

No. A05-2513

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State of Minnesota  
**In Court of Appeals**

ENTERPRISE COMMUNICATIONS INC,

*Relator,*

vs.

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

*Respondent.*

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**RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX**

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## **I. LEGAL ISSUE**

Under the law, an employer's unemployment tax rate is based on the benefits that have been paid to its employees over a four-year period. All benefits paid are used in computing the employer's experience rating unless by statute they are subject to an exception. Benefits were paid to an employee of Enterprise Communications, those benefits are not covered by any statutory exception, and the employee's entitlement to those benefits has already been adjudicated by the department and by this court. Can Enterprise collaterally attack the employee's entitlement to benefits again by challenging the computation of its unemployment tax rate?

## **II. STATEMENT OF THE CASE**

This is a case attempting to reverse the effect of a decision this court has already made.

Relator Enterprise Communications employed Nancy D. Garrison, who established a benefit account with the Minnesota Department of Employment and Economic Development. After the agency reached a final decision, following a de novo hearing, that Garrison was not disqualified, Enterprise appealed to this court, which affirmed the agency's decision in the face of Enterprise's claim that Garrison had not been discharged, but had quit her employment, and also its claim that she had refused an offer of suitable employment. *Enterprise Communications, Inc. v. Garrison*, No. A04-1554 (July 5, 2005) (review denied September 20,

2005). Enterprise did not raise any issue of eligibility or claim that Garrison was not actively seeking work during the time she collected benefits.

On December 7, 2004, the department mailed to Enterprise a notice of its tax rate, showing the benefits Garrison received as a part of its experience rating. (Department's Exhibit ("D")-1) Enterprise filed a protest of its tax rate, citing "preparation errors" and the fact that the appeal of Garrison's disqualification issue had not yet been concluded. (D2) The tax rate was affirmed after it was determined that it was correctly assigned in accordance with Minnesota law. (D3)

Enterprise appealed the affirmation notice and a de novo hearing was held. For the hearing, Enterprise attempted to subpoena Garrison in order to reopen the issue of whether she should have received benefits. (Employer's Exhibit ("H")-H8) Enterprise also attempted to subpoena every person at the department who had reviewed Garrison's eligibility, the unemployment law judge (ULJ) who made the earlier decision, and the senior unemployment review judge who reviewed the earlier decision. (H8) The subpoena requests were denied, as the testimony sought was not relevant to whether the tax rate had been properly computed, which was what was at issue in the appeal. (H9)

A de novo hearing was held, before which Enterprise submitted 11 motions, including that the hearing be postponed (four motions), that the proceeding be declared a "kangaroo court," that the hearing be "stricken" (two motions), and several others. (App. To Rel. Br. 33) The submissions also contained heated rhetoric accusing the department of intentionally conspiring with

Garrison to allow her to collect benefits, and of intentionally attempting to damage the interests of small employers. (*Id.* at 39-40). After the hearing, the ULJ affirmed that the tax rate had been properly computed. Enterprise submitted a request for reconsideration, and the ULJ issued an order affirming the initial decision.

This matter is before the Minnesota Court of Appeals on a writ of certiorari obtained by Enterprise under Minn. Stat. §268.105, subd. 7(a) (2004) and Minn. R. Civ. App. P. 115.

### **III. STATEMENT OF FACTS**

Nancy Garrison collected unemployment benefits following her discharge from Enterprise Communications. Her entitlement to benefits was contested by Enterprise, which ultimately appealed to this court and lost, and then was denied review in the Minnesota Supreme Court.

### **IV. ARGUMENT**

#### **A. SUMMARY OF ARGUMENT**

It is Enterprise's contention that each year, when an employer receives notice of its unemployment tax rate, it is entitled to challenge anew all of the benefits that its employees have received in the four-year period of experience that figures into the tax rate calculation. Enterprise claims that right to reopen and collaterally attack every employee's claim for benefits, even if that claim has already been adjudicated and appealed in full. Enterprise is mistaken. An

employer cannot contest its tax rate by taking another run at a previous claim that benefits paid to an employee should not have been paid.

