

No. A12-2194

---

State of Minnesota  
**In Court of Appeals**

**DIEDERICK VAN DE WERKEN,**

*Relator,*

vs.

**BELL & HOWELL, LLC,**

*Respondent,*

and

**DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,**

*Respondent.*

---

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

---

*DIEDERICK VAN DE WERKEN  
3 DOGWOOD LANE  
NORTH OAKS, MINNESOTA 55127-2135  
(651) 481-8419  
Relator - Pro se*

*BELL & HOWELL, LLC  
c/o ADP-UCM / THE FRICK CO  
P.O. BOX 66744  
ST. LOUIS, MISSOURI 63166-6744  
(919) 767-6400  
Respondent- Employer -Pro se*

*LEE B. NELSON (#77999)  
AMY R. LAWLER (#0388362)  
MINNESOTA DEPARTMENT OF EMPLOYMENT  
AND ECONOMIC DEVELOPMENT  
1<sup>ST</sup> NATIONAL BANK BUILDING  
332 MINNESOTA STREET, SUITE E200  
ST. PAUL, MINNESOTA 55101-1351  
(651) 259-7117  
Attorneys for Respondent-Department*

---

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).

**TABLE OF CONTENTS**

**LEGAL ISSUE..... 1**  
**STATEMENT OF THE CASE ..... 1**  
**STATEMENT OF FACTS ..... 3**  
**STANDARD OF REVIEW..... 4**  
**ARGUMENT ..... 5**  
**CONCLUSION ..... 9**  
**APPENDIX..... 11**

## TABLE OF AUTHORITIES

### CASES

<i>Bukkuri v. Department of Employment and Economic Development</i> , 729 N.W. 2d 20 (Minn. App. 2007)-----	4, 5
<i>Duschane v. Northwest Airlines, Inc.</i> , 2004 WL 513772, at *1 (Minn. App. Mar. 16, 2004)-----	7
<i>Jackson v. Minneapolis Honeywell Regulator Co.</i> , 47 N.W.2d 449 (Minn. 1951) -	3
<i>Jenkins v. Am. Express</i> , 721 N.W.2d 286 (Minn. 2006)-----	4
<i>Lolling v. Midwest Patrol</i> , 545 N.W.2d 372 (Minn. 1996)-----	2, 3
<i>Moore Assocs., LLC v. Comm’r of Econ. Sec.</i> , 545 N.W.2d 389 (Minn. App. 1996)-----	4
<i>Stagg v. Vintage Place</i> , 796 N.W.2d 312 (Minn. 2011) -----	4
<i>Stever v. Ford Motor Co.</i> , 2008 WL 2574356, at *2 (Minn. App. July 1, 2008) ---	6

### STATUTES

Minn. Stat. § 116J.401, subd. 1(18) (2012) -----	2
Minn. Stat. § 268.03, subd. 1 (2012) -----	8
Minn. Stat. § 268.035, subd. 29 (2012) -----	5, 6
Minn. Stat. § 268.069, subd. 2 (2012)-----	3
Minn. Stat. § 268.085, subd. 3 (2012)-----	5, 7
Minn. Stat. § 268.101, subd. 6 (2012)-----	2
Minn. Stat. § 268.105, subd. 7 (2012)-----	2, 3, 4

### RULES

Minn. R. Civ. App. P. 115 -----	2
---------------------------------	---

## **LEGAL ISSUE**

Under Minnesota law, severance payments that an applicant receives “with respect to” a particular week are deducted from the applicant’s weekly unemployment benefit amount. Diederick Van de Werken entered into a separation agreement which provided that Bell & Howell would pay him eight weeks of severance pay, which amounted to over \$29,000. Van de Werken became eligible for the severance payments following his termination and signature of a general release of claims. Was this severance payment deductible from the eight weeks of unemployment benefits that Van de Werken received following his separation from employment?

Unemployment Law Judge Tim Schepers found that it was, resulting in an overpayment of benefits that Van de Werken had already received.

