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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF JACKSON

JOSEPH W. HAMILTON,
Claimant-Appellant,

- v -

File No. 84-33223-AE
10-3-84

W. A. FOOTE MEMORIAL HOSPITAL,
Employer-Appellee,

and

OPINION OF THE COURT

MICHIGAN EMPLOYMENT SECURITY
COMMISSION,
Appellee.

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The issue involved in this appeal is whether the Employer's payment at the time of separation of six months severance pay is severance pay under the Michigan Employment Security Act. It is the Employer's position that the Board of Review correctly held that this payment was severance pay, thereby limiting the number of weeks for which Claimant was eligible for unemployment insurance benefits.

A brief synopsis of the relevant provisions of the Michigan Employment Security Act is necessary to understanding the facts involved. To receive unemployment insurance benefits, a claimant must have at least 18 credit weeks within the base period MCLA 421.46(D); MSA 17.550. The base period is the 52 week period preceding Claimant's application for unemployment insurance benefits. MCLA 421.45; MSA 17.549. A credit week is a base period calendar week in which Claimant earned wages as defined

by statute resulting in earnings of at least \$67.00. MCLA 421.50 (3)(c); MSA 17.554. Thirty five credit weeks is the maximum amount which can be used to establish a claim for unemployment insurance benefits. MCLA 421.50(2); MSA 17.554.

The number of weeks claimant may receive unemployment insurance benefits is dependent on the number of credit weeks earned with the employer. Claimant may receive three weeks of unemployment insurance benefits for every four credit weeks earned with the employer. MCLA 421.20(c); MSA 17.521. If claimant has 35 credit weeks within the base period, he can collect regular unemployment insurance benefits for 26 weeks. MCLA 421.27; MSA 17.529.

Joseph Hamilton (hereinafter the Claimant) worked for W. A. Foote Memorial Hospital (hereinafter the Employer) as a controller from September 5, 1961 until May 17, 1982 (T 5, 6). Claimant was a salaried employee and received bi-monthly gross wages in the amount of \$2,023.20. (T 6).

On May 17, 1982, Claimant was asked to resign by the Employer. (T 5). A final check was issued to Claimant on May 18, 1982. Claimant's retirement date was set for November 14, 1982. Nevertheless, Claimant was not retired because he had not signed the retirement papers. (T 13).

Janet Blair, Personnel Assistant, testified that the Employer has no written or verbal policy regarding severance pay. (T 9). However, a memorandum from the Employer's president written on the date of separation clearly identifies this arrangement as severance pay. It states, in pertinent part:

I met with Joseph W. Hamilton this morning requesting his resignation, indicating a six month severance arrangement with benefits to be in force during that period. I indicated my personal as well as the Board's appreciation for his years of service but indicated the inability of the management team to function as a team resulted in my actions. (T 10, 33).

Ms. Blair also testified that there are 2080 working hours in a calendar year and that Claimant was paid for 1/2 of these hours thereby resulting in 1040 hours or six months severance pay. (T 12).

Claimant filed an application for unemployment insurance benefits more than six months after his separation on December 29, 1982. (T 30). Therefore, Claimant's base period extended from December 27, 1981 through December 25, 1982. (T 31). On January 17, 1982, Claimant acknowledged that he had received severance pay from the Employer. In a contested claim statement, Claimant verified:

I wish to have my claim back dated to my separation in May 1982.

I did not file sooner because I was receiving severance pay. (T 32).

The Michigan Employment Security Commission issued a determination on February 15, 1983 that Claimant had 20 credit weeks in his base period and that the severance payment made by the Employer could not be used to establish a credit week. (T 41).

On April 19, 1983, a redetermination was issued which affirmed the determination. (T 44).

A Referee hearing was held on July 13, 1983 before Patrick M. Burns. Referee Burns affirmed the Michigan Employment Security Commission redetermination and found that the six month compensation paid to Claimant after termination was severance pay under the Michigan Employment Security Act. Therefore, it could not be used to establish credit weeks based on MCLA 421.50; MSA 17.554.

The Referee decision was affirmed by the Employment Security Board of Review on December 6, 1983.

Claimant appealed to this Court on January 4, 1984.

Oral arguments were held on September 10, 1984.

