefits (“STUI”) are generally entitled to receive 26 times their weekly benefit amount (their “maximum benefit amount”).¹⁸ During Voge’s benefit year, he collected his maximum benefit amount of \$14,716. However, he did not do this in 26 weeks. While various parties will at times speak of the entitlement to “26 weeks” of benefits, this is not technically correct, but

¹⁵ Voge was no stranger to the unemployment insurance system, as he had also established accounts in 2004, 2005, and 2007.

¹⁶ Minn. Stat. § 268.07, subd. 2; Minn. Stat. § 268.035, subd. 23(c).

¹⁷ Minn. Stat. § 268.035, subd. 6.

¹⁸ Minn. Stat. § 268.07, subd. 2(d).

rather a shorthand way of explaining the maximum number of weeks an average applicant, with no part-time work and no interruption in benefits, could collect benefits before collecting the entirety of his maximum benefit amount. An applicant who worked part-time, and thus collected only part of his weekly benefit amount every week, might never collect his maximum benefit amount during his benefit year.¹⁹ Voge, though, collected his entire maximum benefit amount from STUI, collecting his last STUI check for the week of July 5, 2009, after collecting benefits over 36 weeks.²⁰

2. Applicants who can establish a second state account must do so, and can no longer receive federal extension benefits.

If there were no federal extensions, and STUI were the only type of benefits that had been available to Voge, then Voge would simply have stopped collecting benefits on his first account after July 5, 2009. Instead, Voge then became eligible for extended benefits. In order to discuss these various programs with precision, the brief explains each of them.

One of these programs is not new. Since 1970, when Congress first passed the Federal-State Extended Unemployment Compensation Act, Minnesota (and most other states) has paid extended benefits (“EB”) to applicants who are unemployed during severe economic downturns. Minn. Stat. § 268.115 explains the conditions under which Minnesota “triggers on” to the EB program. Under

¹⁹ Under Minn. Stat. § 268.085, subd. 5(b), 55% of his part-time earnings would be deducted from his weekly benefit amount each week.

²⁰ E-3.

this EB program, applicants are entitled to either an additional 50% or 80% of their maximum benefit amount – in shorthand, either an additional 13 or 20 weeks of benefits.²¹ EB programs are currently being entirely funded with federal dollars, an arrangement that is set to continue through at least December 1, 2010.²²

Before June 30, 2008, a Minnesota applicant who collected 26 weeks of benefits and exhausted his STUI account would generally have had no options for extended benefits, unless Minnesota's unemployment rate had grown so high that it "triggered on" to federal EB. But for reasons that may be attributed largely to politics, for the past two years applicants who collect all available STUI benefits do not then begin to collect EB dollars; instead, Congress and the Minnesota legislature have created intermediate programs. These now include three tiers of Federal Emergency Unemployment Compensation ("EUC" tiers 1, 2, and 3), Special State of Minnesota Emergency Unemployment Compensation ("SSEUC"),²³ and Special State of Minnesota Extended Unemployment Insurance ("SSEUI").²⁴ SSEUC and SSEUI exist to pay extended benefits to applicants who collect all available STUI benefits but do not qualify for EUC or EB; this was not Voge's issue, and these special state programs are not the subject of the brief.

Congress first established the EUC program on June 30, 2008, and has amended it several times, most recently in July of 2010. As it currently stands,

²¹ Minn. Stat. § 268.115, subd. 5.

²² P. L. 111-205. Normally the EB program is 50% state-funded, and 50% federally-funded.

²³ Laws 2009, ch. 1, § 2, subd. 4; Laws 2010, Chapter 347, Article 2, Section 24.

²⁴ Laws 2010, Chapter 347, Article 2, Section 22.