## **STATEMENT OF THE CASE**

Diederick Van de Werken established a benefit account with the Minnesota Department of Employment and Economic Development (“DEED”) effective May 20, 2012, and regularly request benefits through late September, 2012. That month, after Van de Werken reported that he had received a severance payment from Bell & Howell, a Department clerk determined that Van de Werken had

received \$53,115.38 in severance pay and was ineligible for unemployment benefits from September 2 through November 27, 2012.<sup>1</sup>

Van de Werken appealed that determination, and Unemployment Law Judge (“ULJ”) Tim Schepers conducted a de novo hearing. The ULJ found that Van de Werken had received eight weeks of severance pay, amounting to \$29,218.46, and was therefore ineligible for unemployment benefits for eight weeks following his separation from Bell & Howell.<sup>2</sup> This resulted in Van de Werken being considered, under the statute, overpaid the \$4,776 he received in unemployment benefits during the eight weeks after he was discharged.<sup>3</sup> Van de Werken filed a request for reconsideration with the ULJ, who affirmed.<sup>4</sup>

This matter comes before the Minnesota Court of Appeals on a writ of certiorari obtained by Van de Werken under Minn. Stat. § 268.105, subd. 7(a) (2012) and Minn. R. Civ. App. P. 115. DEED is charged with the responsibility of administering and supervising the unemployment insurance program.<sup>5</sup> As the Supreme Court stated in *Lolling v. Midwest Patrol*, unemployment benefits are paid from state funds, the Minnesota Unemployment Insurance Trust Fund, and

---

<sup>1</sup> E-1. Transcript references will be indicated “T.” Exhibits in the record will be “E-” with the number following.

<sup>2</sup> Appendix, A5-A9.

<sup>3</sup> Minn. Stat. § 268.101, subd. 6.

<sup>4</sup> Appendix, A1-A5.

<sup>5</sup> Minn. Stat. § 116J.401, subd. 1(18) (2012).

not from employer funds.<sup>6</sup> This was later codified.<sup>7</sup> In 2012, over \$1.28 billion in combined state benefits and federally funded extended benefits were paid from the trust fund to 237,000 unemployed Minnesotans. DEED's interest therefore carries over to the Court of Appeals' interpretation and application of the Minnesota Unemployment Insurance Law. DEED is thus considered the primary responding party to any judicial action involving an unemployment law judge's decision.<sup>8</sup>

### STATEMENT OF FACTS

Diederick Van de Werken worked as the executive director of sales for Bell & Howell from January of 2006 through May 21, 2012.<sup>9</sup> He received an annual salary of \$135,000, and additionally earned sales commissions of around \$65,000 per year.<sup>10</sup> After Van de Werken separated from employment he established a benefit account effective May 20, 2012, with a weekly benefit amount of \$597.<sup>11</sup> When he separated from employment, Bell & Howell offered him a severance package that included a severance payment of six weeks of salary.<sup>12</sup> Van de Werken rejected this offer, and the parties negotiated the amount until August.<sup>13</sup> During this negotiation process Van de Werken knew he would be receiving a

---

<sup>6</sup> 545 N.W.2d 372, 376 (Minn. 1996). *See also Jackson v. Minneapolis Honeywell Regulator Co.*, 47 N.W.2d 449, 451 (Minn. 1951). Unemployment benefits are paid from state funds, even though taxes paid by employers helped create the fund.

<sup>7</sup> Minn. Stat. § 268.069, subd. 2.

<sup>8</sup> Minn. Stat. § 268.105, subd. 7(e).

<sup>9</sup> T. 7.

<sup>10</sup> T. 8.

<sup>11</sup> T. 9-10.

<sup>12</sup> T. 13.