Even if Enterprise's argument regarding ineligibility were considered, it has no merit, as Garrison could not reasonably be expected to request additional work with Enterprise in light of the obviously poisoned relationship she has with her former employer. However, the underlying circumstances of her discharge, and the record of the previous case, is not even part of the record in this case, and this court cannot consider it. The previous transcript on which Garrison relies is simply not part of the record in his tax-rate case, and no conclusions regarding the merits of Garrison's entitlement to benefits can even be made based on the record in this case.

#### **B. STANDARD OF REVIEW**

The scope of the court's review in unemployment insurance cases is a very narrow scope of review. *Markel v. City of Circle Pines*, 479 N.W.2d 382, 383-84 (Minn. 1992).

The unemployment law judge's fact findings are reviewed in the light most favorable to the decision and if there is any reasonable evidence to sustain those findings, they must be affirmed. *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 377 (Minn. 1996). When witness credibility and conflicting evidence are at issue, the court defers to the unemployment law judge's ability to weigh the evidence and make those determinations. *Whitehead v. Moonlight Nursing Care, Inc.*, 529 N.W.2d 350, 352 (Minn. App. 1995). The courts exercise independent judgment

on issues of law. *Ress v. Abbott Northwestern Hosp., Inc.*, 448 N.W.2d 519, 523 (Minn. 1989).

### **C. COMPUTATION OF AN EMPLOYER'S TAX RATE**

#### **1. A protest of the computation of an employer's tax rate is not a forum to litigate every employee's entitlement to benefits.**

The primary issue in this case is whether an employer who has already litigated an employee's claim for benefits has another opportunity to challenge those benefits under a new theory every year when it receives notice of its tax rate. Under Minn. Stat. § 268.051, subd. 3, benefits paid to an employee affect the employer's taxes for four years. Enterprise claims that every year, every employee who has received benefits in the last four years can be brought back to the department to respond to a new theory from the employer as to why the employee should never have been paid benefits.

Under this theory, when an employee collects benefits, the employee has one opportunity to litigate any issues of disqualification or ineligibility he or she can think of, but the employer has five – one when the initial determination is made, and another each year when the affected tax rate notice is received. Under Enterprise's theory, if the employer can conceive of a new basis on which to argue the benefits should not have been paid, the employee must be brought back for a hearing, the issue must be reheard, and the employee must repay the benefits if the employer manages to prevail. The employee, of course, has no similar opportunity

to raise new issues he or she discovers after the initial adjudication, if denied benefits.

We would note that this court enforces, as to both parties, a requirement that new arguments cannot be raised to it that were not raised to the ULJ and to the department generally. Were Enterprise's theory adopted, that requirement would continue to work strictly against employees, but would have no effect on employers, who could simply wait until their next tax rate notice to raise a new argument. Employees would be entirely deprived of finality for a full four years after they collect benefits, as employers would be free to raise new theories annually.

The unfairness of this approach is obvious. Enterprise challenged Garrison's entitlement to benefits when the department initially issued the ULJ decision holding her not disqualified. At that hearing, the circumstances under which her employment ended, the circumstances of Enterprise's "offers" to her, and the circumstances of her continuing unemployment were extensively discussed. Enterprise had every opportunity to raise any eligibility issue it chose to raise, including any argument that she was not actively seeking suitable employment or that she had not contacted Enterprise to ask for work. This Court has affirmed that the department has an obligation at a hearing to address any issues that are raised by the parties; if Enterprise wished to raise the issue of her ongoing search for work at that time, the department would have been obligated to

address it. *Worthington Tractor Salvage, Inc. v. Miller*, 346 N.W.2d 168 (Minn. App. 1984).

