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No. A13-0872

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.

RESPONDENT ENGFER'S BRIEF

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LEGAL ISSUES

1. Appellant Department of Employment and Economic Security (DEED) raised, for the first time in its Petition for Review before the Minnesota Supreme Court, whether Respondent General Dynamics Advanced Information Systems, Inc.'s (General Dynamics) supplemental unemployment benefits (SUB) plan was exempt from ERISA preemption. Is the issue of exemption from ERISA preemption reviewable if never raised or briefed in the lower courts?

    a. No party ever raised or briefed the issue of exemption from ERISA preemption and, consequently, neither the Unemployment Law Judge (ULJ) nor the Minnesota Court of Appeals ruled on the issue.

    b. Most apposite cases:

        i. *Lee v. Fresenius Medical Care, Inc.,* 741 N.W.2d 117 (Minn. 2007);
        ii. *Broehm v. Mayo Clinic Rochester,* 690 N.W.2d 721 (Minn. 2005); and
        iii. *Theile v. Stich,* 425 N.W.2d 580 (Minn. 1988)

    c. Most apposite statutes:

        i. N/A

2. If the issue of exemption from ERISA preemption is considered on appeal to the Minnesota Supreme Court, is General Dynamics' SUB plan exempt from ERISA preemption?

    a. No party ever raised or briefed the issue of exemption from ERISA preemption and, consequently, neither the Unemployment Law Judge (ULJ) nor the Minnesota Court of Appeals ruled on the issue.

b. Most apposite cases:

   i. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983)
   ii. *Hernandez v. Jobe Concrete Products, Inc.*, 282 F.Supp.3d 360 (5th Cir. 2002);
   iii. *Scott v. Cooper Industries-Crouse Hinds Division,* 927 F. Supp. 50 (N.D.N.Y. 1996); and

c. Most apposite statutes:

   i. 29 U.S.C. §1003(b)(3)
   ii. 29 U.S.C. §1144
   iii. Minn. Stat. §268.035, subd. 29(2012)

3. ERISA preempts state laws to the extent they "relate to any employee benefit plan" covered by ERISA. Minnesota unemployment laws address SUB plans. If General Dynamics' SUB plan is governed by ERISA, does ERISA preempt the Minnesota statute addressing SUB plans?

   a. The Minnesota Court of Appeals held that ERISA preempted the Minnesota statute addressing SUB plans.

   b. Most apposite cases:

      i. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.,* 514 U.S. 645 (1995)
      ii. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85(1983);
      iii. *Eide v. Grey Fox Technical Services Corp.*, 329 F.3d 600 (8th Cir. 2003); and
      iv. *Hernandez v. Jobe Concrete Products, Inc.*, 282 F.3d 360 (2002).

   c. Most apposite statutes:

      i. 29 U.S.C. §1144(a)(2006);
      ii. Minn. Stat. §268.035 subd.29(a)(12)(2012)

STATEMENT OF THE CASE

Respondent Thomas V. Engfer (Engfer) adopts DEED's Statement of the Case.

STATEMENT OF FACTS[1]

Engfer was employed with General Dynamics as a software developer for 32 years until his employment ended on December 16, 2011. T[2] 12. Engfer's final rate of pay was approximately $92,000 per year. T13.

When Engfer's employment ended he was offered the opportunity to participate in an Employee Transition Benefit Plan (Plan). T14. The Plan provided a supplement to Engfer's weekly state unemployment compensation benefits that, when combined, would equal 100% of his last normal weekly gross pay. Exh. 6, p. 3. The Plan provided that Engfer not declare the Plan amounts as severance benefits when applying for unemployment benefits. *Id.* The Plan also provided that Engfer must be eligible to receive state unemployment compensation benefits in order to receive the Plan benefits. *Id.* at p. 4.

Accordingly, on or about December 18, 2011, Engfer applied for unemployment compensation benefits and immediately began to receive Plan benefits, as well. T14. Because of Engfer's tenure with General Dynamics, he was entitled to receive 26 weeks of Plan benefits to supplement his unemployment compensation benefits. T14.

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[1] DEED inappropriately attempts to cast as fact, information about how DEED operates, as well as citations to statutes. Appellant-Department Brief, pp. 5-6. Those "facts" are more appropriate for argument as they were not part of the record below.

