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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-144**

Lisa Williams,
Respondent,

vs.

Advanced Auto Transport, Inc.,
Relator,

Department of Employment and Economic Development,
Respondent.

**Filed November 9, 2009
Reversed and remanded
Lansing, Judge**

Department of Employment and Economic Development
File No. 22708663-4

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Development)

Considered and decided by Connolly, Presiding Judge; Lansing, Judge; and
Kalitowski, Judge.

UNPUBLISHED OPINION

LANSING, Judge

Advanced Auto Transport, Inc. appeals, by writ of certiorari, from an unemployment law judge's determination that Lisa Williams is eligible for unemployment benefits. The Minnesota Department of Employment and Economic Development and Advanced Auto Transport agree that the unemployment law judge erred by applying Minn. Stat. § 268.035, subd. 25b, instead of a common-law analysis to determine whether Williams was an employee or an independent contractor. Because substantial rights were prejudiced by this error and because the record was not clearly and fully developed on the applicable common-law factors, we reverse and remand for further proceedings.

F A C T S

Lisa Williams worked as a driver for Advanced Auto Transport (AAT) from November 2008 until May 2009. AAT is a company that transports vehicles for other companies. Williams is not an owner-operator and did not own or lease the vehicles that she drove for AAT.

In May 2009 AAT discharged Williams for violating federal trucking regulations and for disobeying an order to stop driving and take a rest break. Williams denied violating any regulation or disobeying an order to take a rest break. After her discharge, Williams applied for unemployment benefits, and the Minnesota Department of Employment and Economic Development issued a determination of eligibility.

AAT appealed the department's determination, and an unemployment law judge (ULJ), held an evidentiary hearing and upheld the determination of eligibility. At the hearing and in the subsequent decision, the ULJ applied Minn. Stat. § 268.035, subd. 25b (Supp. 2009), to determine that Williams was an employee and not an independent contractor. The ULJ also ruled that Williams's actions did not constitute employment misconduct, and she was therefore eligible for benefits.

On AAT's request for reconsideration, the ULJ affirmed the findings of fact and decision. The order on reconsideration again referred to Minn. Stat. § 268.035, subd. 25b (Supp. 2009), but also referred to the predecessor statute, Minn. Stat. § 268.035, subd. 25b (2008), that governs owner-operators. AAT appeals, raising three issues: the ULJ's determination that Williams was an employee and not an independent contractor, the ULJ's determination that Williams did not commit employment misconduct, and the constitutionality of Minn. Stat. § 268.035, subd. 25b (Supp. 2009).

D E C I S I O N

I

When determining eligibility for unemployment compensation benefits, the ULJ must apply the law in effect at the time of discharge. *Brown v. Nat'l Am. Univ.*, 686 N.W.2d 329, 332 (Minn. App. 2004). The determination of which statutes apply to the discharge is a question of law that we review de novo. *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996) (applying statute to undisputed set of facts).

Williams was discharged on May 14, 2009. At the evidentiary hearing and in the decision following that hearing, the ULJ applied Minn. Stat. § 268.035, subd. 25b (Supp.

2009), to the issue of whether Williams was an employee or an independent contractor. In the order on reconsideration, the ULJ reaffirmed application of the 2009 statute, but also stated that the result would not change under the predecessor statute that governed owner-operators, Minn. Stat. § 268.035, subd. 25b (2008). On appeal, the department and AAT agree neither version of the statute applies to this case. Williams has not submitted a brief.

We agree that the 2009 version of section 268.035, subdivision 25b, does not apply to Williams's discharge. This version of the statute was not enacted until May 16, 2009; was not effective until August 1, 2009; and does not indicate that it is to be applied retroactively. 2009 Minn. Laws ch. 89, § 3 at 1308; *see* Minn. Stat. §§ 645.02 (stating default rule for effective date), .21 (providing that statutes are not retroactive unless clearly so intended by legislature) (2008). Thus, the 2009 version was not in effect on May 14, 2009, and does not apply.

We also agree that the 2008 version of section 268.035, subdivision 25b, that was in effect on May 14, 2009, does not apply to Williams's discharge because it applies only to an "owner-operator." Minn. Stat. § 268.035, subd. 25b (2008). The plain language of the statute clearly indicates that its application is limited to drivers who own or lease the vehicles that they operate. This does not apply to Williams because the evidence is undisputed that she did not own the vehicles she operated while working for AAT. Thus, neither the 2008 nor 2009 version applies to Williams.

