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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2074**

Janine M. Bailey,
Relator,

vs.

American Crystal Sugar Company Cooperative,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed August 20, 2012
Reversed
Toussaint, Judge***

Department of Employment and Economic Development
File No. 28585549-2

Janine M. Bailey, Grand Forks, North Dakota (pro se relator)

James M. Dawson, Ryan A. Olson, Felhaber, Larson, Fenlon & Vogt, P.A., Minneapolis,
Minnesota (for respondent American Crystal Sugar Company Cooperative)

Lee B. Nelson, Amy Lawler, Department of Employment and Economic Development,
St. Paul, Minnesota (for respondent department)

Considered and decided by Ross, Presiding Judge; Hooten, Judge; and Toussaint,
Judge.

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

UNPUBLISHED OPINION

TOUSSAINT, Judge

Relator Janine M. Bailey challenges the decision of an unemployment-law judge (ULJ) that, for the purpose of unemployment benefits, a payment she received for accumulated sick leave constitutes deductible income in the week that it was received. Because we conclude that under the unemployment statute Bailey is deemed permanently separated from employment, we reverse.

DECISION

We acknowledge that Bailey currently has two other appeals before this court: *Bailey v. Am. Crystal Sugar Co.*, A11-2075, and *Bailey v. Am. Crystal Sugar Co.*, A11-2275. This opinion addresses only the issues and the record presented to the ULJ in this case.

When reviewing the decision of a ULJ, we may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator 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) (2010).

We view a ULJ’s factual findings in the light most favorable to the decision, and we will not disturb the findings if the evidence substantially sustains them. *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct.

1, 2008). But issues of statutory interpretation are questions of law, which we review de novo. *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001); *Bukkuri v. Dep't of Emp't & Econ. Dev.*, 729 N.W.2d 20, 21 (Minn. App. 2007).

Under Minnesota law, certain employment-related payments delay an applicant's receipt of unemployment benefits. Minn. Stat. § 268.085, subd. 3 (Supp. 2011). If an applicant for unemployment benefits receives or files for "sick pay . . . paid upon temporary, indefinite, or seasonal separation," the payment constitutes deductible income and, if the payment is less than the applicant's weekly unemployment benefit amount, reduces the applicant's benefits, during the period immediately following the applicant's last day of employment, by the amount of the payment. *Id.*, subd. 3(a)(1), (b), (c) (Supp. 2011). But if an applicant for unemployment benefits receives sick pay "upon a permanent separation from employment," the payment does not constitute deductible income. *Id.*, subd. 3(a)(1).¹

For the purpose of unemployment benefits, if an applicant is suspended from employment without pay for more than 30 calendar days, the suspension is considered a discharge from employment. *Id.*, subd. 13(b), .095, subd. 5(a) (2010). Because a

¹ Our careful review of the record establishes that DEED, in its August 26 determination, analyzed Bailey's situation under the 2010 version of Minn. Stat. § 268.085, subd. 3, while the ULJ analyzed her situation under the 2011 version of Minn. Stat. § 268.085, subd. 3. *Compare* Minn. Stat. § 268.085, subd. 3(a) (2010) (permanent separation from employment creates an exception only for vacation pay, and sick pay is analyzed in the same manner as severance and bonus pay), *with* Minn. Stat. § 268.085, subd. 3(a) (Supp. 2011) (sick pay is analyzed in the same manner as vacation pay, with an exception for permanent separation). The 2011 version of Minn. Stat. § 268.085, subd. 3, is effective for determinations issued on or after August 7, 2011. 2011 Minn. Laws ch. 84, art. 1, § 8, at 315–16. Because DEED issued its determination on August 26, 2011, the 2011 version of Minn. Stat. § 268.085, subd. 3, controls this case.

discharge involves a reasonable belief that “the employer will no longer allow the employee to work for the employer in any capacity,” Minn. Stat. § 268.095, subd. 5(a), a discharge constitutes a permanent separation from employment.

Bailey argues that, because she is permanently separated from respondent American Crystal Sugar Company Cooperative, her sick pay falls within the statutory exception to Minn. Stat. § 268.085, subd. 3(a)(1). In his initial decision, the ULJ referenced this statutory exception but did not make a specific finding regarding its applicability. But the ULJ found, and the parties do not dispute, that Bailey was suspended from employment on June 11, 2011. And the uncontroverted evidence establishes that when American Crystal Sugar locked out its union employees on August 1, 2011, Bailey had not returned to work. The ULJ did not determine whether Bailey’s suspension is with or without pay. But if an applicant is suspended *with* pay, the applicant is ineligible for unemployment benefits for the duration of the suspension. *Id.*, subd. 13(c) (2010). Because Bailey is receiving unemployment benefits, her suspension must be without pay. Because Bailey was suspended without pay and the period between June 11 and August 1 encompasses more than 30 calendar days, Bailey’s suspension amounts to a discharge from employment. *See id.*, subd. 13(b), .095, subd. 5. Because Bailey is permanently separated from employment, her sick pay falls within the statutory exception to Minn. Stat. § 268.085, subd. 3(a)(1). The ULJ erred by determining that Bailey’s sick pay constitutes deductible income.

Notwithstanding our decision, we observe a dearth of record evidence regarding the grounds for Bailey’s suspension and ultimate discharge. Though not before us, we

note that if Bailey was discharged for employment misconduct, she is ineligible to receive unemployment benefits. *See* Minn. Stat. § 268.095, subd. 4(1) (2010).

Reversed.