<sup>13</sup> T. 10, 13, 16-17.

severance payment, but did not know the exact amount.<sup>14</sup> Around August 20, 2012, Van de Werken agreed to accept eight weeks of severance pay, amounting to \$29,218.46.<sup>15</sup> The severance package included additional payments that are not at issue in today's appeal.<sup>16</sup>

### 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 Van de Werken'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.<sup>17</sup>

The Supreme Court held in *Stagg v. Vintage Place* that it views the ULJ's "factual findings in the light most favorable to the decision," and that it will not disturb the findings when the evidence substantially sustains them.<sup>18</sup> "Substantial evidence" is the relevant evidence that "a reasonable mind might accept as adequate to support a conclusion."<sup>19</sup> In *Bukkuri v. Department of Employment and*

---

<sup>14</sup> T. 16.

<sup>15</sup> E-3(3), T. 16-17.

<sup>16</sup> E-3.

<sup>17</sup> Minn. Stat. § 268.105, subd. 7(d) (2012).

<sup>18</sup> 796 N.W.2d 312, 315 (Minn. 2011) (citing *Jenkins v. Am. Express*, 721 N.W.2d 286, 289 (Minn. 2006)).

<sup>19</sup> *Moore Assocs., LLC v. Comm'r of Econ. Sec.*, 545 N.W.2d 389, 392 (Minn. App. 1996).

*Economic Development*, the Court of Appeals reiterated that it reviews de novo the question of statutory interpretation.<sup>20</sup>

## ARGUMENT

Van de Werken received eight weeks of severance pay, and is therefore ineligible for eight weeks of unemployment benefits, beginning on the date of his separation from employment. Minn. Stat. § 268.085 provides:

**Subd. 3. Payments that delay unemployment benefits.**

(a) An applicant 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, in the form of:

\* \* \*

(2) severance pay, bonus pay, and any other payments, \* \* \* paid by an employer because of, upon, or after separation, but only if the payment is considered wages at the time of payment under section 268.035, subd. 29:

\* \* \*

(b) This subdivision applies to all the weeks of payment...The number of weeks of payment is determined as follows:

(1) if the payments are made periodically, the total of the payments to be received is divided by the applicant's last level of regular weekly pay from the employer;

\* \* \*<sup>21</sup>

Minn. Stat. § 268.035, subd. 29 provides:

**Subd. 29. Wages**

(a) "Wages" means \* \* \*; severance payments; \* \* \*

---

<sup>20</sup> 729 N.W. 2d 20, 21 (Minn. App. 2007).

<sup>21</sup> Minn. Stat. § 268.085, subd. 3 (2012). There is no dispute that Van de Werken's weekly pay rate far exceeded his weekly benefit amount, and thus he would be ineligible for unemployment benefits during any week in which he received severance pay.

Van de Werken offers one argument: that he did not actually begin to collect his severance payment until late August 2012, after he and his employer reached an agreement on the terms of the severance package, and that his period of ineligibility should not begin until after he actually began to collect the severance payments.<sup>22</sup>

Van de Werken's case is not dissimilar from other severance cases this Court has considered, and while many such cases are unpublished, they do provide guidance on this question. Workers do not necessarily pack their desks and pick up their severance checks on their way out the door. Indeed, there is often a lag of some amount of time between a worker's last day on the job and the day they first receive a severance check. In *Stever v. Ford Motor Co.*, Stever's employment with Ford Motor Company ended on January 1, 2007, and he did not receive a severance check until approximately two weeks later.<sup>23</sup> The Court found *Stever* to be ineligible for his entire benefit year, since the severance payment, divided per week, was greater than his weekly benefit amount would have been.<sup>24</sup> The Court made no allowance for eligibility in the two-week period before Stever received the check, but instead found that the ineligibility period began on the date of the separation.

---

<sup>22</sup> Relator's brief, p. 4.

<sup>23</sup> 2008 WL 2574356, at \*2 (Minn. App. July 1, 2008), Appendix, A9-A10. These dates do not appear in this Court's decision, but the Court affirmed the ULJ's decision that was based on testimony surrounding these dates that can be found on pp. 12, 13, 15, and 28 of that case's transcript.