[2] Transcript of Testimony will be referred to with a "T" followed by a page number. Any exhibits referenced in the record will be referred to as "Exh." followed by the exhibit number in the record and a page number.

Engfer was only entitled to receive the Plan benefits if he signed, executed, and did not revoke General Dynamic's Confidential Separation Agreement and General Release (Agreement). T16, Exh 6 at p. 6. The Plan provided 26 weeks of benefits which, if exhausted, meant that Engfer would continue to receive only his unemployment benefits. T19, Exh 6. According to the Plan, there were three exceptions under which Engfer could receive Plan benefits but not be eligible to receive unemployment compensation benefits: first, if there was a state waiting period with respect to receipt of unemployment compensation benefits; second, there were insufficient earnings to qualify for unemployment; and third, unemployment benefits were exhausted before the Plan benefit expired. Exh. 6 at p. 4.

Engfer's state unemployment compensation benefits began on or about December 18, 2011 and he continued to request state unemployment benefits and federal extension through the his Determination of Ineligibility on January 28, 2013 . A[3]24. Engfer's Plan supplemental benefits ended on July 5, 2012. *Id.* The Plan paid him a total of $31,397.50. *Id.*

PROCEDURAL POSTURE

The Unemployment Law Judge found Engfer's receipt of supplemental unemployment compensation benefits under the General Dynamics Plan qualified as wages. Thus, the ULJ disqualified Engfer from receiving Minnesota unemployment compensation benefits for a period of time which resulted in an overpayment to Engfer.

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[3] Engfer will refer to DEED's Appendix/Addendum (per the new amendments to the Minnesota Rules of Civil Appellate Procedure, effective July 1, 2014) as "A" followed by the page number.

The Minnesota Court of Appeals reversed, holding that ERISA preempted the Minnesota statutory section dealing with wages in the SUB plan context. DEED's request for review to the Minnesota Supreme Court followed.

STANDARD OF REVIEW

The Court of Appeals may affirm the decision of the ULJ, 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 was in excess of the statutory authority or jurisdiction of the department, affected by other areas of law, or unsupported by substantial evidence in view of the entire record as submitted. Minn.Stat. §268.105, subd. 7(d)(2) and (4)-(5)(2010). "On undisputed facts, whether an employee is ineligible to receive unemployment benefits is a question of law, which [the Minnesota Court of Appeals] reviews de novo." *Bergen v. Sonnie of St. Paul, Inc.*, 799 N.W.2d 234, 236 (Minn.Ct.App. 2011)(citing *Ress v. Abbott Northwestern Hospital, Inc.*, 448 N.W.2d 519, 523 (Minn. 1989)).

> The unemployment compensation statute is remedial in nature and must be liberally construed to effectuate the public policy set out in Minn.Stat. § 268.03," which states that the unemployment benefits provisions are " 'to be used for the benefit of persons unemployed through no fault of their own.' " *Prickett v. Circuit Science, Inc.,* 518 N.W.2d 602, 604 (Minn.1994) (citing Minn.Stat. § 268.03 (1992)). We have stated that this policy urges us to narrowly construe the disqualification provisions. *Id.*

Jenkins v. American Express Financial Corp., 721 N.W.2d 286, 289 (Minn.2006). The Minnesota Supreme Court may review Court of Appeals decisions. *See* Minn. R. Civ.App. P. 117 (2009)

ARGUMENT

The Minnesota Supreme Court should not consider, review, or rule upon DEED's waived argument that the General Dynamics SUB Plan was exempt from ERISA preemption. DEED failed to raise the issue of exemption at any time in the lower Courts and only now raises it for the first time on appeal before this Court. Even if the Supreme Court does consider the exemption argument, the record amply illustrates its inapplicability to the case at bar. The SUB plan was governed by ERISA. It follows then, that ERISA's broad preemption of state laws relating an ERISA plan came into play. Because the Minnesota statute related to an ERISA governed plan, it was appropriately found to be preempted. The record clearly supported the Court of Appeals ruling. Thus, the Court of Appeals decision should be affirmed.