Enterprise did not do so, instead relying entirely on an argument that Garrison quit and a claim that it made her an offer of employment that she refused, meaning she should be disqualified. Those issues were fully adjudicated. The case was appealed to this court, and when this court affirmed the department's decision, Enterprise sought review in the Minnesota Supreme Court, which denied review.

It is time for this litigation to end. It would be literally impossible for the department to function if every employer, large and small, were permitted as part of the tax rate-setting process to annually subpoena every employee who had collected benefits charged to its account in the preceding four years in order to revive issues that it chose not to raise or neglected to raise in initial proceedings regarding those employees' benefits.

**2. The requirement that the department not include benefits that have been determined overpaid does not authorize Enterprise to raise the issue it attempts to raise here.**

Enterprise premises the notion that it has some ability to collaterally attack Garrison's entitlement to benefits on the provision of § 268.047, subd. 2(8), providing that benefits are not used in calculating an employer's tax rate if "the unemployment benefits were determined overpaid unemployment benefits under section 268.18." Enterprise claims that this means that the issue of whether or not the benefits *should* have been determined overpaid is newly raised every time the tax rate is calculated. Of course, before there can be a determination of

overpayment, there must be a determination of ineligibility, which is what Enterprise actually seeks, a year after the fact, contending that Garrison did not actively seek work because she did not ask Enterprise to reemploy her.

The plain language of this provision makes it clear that it applies where there has been a *determination of overpayment* made by the department under Minn. Stat. § 268.18. It does not allow an employer to bootstrap into demanding a determination of overpayment simply because it has received a tax rate notice. Had there actually been a determination of overpayment in this case, and had the department erroneously failed to account for the determination due to a data entry error or an oversight such that it failed to exclude the overpaid benefits from the calculation, then § 268.047, subd. 2(8) would be implicated. Notably, in such a case, the only issue before the court would be *whether there was or was not an overpayment determination*, and not whether the overpayment determination was correct. That case would not, for instance, allow the employee to return and litigate once more his entitlement to benefits on the basis that the overpayment determination, while it had been made, should not have been made.

**3. A tax-rate notice is not an adjudication of individual employees' entitlement to benefits, so that issue is not appealable.**

An appeal of an employer's tax rate simply is not a proper forum for arguing that benefits were overpaid to begin with. To suggest otherwise would be to suggest that the department issues an appealable adjudication of every individual employee's claim to benefits every time an employer's experience

rating is calculated. That is not the case. An appeal of an employer's tax rate is an appeal of the calculation itself given the benefits that have already been paid and the law regarding whether those benefits do or do not affect the employer's experience rating. It does not reopen every past benefit determination for every employee. To hold otherwise would create complete chaos for both employees and employers, not to mention working substantial hardships on employees who would necessarily have to be made parties to every tax rate determination of every employer they've worked for over a period of four years.

The statutes clearly do not contemplate that the interests of benefit recipients are implicated in tax-rate issues. There is no requirement that a recipient of benefits be notified of an employer's tax-rate notice. She has no opportunity under the law to be notified of the hearing or to attend, she is not a party to the case, and it is simply not possible that the legislature would intend for an individual's entitlement to benefits to be determined in a proceeding in which she is not a party. Enterprise, interestingly, does not explain whether its theory works both ways – whether it believes an employee could protest that its employer's experience rating is too *low* and is incorrect because she was not paid benefits as she should have been. Had Garrison lost the case in the Court of Appeals, is it Enterprise's position that she could have used the determination of his tax rate as an opportunity to reopen the issue according to a different legal theory? This is not made clear.

Obviously, for many employers, there are hundreds or thousands of employees involved who collect benefits in a given year. The notion that every one of those employees is subject to having her entitlement to benefits readjudicated each year is not only completely unworkable, but not at all in line with the way the statutes are currently written.