<sup>24</sup> *Id.*

Similarly, in *Duschane v. Northwest Airlines, Inc.*, Duschane was laid off on February 28, 2003, but did not begin receiving her severance installment payments until March 14, 2003.<sup>25</sup> Nonetheless, the Court affirmed DEED's decision that Duschane was ineligible beginning the week of her separation from employment.<sup>26</sup> The Court's decision did not even discuss the possibility of delaying Duschane's ineligibility to coincide with the dates that she actually received the payments.

This analysis comports with the language of the current statute governing severance pay. The law does not allow DEED to simply record the date on which an applicant received a severance payment in excess of his weekly benefit amount, and find him ineligible solely for that week. Instead, the law finds applicants ineligible "for any week with respect to which the applicant is receiving, has received, or has filed for payment..."<sup>27</sup> And here, Van de Werken received this payment with respect to the eight weeks following his separation from employment. Like most applicants, Van de Werken received severance pay because his employment was severed. As the ULJ found, and Van de Werken conceded at hearing, Van de Werken always knew that he would be entitled to at least six weeks of severance pay, and that he was offered this amount immediately upon his separation. The portion of the severance agreement itself does not specify any particular payment schedule, and particularly notes that he would "be

---

<sup>25</sup> 2004 WL 513772, at \*1 (Minn. App. Mar. 16, 2004), Appendix, A11-A13.

<sup>26</sup> *Id.* at \*3.

<sup>27</sup> Minn. Stat. §268.085, subd. 3.

eligible to receive a total of eight (8) weeks of severance pay at your Annual Benefits Base Rate (ABBR) as of your last day worked. The amount will be paid to you in form of salary continuation...<sup>28</sup> Van de Werken is precisely the type of worker that Minnesota law seeks to address: an individual who separates from a job, and receives a salary continuation for a set number of weeks, even if he does receive the sum immediately.

Unemployment insurance benefits are designed to be a temporary partial wage replacement for workers who need assistance to become reemployed.<sup>29</sup> Unemployment benefits are not designed to be collected, in tandem, with severance payments. The law specifically requires that the number of weeks of ineligibility or deductibility be calculated by taking the sum of the severance payments, dividing it by the last level of weekly pay, and determining the number of weeks of payment, in order to avoid calendar manipulations that would allow an applicant to collect more in benefits than those who do not engage in such manipulation. If Van de Werken's analysis were adopted, it would offer an obvious enticement to applicants who would seek to delay the receipt of a severance package, allowing them to collect both unemployment benefits and severance payments without experiencing any benefit reduction or period of ineligibility. This would thwart the purpose of the statute, which is not designed to layer payments from public funds on top of generous severance payments; this

---

<sup>28</sup> E-3(3).

<sup>29</sup> Minn. Stat. § 268.03, subd. 1 (2012).

would create not a partial wage replacement, but a windfall, in which an applicant receives both his full salary and a benefit payment.

Van de Werken always knew that he would be collecting at least six weeks of severance pay following his May 2012 separation from employment. That his prolonged negotiations increased this amount to eight weeks does not change the fact that he received the payment because he separated from employment. Under the law, his eight-week period of ineligibility must begin the week following his separation from employment.

### **CONCLUSION**

Unemployment Law Judge Tim Schepers correctly concluded that Van de Werken's severance pay rendered him ineligible for benefits for eight weeks following his separation from employment. DEED requests that the Court affirm the decision of the Unemployment Law Judge.

Dated this 4<sup>th</sup> day of March, 2013.



---

Lee B. Nelson (#77999)  
Amy Lawler (#0388362)

Department of Employment and  
Economic Development  
1<sup>st</sup> National Bank Building  
332 Minnesota Street, Suite E200  
Saint Paul, Minnesota 55101-1351  
(651) 259-7117

Attorney for Respondent Department