1. Raised For The First Time On Appeal, The Minnesota Supreme Court Should Not Consider DEED's Exemption From Preemption Argument.

DEED tried in vain to raise another argument—exemption from preemption—to escape the Minnesota Court of Appeals' well-reasoned decision that ERISA preempted the wage statute at issue. Not only does the exemption argument fall flat (which is addressed *infra*) but the argument was waived when not raised before the Court of Appeals. Consequently, DEED's current effort to resuscitate an argument they neglected to raise below is a wasted one.

It is settled Minnesota law that failing to raise an issue in the lower courts or failing to adequately brief the issue on appeal will generally preclude review by the Minnesota Supreme Court. *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 7285 (Minn. 2005)(citing *Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.,* 558 N.W.2d 480, 480 (Minn.1997) (issue not adequately briefed on appeal); *Thiele v. Stich,* 425 N.W.2d 580, 582-83 (Minn.1988) (issue not raised in district court)). Such is the case at bar.

Engfer's entire appeal and argument at the Court of Appeals focused on preemption of the Minnesota statute as it related to General Dynamics' ERISA governed SUB plan. DEED's entire opposing argument focused *only* on why preemption should not apply to the ERISA governed plan because the Minnesota statute did not sufficiently relate to the SUB plan. Exemption was never asserted. In addition, DEED never challenged the ULJ's finding that: "These [SUB] payments are supplemental unemployment compensation benefits awarded through the General Dynamics Corporation Employment Transition Benefit Plan qualified under the provisions of the Employee Retirement Income Security Act of 1974 as amended." *See* Exh.6, p. 8. Based on DEED's brief and argument, the Court of Appeals specifically stated: "DEED does not dispute that Engfer's [SUB] plan is an "employee benefit plan," as defined in 29 U.S.C. §1002 (3)(2012) and is *governed by* ERISA." *Engfer v. General Dynamics Advanced Information Systems, Inc.*, 844 N.W.2d 236, 239 (Minn. Ct. App. 2014)(emphasis added).

Despite a clear opportunity before the Court of Appeals, DEED never raised, argued or briefed the issue of exemption from ERISA preemption even though ERISA preemption was the sole issue before that Court. Appropriately, the Court of Appeals never ruled on that issue and neither should the Supreme Court.

But now DEED expects the Supreme Court to rule on that issue. DEED has completely reversed its position, claiming ERISA did not govern the SUB plan due to an exemption. Much like failure to raise an affirmative defense, DEED waived their ability to assert that argument to the Supreme Court. *See, Bowman v. Brooklyn Pet Hospital,* 311 Minn. 526, 527, 247 N.W.2d 424, 425 n.1 (1976)(Plaintiff argued for first time on appeal that Hennepin County Conciliation Court judgment was res judicata and barred action in Anoka County Conciliation Court. Having failed to raise res judicata in the pleadings in the second action, the defense was waived. Rule 8.03, Rules of Civil Procedure; *Melbo v. Rinn*, 280 Minn. 72, 157 N.W.2d 842 (1968)).

Because DEED never raised the exemption issue below, the Minnesota Supreme Court should not consider such an argument raised for the first time before them. However, assuming *arguendo* that the exemption issue is considered, it still fails.

2. ERISA Governs The General Dynamics SUB Plan.

The General Dynamics SUB Plan was not exempt from ERISA preemption. For exemption to apply, DEED must show the General Dynamics Plan was: "...maintained solely for the purpose of complying with applicable ...unemployment compensation ...laws." 29 U.S.C. §1003(b)(3)(2002). DEED has not meet that burden.

The purpose of General Dynamics Plan was to supplement an employee's unemployment compensation. Minnesota did not require a SUB plan. The Plan was voluntarily provided to General Dynamics employees.

To prevail on the exemption argument, DEED must show the SUB Plan was separately administered and *maintained solely* to comply with Minnesota's unemployment compensations laws, specifically Minn. Stat. §268.035 subd. 29(12)(2012)(Wage Definition). *See, Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 108 (1983). A failure of either the "separately administered" or "solely maintained" requirement is dispositive. *Guilbeaux v. 3927 Found., Inc.*, 177 F.R.D. 387, 394 n.2 (E.D. Tex. 1998). The test to determine exemption from ERISA preemption is whether the plan, as an administrative unit, provided only those benefits *required* by the applicable state law. *Shaw,* 463 U.S. at 107(emphasis provided). The present SUB Plan was not maintained solely for that purpose[4].

a. The Wage Definition did not require SUB benefits from employers.