Because both versions of Minn. Stat. § 268.035, subd. 25b are inapplicable, the ULJ erred by applying them to this case. The question of whether Williams was an

employee or an independent contractor is, instead, governed by Minn. Stat. § 268.035, subd. 15(a)(1) (2008), which provides a general definition of employment for purposes of determining eligibility for unemployment benefits. Under that provision employment is defined as service by “an individual who is considered an employee under the common law of employer-employee and not considered an independent contractor.” Minn. Stat. § 268.035, subd. 15(1) (2008). The determination of whether Williams was an AAT employee or an independent contractor must therefore be analyzed under Minnesota common law.

This court may reverse, modify, or remand the case for further proceedings if the petitioner’s substantial rights have been prejudiced by an error of law affecting the ULJ’s findings, inferences, conclusion, or decision. Minn. Stat. § 268.105, subd. 7(d) (2008); *see Ywsyf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007) (citing this standard of review). AAT asks this court to rule as a matter of law that Williams is an independent contractor.

Minnesota applies a five-factor analysis to determine whether a person is an employee or an independent contractor. Those five factors are: “(1) The right to control the means and manner of performance; (2) the mode of payment; (3) the furnishing of material or tools; (4) the control of the premises where the work is done; and (5) the right of the employer to discharge.” *Guhlke v. Roberts Truck Lines*, 268 Minn. 141, 143, 128 N.W.2d 324, 326 (1964), *codified in* Minn. R. 3315.0555, subp. 1 (2009). The most important factors are the rights to control performance and to “discharge the worker without incurring liability.” Minn. R. 3315.0555, subp. 1(A), (B). Undisputed facts in

the record indicate that Williams's employment met some of these factors. Other factors, however, including the mode of payment and the right to control performance, remain disputed issues.

The evidentiary hearing before a ULJ serves as an evidence-gathering inquiry. Minn. Stat. § 268.105, subd. 1(b) (Supp. 2009). The ULJ has a duty to "ensure that all relevant facts are clearly and fully developed." *Id.* The ULJ also has a duty to "assist unrepresented parties in the presentation of evidence." Minn. R. 3310.2921 (2009).

At the outset of the evidentiary hearing, the ULJ, incorrectly relying on the inapplicable statutory provision, stated that "for unemployment law purposes, if the driver does not own the vehicle or own it under a lease, they're an employee." The record is clear that the ULJ determined that Williams was an employee because she did not own the vehicle she was operating. The ULJ's attention was incorrectly focused on the factors listed in the statute rather than those in the common law.

In excluding consideration of the common-law factors, the ULJ did not evaluate AAT's claim that Williams was an independent contractor and not an employee. Consequently, the error of law affected the decision, findings, and conclusions and prejudiced AAT's rights.

The ULJ's incorrect statement of the law that applied to Williams's discharge had a prejudicial effect on Williams as well. The statement was misleading and indicated to Williams that there would be no reason to present evidence relevant to the common-law factors. By curtailing any discussion of the common-law factors, the ULJ failed to satisfy

his duty to assist Williams in the presentation of relevant evidence and to ensure that the record was clearly and fully developed.

We conclude that the relevant facts were not sufficiently developed under the common-law factors because of the ULJ's incorrect statement of law to Williams and AAT at the outset of the evidentiary hearing. Therefore, we reverse and remand for further proceedings.

II

The ULJ's ultimate determination that Williams did not engage in employment misconduct has support in the current record. The evidence relating to the common-law employment factors that was not developed, however, may affect the determination of employment misconduct. Specifically, the undeveloped evidence could determine the degree to which Williams could properly exercise discretion in controlling the method and manner of her performance. The issue of employment misconduct is more appropriately decided after the record is fully developed on remand. Because we reverse and remand on the issue of whether Williams was an independent contractor or an employee, we also reverse and remand on the issue of whether Williams committed employment misconduct.

III

Finally, AAT asks us to hold that Minn. Stat. § 268.035, subd. 25b (Supp. 2009), is unconstitutional. This issue, however, is not justiciable on the facts presented in this case.

“The concept of justiciability forms a threshold for judicial action and requires . . . a controversy that allows for specific relief . . . as distinguished from an advisory opinion predicated on hypothetical facts.” *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 321 (Minn. App. 2007). “When a lawsuit presents no injury that a court can redress, the case must be dismissed for lack of justiciability.” *Id.*

Because Minn. Stat. § 268.035, subd. 25b (Supp. 2009), is not applicable to the determination of Williams’s employment status and presents no injury to AAT under the facts of this case, there is no injury under that statute that can be redressed. We, therefore, decline to reach AAT’s challenge to the constitutionality of Minn. Stat. § 268.035, subd. 25b (Supp. 2009).

Reversed and remanded.