The question for review is whether the Appellant received severance pay under the Act, which pay is not deemed to be wages for the purpose of establishing credit weeks. The Appellant-Claimant says it was not severance pay and the Appellees say it was. Appellant contends that because he had the option of receiving the six months pay every two weeks over the six months period rather than the lump sum, that that is an indication that he was still employed up to November 14, 1982. He points out that the deductions from the lump sum check which he agreed to take had the deductions computed in the same manner had he taken the money every two weeks. It is clear that Appellant did not work during the six months period from May to November, 1982.

MCLA 421.38 sets forth the Circuit Court's jurisdiction as follows:

"The Circuit Court . . . may reverse an order or decision (issued by the Board of Review) only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record."

If the Board's decision is supported by substantial evidence, it should be affirmed by the Court. Dynamic Manufacturers, Inc v Employment Security Commission, 369 Mich 556; 120 NW2d 173 (1963); Williams v Lakeland Convalescent Center, Inc, 4 Mich App 477; 145 NW2d 272 (1966).

Section 48 of the Act provides in relevant part as follows:

An individual shall be deemed "unemployed" with respect to any week during which he or she performs no services and with respect to which remuneration is not payable to the individual, or with respect to any week of less than full-time work if the remuneration payable to the individual is less than his or her weekly benefit rate.

(2) All amounts paid to a claimant by an employing unit or former employing unit for a vacation or a holiday, and amounts paid in the form of retroactive pay, or in lieu of notice, shall be deemed remuneration in determining whether an individual is unemployed

under this section and also in determining his or her benefit payments under Section 27(c), for the period designated by the contract or agreement providing for the payment, or if there is no contractual specification of the period to which such payments shall be allocated, then for the period designated by the employing unit or former employing unit. However, payments for a vacation or holiday, and payments in the form of termination, separation, severance or dismissal allowances, and bonuses, shall not be deemed wages or remuneration within the meaning of this section. (Emphasis added).

Section 50 (b) indicates that an individual can establish credit weeks if he earns wages.

As stated before, the issue before this Court is whether the payment given to the appellant was a severance allowance, deemed not to be wages under the Act for the purposes of establishing credit weeks.

The parties are in agreement that there are no definitive appellate decisions in Michigan addressing this issue, however, Bolta Products Division v Director of Division of Employment Security, 356 Mass 684; 255 NE 2nd 357, discussed the difference between payment in lieu of notice and severance pay:

A payment in lieu of dismissal notice may be defined as a payment made under the circumstances where the employing unit, not having given an advance notice of separation to an employee, and irrespective of the length of service to the employee, makes a payment to the employee equivalent to the wages which he could have earned had he been permitted to work during the period of notice. Severance pay, on the other hand, may be defined as a payment to an employee at the time of his separation in recognition and consideration of the past service he has performed for the employer and the amount is usually based on the number of years of service. Those definitions are substantially in accord with the accepted usage of the same words and phrases in similar statutes of other states.

It is important to try to determine the understanding of the parties at the time of separation. The employer's memorandum stated as follows:

I met with Joseph W. Hamilton this morning requesting his resignation, indicating a six month severance arrangement with benefits to be in force during that period. I indicated

my personal as well as the Board's appreciation for his years of service but indicated the inability of the management team to function as a team resulted in my actions. (T 33).

Appellant at page 31 of the transcript indicated:

"I did not file sooner because I was receiving severance pay."

There isn't any criteria set forth by statute or case law which states in what mode severance payment is to be made. Therefore, the fact that Appellant had the option of taking it every two weeks rather than a lump sum is not helpful to the Court.

The facts that I find important is that both parties referred to the payment as severance pay, and that Appellant did not perform any services thereafter during the six months period for the employer. This indicates to this Court that it was payment for past services performed and that the ruling of the Employment Security Board affirming the Referee's decision should be affirmed. I do not find the ruling to be contrary to law, and it is supported by competent, material and substantial evidence on the whole record.

This Court cannot review issues not raised below. Therefore, the issue of whether the vacation, personal and sick day payments are wages as claimed in Appellant's brief are not considered by this Court.



Charles J. Fajalee - Circuit Judge
P13276

Dated: October 3, 1984