EUC Tier 1 pays an additional 80% of an applicant's STUI maximum benefit amount (or 20 weeks of benefits, in shorthand), while Tier 2 pays an additional 54% (or 14 weeks), and Tier 3 pays an additional 50% (or 13 weeks).²⁵ Under EUC, Voge continued to receive the same weekly benefits that he had enjoyed – a maximum of \$566 a week – from July 12, 2009, through the week of October 18, 2009, the expiration of his benefit year.²⁶

The sole reason that Voge was able to receive these EUC benefits was that he had exhausted his STUI account. The EUC program has been clear, since the start, that EUC benefits are payable only to those applicants who have exhausted STUI benefits, and cannot establish another state account. The EUC law explains that benefits are payable only to those who “have exhausted all rights to regular compensation under the State law or under Federal law with respect to a benefit year...”²⁷ The EUC law also explains what “exhaustion” means, explaining that:

an individual shall be deemed to have exhausted such individual's rights to regular compensation under a State law when - (1) no payments of regular compensation can be made under such law because such individual has received all regular compensation available to such individual based on employment or wages during such individual's base period; or (2) such individual's rights to such

²⁵ Supplemental Appropriations Act of 2008, 26 U.S.C. § 3304, § 4002(b)(1), Pub. L. 110-252 (June 30, 2008); amended by Pub. L. 110-449 (November 21, 2008), P.L. 111-5 (February 17, 2009), P.L. 111-92 (November 6, 2009), P.L. 111-118 (December 19, 2009), P.L. 111-144 (March 2, 2010), P.L. 111-157 (April 15, 2010), and P.L. 111-205 (July 22, 2010). A full explanation of the history of the EUC program, as well as a more detailed discussion of the qualifying requirements, is available on the Department of Labor website at <http://www.ows.doleta.gov/unemploy/pdf/euc08.pdf>.

²⁶ E-3.

²⁷ 26 U.S.C. § 4001(b)(1), Pub. L. 110-252.

compensation have been terminated by reason of the expiration of the benefit year with respect to which such rights existed.²⁸

Thus, in order for an applicant to receive EUC, he must have exhausted his STUI benefits, or have insufficient wage credits to establish a new benefit account after his benefit year has expired. Since Voge had exhausted his October 2008 benefit account in July of 2009, he was able to collect EUC benefits for the remainder of his benefit year.

The rub, then, appeared after Voge's benefit year ended in October of 2009. An applicant's benefit account expires after one year, and unless he works part-time or temporarily during that year, he is unable to open a second benefit account.²⁹ By October of 2009, because Voge had worked part-time throughout his benefit year, he had earned wages sufficient to establish a new account, and was eligible to collect STUI benefits once again. To establish a second benefit account, Minnesota law requires that an applicant have earned eight times his weekly benefit amount in covered employment after the effective date of his prior account.³⁰ For Voge, this was \$4,528, or eight times his weekly benefit amount of \$566. Voge had earned over \$17,323 during his base period, which was more than sufficient to establish a new account.³¹ Voge had sufficient wage credits to establish a new benefit account after the benefit year expired on his prior account,

²⁸ 26 U.S.C. § 4001(c)(1) and (2), Pub. L. 110-252.

²⁹ Minn. Stat. § 268.07, subd. 3 (2008).

³⁰ Minn. Stat. § 268.07, subd. 3 (2008); Minn. Stat. § 268.035, subd. 27. Base period is defined in Minn. Stat. § 268.035, subd. 4.

³¹ E-1.

and since he was eligible for up to \$198 in STUI benefits every week under the new account he established in October of 2009, he was ineligible to continue receiving EUC benefits.

There is no question that this is what the law, in effect prior to July of 2010, intended. A United States Department of Labor Unemployment Insurance Program Letter (“UIPL”) explains:

Exhaustees cease to be exhaustees when they can establish a valid new benefit year; therefore, at each quarter change, the state must check to see if an individual meets the state’s requirements to establish a new benefit year. If the individual can establish a new benefit year, s/he would no longer qualify for the EUC08 claim. In these cases, the claimant should be advised that s/he no longer qualifies for the EUC08 claim and that s/he can file a regular UI claim.³²

The UIPL is abundantly clear – the test for whether an applicant can continue on EUC, or must return to STUI, is based solely on whether an applicant can establish a benefit account. The statute, until last month, did not concern itself with whether an applicant’s weekly benefit amount would be severely reduced, or whether the applicant’s ongoing part-time work would effectively prevent him from collecting any benefits at all. Of the applicants who, like Voge, do not qualify for EUC after they establish a second benefit account, approximately 40%