The Wage Definition did not *require* SUB benefits, but only dictated when a plan could pay benefits and that a plan could not require consideration for benefits. The pertinent language provided that wages did not include:

> ...Payments made to supplement unemployment benefits under a plan established by an employer, that makes provisions for employees generally or for a class or classes of employees under the written terms of an agreement, contract, trust arrangement, or other instrument. The plan must provide supplemental payments solely for the supplementing of weekly state or federal unemployment benefits. The plan must provide supplemental payments only for those weeks the applicant

[4] Engfer concedes the Plan was separately administered.

> has been paid regular, extended, or additional unemployment benefits. The supplemental payments, when combined with the applicant's weekly unemployment benefits paid, may not exceed the applicant's regular weekly pay. The plan must not allow the assignment of supplemental payments or provide for any type of additional payment. The plan must not require any consideration from the applicant and must not be designed for the purpose of avoiding the payment of Social Security obligations, or unemployment taxes on money disbursed from the plan...

Minn.Stat. §268.035, subd. 29(a)(12)(2012).

For DEED's exemption argument to succeed, they need to show that the Wage Definition *required* a supplemental employee benefit, much like employer contributions to the State unemployment compensation fund, or workers' compensation insurance. General Dynamics' SUB Plan was simply a benefit voluntarily offered to certain departing employees to supplement their unemployment compensation. It was not provided because Minnesota law mandated it. Thus, DEED cannot show that the SUB Plan was providing benefits pursuant to State law.

DEED seems to believe permitting a potential supplemental benefit and requiring it are the same. They are not. If Minnesota law had required employers to provide SUB plan benefits, and General Dynamics provided one, it would have likely been exempt from ERISA because it was maintained solely to comply with Minnesota law. That is not the case here. The SUB plan was voluntarily provided.

DEED's argument of following the lead of Pennsylvania, Oklahoma and other states which required prior approval of SUB plans before allowing supplementation, actually supports Engfer's position. In such a situation, an employer would have to maintain a plan solely to comply with the state law to obtain prior approval. But Minnesota does not

have such a requirement. Contrary to DEED's positon, Minnesota's lack of pre-approval is a critical part of the path to exemption, not just a "mere procedural step which neither adds to nor takes away from the substance and effect of the law." Without pre-approval, Minnesota law is an after-the-fact attempt to impact and affect ERISA covered benefits, to the detriment of employers and employees, alike. With it comes the absolute necessity of maintaining a plan solely to comply with the law, which DEED has also failed to show.

b. The General Dynamics Plan was not maintained solely to comply with Minnesota unemployment compensation laws.

Because the Wage Definition did not require SUB benefits the SUB Plan could not have been solely maintained to comply with the statute. Therefore, the Plan was not exempt from preemption.

The present Plan is similar to the plan in *Scott v. Cooper Industries-Crouse Hinds Div.*, 927 F.Supp. 50 (N.D.NY 1996). In *Scott*, an employer provided funds to employees in addition to state unemployment compensation insurance alone. The Court found that such a plan was not covered by §1003(b)(3) because it was not maintained for the purpose of complying with unemployment laws, but rather to supplement them. *Scott*, 927 F.Supp. at 52.

Like *Scott,* the present SUB Plan was in place to supplement their unemployment compensation under State laws. Also like *Scott*, the Plan was not maintained for the sole purpose of complying with State unemployment compensation laws, but rather to

supplement them. Thus, in accord with *Scott*, the Supreme Court should rule that the General Dynamics Plan was not exempt under §1003(b)(3).

Also instructive is the analogous case, *Hernandez v. Jobe Concrete Products, Inc.*, 282 F.3d 360 (5th Cir. 2002). In *Hernandez*, the Court analyzed Texas workers' compensation benefit requirements. The state did not require that an employer provide such a benefit though specified a State option with requirements, if so chosen. The employer in the case, Jobe, adopted its own plan to cover work injuries, as was its right. The Court, evaluating whether the plan was exempt from ERISA under §1003(b)(3), held that the plan was not maintained solely for the purpose of complying with Texas workers' compensation laws because there was no law requiring the employer to maintain its own plan. They held no exemption applied. *Hernandez*, 282 F.3d at 363. If Jobe had elected to comply with the statutorily provided workers' compensation option, the exemption to ERISA would have applied. *Id.* at 364.