**4. There is no basis to determine that Garrison was not entitled to benefits, even if that issue were reached.**

In any event, even if Garrison's eligibility were a proper part of this appeal, Enterprise's entire argument appears to be premised on the requirement that in order to be eligible for benefits, an employee must be actively seeking work. In order to be actively seeking work, the statute provides that "an applicant shall, when reasonable, contact those employers from whom the applicant was laid off due to lack of work and request suitable employment." Minn. Stat. § 268.085, subd. 16(b) (2004 and Supp. 2005). Enterprise argues that Garrison did not call to ask for work after it laid her off, and that her failure to make that single phone call should disqualify her from benefits for the entire time she collected.

Again, Garrison is not a party to this case. It is the department's position that her entitlement to benefits is not at issue, and as a result, Enterprise's effort to subpoena her for the evidentiary hearing was refused. Thus, this court does not have an adequate record to draw a conclusion regarding whether Garrison did or did not contact Enterprise following her discharge to request work. Her testimony at the initial hearing is not part of the record in this case, and the court is urged not

to rely on Enterprise's assertions regarding what did and did not occur, given that those assertions are not necessarily consistent with what Garrison's testimony would be had she been called.

Even if the court were to determine that every employee was subject to a new adjudication of her entitlement to benefits every time her employer's experience rate was calculated, the result in this case could only be a new hearing in which Garrison could testify regarding whether she contacted Enterprise to request additional work.

In any event, even indulging every other part of Enterprise's argument, the key words here are that an employee must contact the employer to request work "when reasonable." Reviewing the file in this case, in which Enterprise continues adding to a record measured in cubic feet in order to protest the payment of unemployment benefits nearly two years ago, it does not appear that the relationship between the parties was such that a return to employment was plausible for Garrison. It is evident from the record in this case that by the time Garrison applied for unemployment benefits, the relationship between the parties was, for whatever reason, so deeply troubled that it would not have been "reasonable" for Garrison to call and ask for more work.

Similarly, the "offers" that Enterprise now claims to have made to Garrison – which are not in the record in this case, as they are part of the earlier transcript and not this case – were, if the Court did consult that transcript, not offers, but general representations of available work made to the ULJ during an acrimonious

evidentiary hearing. Enterprise never provided any particular offers of work, never mentioning where she would be working, how long the work would last, what Garrison would be doing, how much she would be paid, or anything else that would transform a general assertion that work is available into an “offer.” It is not uncommon for employers to generally assert that they have work available; that does not transform that general testimony into an offer of a specific job to a specific employee. Furthermore, based on a review of the file, Garrison clearly would have had “good cause” for refusing any offer from Enterprise under Minn. Stat. § 268.085, subd. 13c (2004). It is safe to say the department would never have held Garrison disqualified based on a decision not to return to work for Enterprise under the circumstances of this case.

The critical issue, however, is that the calculation of an employer’s experience rating is not a fresh adjudication of every individual employee’s entitlement to benefits such that all issues related to those benefits can be raised again (and again, and again, and again). The issue when an employer protests its tax rate is whether the rate was properly calculated given the benefits paid, not whether years ago, benefits that were paid should not have been. In this case, it cannot be seriously questioned that were Enterprise allowed to do so, it would raise a new “issue” regarding Garrison’s benefits every year for the next four years, and we would find ourselves in the same place. Benefit recipients are entitled to some finality, and endlessly drawing out litigation over issues that could have and should have been raised much earlier, simply because Enterprise

was informed of its tax rate, would entirely frustrate the purpose of the appeals process and the finality it is intended to provide to applicants and employers.

Enterprise does not even contest any of the issues that are actually implicated by the computation of its tax rate, and apparently agrees with the department that unless Garrison's entitlement to benefits can be revisited, its tax rate is correct.

## V. CONCLUSION

The benefits paid to Garrison were properly included in the calculation of Enterprise's experience rating and the computation of its tax rate. The department respectfully requests that this court affirm the decision of the unemployment law judge.

Dated this 7<sup>th</sup> day of April, 2006.

  
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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) (with amendments effective July 1, 2007).