³² Employment and Training Administration Advisory System, U.S. Department of Labor, Unemployment Insurance Program Letter 23-08, July 7, 2008, p. A-3, § 1(b)(2). Available electronically on the U.S. Department of Labor website at <http://wdr.doleta.gov/directives/attach/UIPL/UIPL23-08.pdf>, last amended by UIPL No. 23-08, change 6, at <http://wdr.doleta.gov/directives/attach/uipl/uipl23-08c6.pdf>.

find that their weekly benefit amounts have decreased, 40% find that their weekly benefit amounts have increased, and 20% find that their weekly benefit amounts stay about the same. Although the Department uniformly upholds the statutory scheme, it is likely that the 40% whose benefit amount decreases feel penalized, while the other 60% do not.

This should not be taken as a sign that our leaders were unaware of the problem. The problem has existed since 1970, when Congress first enacted the EB program, which has similar exhaustion requirements.³³ An applicant who works part-time throughout the duration of his first benefit account will generally earn enough to establish a second benefit account the following year, but the weekly benefit amount on the second account might be much lower. If the applicant continues working in the same part-time job, at roughly the same number of hours per week, he will not actually be able to collect any benefits. Each week, his wages would be too high to collect from the (now-lowered) weekly benefit amount. He would in essence be the owner of an entirely useless account.

Congress has been aware of this issue since 1970, but did not take any action until recently. In 2009 applicants like Voge were the subject of extensive debates at both the state and federal level, and the Minnesota legislature held lengthy hearings on this very question in September of 2009, as well as during the 2010 legislative session. On December 7, 2009, Representative Charles Rangel introduced H.R. 4213, the Unemployment Compensation Extension Act of 2010.

³³ See Minn. Stat. § 268.115.

On July 22, 2010, President Obama signed the Act, which then became Public Law 111-205. The bill provides that states – when faced with an applicant whose weekly benefit amount on his second account would be reduced from his first account by at least either \$100 or 25% - shall continue to pay the applicant EUC until he fully exhausts it.

The relevant section reads:

“(2) For individuals described in paragraph (1), the State shall determine whether the individual is to be paid emergency unemployment compensation or regular compensation for a week of unemployment using one of the following methods:

“(A) The State shall, if permitted by State law, establish a new benefit year, but defer the payment of regular compensation with respect to that new benefit year until exhaustion of all emergency unemployment compensation payable with respect to the benefit year referred to in paragraph (1)(A);

“(B) The State shall, if permitted by State law, defer the establishment of a new benefit year (which uses all the wages and employment which would have been used to establish a benefit year but for the application of this paragraph), until exhaustion of all emergency unemployment compensation payable with respect to the benefit year referred to in paragraph(1)(A);

“(C) The State shall pay, if permitted by State law--

“(i) regular compensation equal to the weekly benefit amount established under the new benefit year, and

“(ii) emergency unemployment compensation equal to the difference between that weekly benefit amount and the weekly benefit amount for the expired benefit year; or

“(D) The State shall determine rights to emergency unemployment compensation without regard to any rights to regular compensation if the individual elects to not file a claim for regular compensation under the new benefit year.’.

(b) Effective Date- The amendment made by this section shall apply to individuals whose benefit years, as described in section 4002(g)(1)(B) the Supplemental Appropriations Act, 2008 (Public

Law 110-252; 26 U.S.C. 3304 note), as amended by this section, expire after the date of enactment of this Act.³⁴

The Minnesota state legislature passed similar legislation as well, in Laws 2010, Chapter 347, Article 2, Section 25. From May 16 through July 24, 2010, the law provided:

Sec. 25. NEW BENEFIT ACCOUNTS.

If an applicant establishes a new benefit account under Minnesota Statutes, section 268.07, subdivision 2, paragraph (b), within 39 weeks of the expiration of the benefit year on a prior benefit account, notwithstanding Minnesota Statutes, section 268.07, subdivision 2a, paragraph (a), the weekly benefit amount on the new benefit account will not be less than 80 percent of the weekly benefit amount on the prior benefit account.