Likewise, Minnesota did not require SUB benefits for employees. It did not provide statutory options to elect, either. It follows, then, that a voluntarily adopted plan like the General Dynamics SUB Plan, was not maintained solely to comply with Minnesota law. The fact that Minn. Stat. §268.035 subd. 29 (12) attempted to control such voluntary plans, if employers adopted them, did not propel an ERISA covered plan into exempt territory. In fact, it did just the opposite—it related to an ERISA plan making it ripe for preemption.

DEED correctly pointed out that an employer's motive in creating and adopting a plan cannot control whether the plan is exempt. What controls is whether the plan was

maintained solely to provide only those benefits required by applicable state law. The U.S. Supreme Court found that use of the word "solely" in the exemption language "demonstrates that the purpose of the entire plan must be to comply..." with applicable law. *Shaw*, 463 U.S. at 107. Here, the SUB Plan provided benefits which were not required by Minnesota state law. The SUB Plan provided such benefits nationwide, not just in Minnesota and not just to comply with Minnesota law. For that reason, the SUB Plan was no maintained solely to comply with Minnesota unemployment compensation laws. Accordingly, the Plan was not exempt from ERISA coverage.

3. ERISA Preempted Minn. Stat.§268.035 subd. 29 (12) (2012).

ERISA preempts any and all state laws to the extent that they "relate to any employee benefit plan" covered by ERISA. 29 U.S.C. §1144(a)(2006); *Eide v. Grey Fox Technical Services Corporation*, 329 F.3d 600, 604 (8th Cir. 2003)(citing *Shea v. Esensten*, 107 F.3d 625, 627 (8th Cir. 1997)(further citations omitted)). ERISA's preemption clause must be broadly read to reach any state law having a connection with or reference to covered employee benefit plans. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 655-656, 115 S.Ct. 1671(1995). In passing ERISA, the U.S. Congress intended:

> To insure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government..., [and to prevent] the potential for conflict and substantive law...requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.

New York State Conference of Blue Cross & Blue Shield Plans, 514 U.S. at 657, 115 S.Ct. 1671 (citing *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 142, 111 S.Ct. 478, 484 (1990)). 2211). If an ERISA plan was required to keep certain records in some states but not in others and make certain benefits available in some states but not in others, necessitating processing claims in certain ways in some states but not in others, provision of employee benefits would be frustrated.

> It is thus clear that ERISA's pre-emption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations.

Fort Halifax Packing Co., Inc., v. Coyne, 482 U.S. 1, 11, 107 S.Ct. 2211(1987) (citations omitted).

a. The Wage Definition is related to the General Dynamics ERISA Plan.

There is no doubt that the Minnesota Wage Definition related to the General Dynamics SUB Plan. The entirety of Wage Definition was devoted to controlling such plans. ERISA should therefore preempt it.

The Minnesota Wage Definition related to, and controlled, SUB plans through restrictions on timing of SUB payments and prohibitions on consideration. Both sets of controls related to, and adversely impacted, the SUB Plan and employee receipt of

benefits. The Wage Definition disqualified employees, like Engfer, from receiving their unemployment benefits for a period of time. If enforced, the prohibition of consideration would have completely cut off employee rights to the SUB benefits.

Even taking DEED's argument that the Wage Definition was designed only to control receipt of State unemployment compensation benefits, it still affected the SUB plan or, at the very least, had an indirect effect on it. Thus, it would still be preempted. A state law may relate to a benefit plan, and thus be preempted, even if the law was not specifically designed to affect such plans or the effect was only indirect. *Mitchell Energy & Development Corp. v. Fain*, 172 F.Supp.2d 880, 888 (S.D.Tex. 2001)(citing *New York State Conference of Blue Cross & Blue Shield Plans*, 514 U.S. 645, 655, 115 S.Ct. 1671).

The Wage Definition, if not preempted, required an employer to tailor their SUB plan to Minnesota law if they wanted to provide such benefits to their Minnesota employees. That required tailoring would frustrate administration and provision of employer benefits by creating administrative hurdles to providing a uniform plan of benefits to multistate employees in large multi-national companies. ERISA's preemption clause was designed to insure uniformity in the design and administration of covered plans. *See*, *Fort Halifax Packing Company, Inc. v. Coyne*, 482 U.S. 1, 9-10, 107 S.Ct. 2211 (1987). However, a uniform plan is difficult to achieve if it is subject to differing regulatory requirements in differing states. *Id.* at 9 (107 S.Ct. ERISA's promise of preemption promotes employee benefits while Minnesota's Wage Definition undercuts their feasibility.

Without preemption of Minnesota's Wage Definition, the Plan would be frustrated. For instance, Minnesota unemployment compensation laws may differ from other state laws in how they treat SUB plans. ERISA's preemption clause was designed to prevent an employer providing benefits, like the present Plan, from implementing state specific plans to comply with different state laws regarding unemployment compensation benefits. "[I]f state laws could be applied in invalidate selected or objectionable plan provisions or benefits, employers would be subject to conflicting requirements in the administration of their ERISA plans. *Mitchell Energy*, 172 F.Sup.2d at 889 (citations omitted). "Indeed, the validity, and therefore, the design, content, and administration of such plans would vary from state to state." *Id.* (citations omitted). Courts should not hesitate to enforce ERISA's preemption provision where state law created the prospect that an employer's administrative scheme would be subject to conflicting requirements. *Fort Halifax*, 42 U.S. at 10, 107 S.Ct. 2211.

Such is the case in Minnesota. The Wage Definition statute relate directly to employer SUB plans. The Wage Definition attempted to restrict such plans by limiting their payments only to weeks the applicant has been paid regular, extended, or additional unemployment benefits. That particular reference related directly to the General Dynamics SUB plan. It was directly contrary to the Plan which provided employee benefits during the waiting week for State unemployment compensation benefits. The Wage Definition addressed that kind of payment as a violation of the statute resulting in harm to the employee. The Plan called for consideration which was prohibited by the

Wage Definition. If the consideration prohibition were not preempted, employees would be unable to participate in the SUB plan benefits. Obviously, the prohibitions and restrictions created an untenable positon for the Plan—conflicting requirements from state to state, creating an administrative nightmare.

ERISA's preemption provision was in place to protect from precisely the outcome of Engfer's case. Specifically, to prevent and preempt application of State laws which negatively impacted the administration of legitimate ERISA Plans.

DEED's explanation of why Minnesota law did not interfere with ongoing SUB payments failed to hit the mark. DEED went to great lengths explaining how they calculated a worker's benefits in light of SUB plan payments. DEED based its analysis on a worker's receipt of *wages* when it explained why Minnesota law came into play only after SUB payments ended. DEED explained that unemployment benefits would not be paid until it had determined how long receipt of *wages* delayed payments of the Minnesota benefits. There was a fatal flaw with DEED's analysis -- SUB payments, according to the Minnesota Wage Definition, were *not* wages at all. In other words, unemployment benefit payments should not be offset, or delayed, due to receipt of SUB payments. But in the present case, they were, which resulted in a direct impact to an ERISA governed SUB plan.

DEED cited Minn. Stat. §268.085 subd. 3 (a) and (c)(2012), to support its argument. Those statutes were not applicable to the present case. Those sections applied to specified employer provided payments like pension, PTO, vacation, severance and sick

time and were considered *wages* under the statute. Receipt of such wages could delay receipt of unemployment benefits. However, the statues did not include SUB payments because they were specifically excluded as wage in the Wage Definition. Thus, receipt of SUB benefits should in no way delay receipt of unemployment benefits or result in overpayment of unemployment benefits.

DEED argued that a delay in Engfer's unemployment benefits did not reduce the total amount he could receive from the State. What DEED omitted from its argument was that a delay in State provided benefits negatively impacted the SUB payments. In order to receive them, Engfer must be receiving State unemployment benefits. Exh. 6 at p.11. DEED missed the point of the SUB plan and its requirements. A worker, like Engfer, could not collect 26 weeks of SUB payments, first, then unemployment benefits next[5]. SUB payments, per the ERISA plan, would not be provided, in the first place, unless the worker was receiving State benefits (subject to some very narrow exceptions).

b. The SUB Plan required an ongoing administrative scheme.