EFFECTIVE DATE. This section applies to benefit accounts effective on or after the first Sunday following enactment and expires the earlier of: (1) the effective date of any federal legislation allowing an applicant to continue to collect federal emergency unemployment compensation, notwithstanding the applicant qualifying for a new regular state benefit account under Minnesota Statutes, section 268.07, subdivision 2, paragraph (b); or (2) June 30, 2011.

The problem for applicants like Voge is that neither Congress nor the Minnesota legislature opted to make the legislation retroactive. If Congress had made it retroactive, Voge would have continued to be eligible for \$566 in EUC benefits each week. If the Minnesota legislature had made its law retroactive, Voge would be eligible for not less than \$452 a week. Legislators were certainly aware of the problem; over 5,000 Minnesota applicants benefited from the

³⁴ Public Law 111-205, § 3(a)(g)(2).

Minnesota law during the ten-week period it was in effect, from May 16 to July 24, 2010.³⁵ But the legislature nevertheless chose not to make the law retroactive.

Voge's ineligibility for EUC, and his weekly benefit amount, were properly decided according to the statute. In his brief, Voge does not cite to any statutory authority to argue that the Department has done anything improper. He admits that he had earnings from his part-time job, and that he qualified for a new benefit account. Voge does not make any legal argument for reversing the ULJ's decision. Voge is simply dissatisfied with the unemployment insurance statutory scheme and believes that a different result would somehow be more just. But many tens of thousands – and likely hundreds of thousands - of unemployed Americans have found themselves in the same circumstances as Voge. Moreover, while it is truly unfortunate that Voge has been unable to secure full time employment, and that his weekly benefit amount decreased after a year, the Department is not penalizing Voge for working part time. It is easy for Voge to look back in hindsight, as he now knows that Congress passed several federal extensions to unemployment compensation. Voge could not have relied on these extensions being passed when he decided not to quit his part-time job. Had Congress failed to pass these extensions, Voge would likely feel that, in hindsight, keeping his part-time job was the right choice. Neither Voge nor the Department

³⁵ This Minnesota Law expired with enactment of the federal change to EUC, which was effective July 24, 2010. Minnesota was the only state to enact such a provision to benefit its citizenry.

can predict what Congress will do, or when it will do it. The Department is instead left to apply the laws as they are passed.

Ultimately, though, it is clear that Voge does not qualify for EUC, or for anything other than his current \$198 weekly benefit amount. Statutory terms are given their plain ordinary meaning unless specifically defined otherwise.³⁶ A court may not set aside the plain meaning of the statute in order to insert its own concept of what it believes the law ought to be.³⁷ This applies as much to the unemployment insurance statutes as to any other law. In *Khabani v. Red Owl Stores*, this Court considered an unemployment insurance provision and enforced its literal language, citing *Norris Grain Co. v. Seafarers' International Union* to explain that:

Neither the wisdom of the laws nor their adequacy to accomplish a desired purpose may be taken into consideration by courts in determining what interpretation the laws should have; we must give effect to them as they are, regardless of our personal opinion regarding their adequacy.

Any change must come from the legislature.³⁸

Conclusion

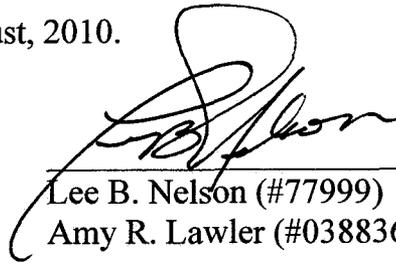
The ULJ properly determined that Voge did not meet the statutory requirements to receive additional EUC. The Department requests the Court of Appeals to affirm the decision of the ULJ.

³⁶ Minn. Stat. § 645.08.

³⁷ Minn. Stat. § 645.16.

³⁸ 392 N.W.2d 698, 700 (Minn. App. 1986), citing 46 N.W.2d 94, 105 (Minn. 1950).

Dated this 9th day of August, 2010.



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