DEED argued that no ERISA covered plan existed. Whether an ERISA plan exists or if benefits are premised on an ERISA plan, is determined by whether an employer requires "an ongoing administrative program to meet [its] obligation." *Eide*, 329 F.3d at 605, (citing *Fort Halifax*, 482 U.S. at 12, 107 S.Ct. 2211).

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[5] Indeed, even the Wage Definition provided that "...supplemental payments, *when combined* with the applicant's weekly unemployment benefits paid, may not exceed the applicant's regular weekly pay." Minn. Stat. §268.035 subd. 29(12)(2012)(emphasis provided). The Wage Definition does not provide that supplemental benefits and State benefits should be received consecutively.

It is clear that General Dynamics' SUB Plan required an ongoing administrative program. The Plan required that employees, like Engfer, apply for unemployment compensation benefits in his particular state in order to receive the supplemental benefits. The Plan required an ongoing administrative scheme to determine continued eligibility for benefits and analyzed an employee's particular circumstances. Particularly, the Plan had to determine how many weeks of benefits to which an employee was entitled based upon years of work; determine the dollar amount of benefits to which an employee would be entitled after particular state unemployment compensation benefits were established; and then pay the employee the difference between their last weekly salary and their state provided unemployment benefit. Obviously, each employee would be subject to different calculations given their different salaries, different state calculations for unemployment benefits and differing years of service. Therefore, the Plan required an ongoing administrative program to meet its obligations. For those reasons, ERISA governed the Plan.

The Plan at issue was clearly an employee benefit plan governed by ERISA. DEED conceded that fact. *Engfer*, 844 N.W.2d at 239. Only now do they take the opposite position that the SUB Plan was not governed by ERISA in their attempt to show that this case should be reversed. The Court of Appeals correctly held ERISA preempted the Wage Definition application to the General Dynamics SUB Plan.

CONCLUSION

The Court of Appeals correctly ruled that the Minnesota Wage Definition was preempted by ERISA. The SUB Plan at issue was not exempt from ERISA. ERISA governed it and the Wage definition related to, and adversely impacted, the Plan. Consequently, the Wage Definition should be preempted and the Court of Appeals affirmed.

Dated: 7/28/14

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By: _____

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OFFICE OF
APPELLATE COURTS
JUL 30 2014
FILED

No. A13-0872
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.

CERTIFICATE OF WORD COUNT COMPLIANCE

I, Howard L. Bolter, certify that Respondent Thomas V. Engfer's Brief complies with Rule 132.01, subd. 3(a) of the Minnesota Rules of Civil Appellate Procedure.

I further certify that, in preparation of this Brief, I used Microsoft Word 2010, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count for the principal Brief.

I further certify that the above-referenced principal Brief contains 5,325 words.

Dated: 7/28/14

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AFFIDAVIT OF SERVICE

STATE OF MINNESOTA
COUNTY OF HENNEPIN

I, Howard L. Bolter, being first duly sworn, depose and say that on July 29, 2014, I served the attached Respondent Thomas V. Engfer's Brief and Certificate of Word Count Compliance, on the following parties by mailing to each of them a copy thereof, enclosed in an envelope, postage pre-paid, and by depositing the same in the United States Mail, directed to said party as follows:

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Dated: 7/29/14

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SHERILEE KATHLEEN TOUSSAINT
Notary Public-Minnesota
My Commission Expires Jan 31, 2019

7/29/14

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HOWARD BOLTER
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July 28, 2014

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Re: Department of Employment and Economic Development v. Thomas V. Engfer and General Dynamics Advanced Information Systems
Court File No. A13-872

Dear Ms. O'Neill:

Enclosed herewith for filing please find 3 bound and 2 unbound copies of Respondent Thomas Engfer's Brief, Certificate of Word Count Compliance and Affidavit of Service. Please note one of the bound briefs is the original. Thank you.

Very Truly Yours,

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