A.D. NO. B81-07873-78457
S.S. NO. [redacted]
B.O. NO. 09
D1 PG 4.11

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

DAVID MIKO,
Claimant-Appellant,

v

WYANDOTTE CEMENT, INC.,
Employer-Appellee,

and

MICHIGAN EMPLOYMENT SECURITY COMMISSION,
Appellee.

_____/

C.A. No. 82-233794-AE

Honorable Thomas J. Brennan (P11173)

OPINION

M. ELIZABETH BUNN (P28297)
Attorney for Claimant-Appellant
ROBB, LACKEY & NUSBAUM

HUDSON MEAD (P17567)
Attorney for Employer-Appellee
TOLLESON, MEAD, WELCHLI & DAHN

FRANK J. KELLEY, Attorney General for the State of Michigan

By: DAVID A. VOGES (P25143)
Assistant Attorney General
Attorneys for Michigan Employment Security Commission

OPINION

This case comes before the Court on a leave to appeal from a decision of the Michigan Employment Security Board of Review. In May, 1982, the Board issued a ruling that claimant, appellant herein, was not entitled to unemployment compensation insurance pursuant to § 48 of the Michigan Employment Security Act, MCLA 412.1 et seq.[1/] The appeal involves the interpretation of this section of the Act as to whether appellant, who received a lay-off allowance equivalent to one week's wages, is disqualified from receiving unemployment compensation for the same period.

The basic facts in this matter are not in dispute. Appellant, who had worked for his employer since 1977, was laid off in January, 1981 for approximately three weeks. A collectiv bargaining agreement was in effect which allowed for the payment of a lay-off allowance. Specifically, the contract provision provides, in pertinent part:

> "Section 6.19 Lay-off Pay"
> "In the event that employees with one or more years of seniority are hereinafter laid off because of a reduction of work scheduled by the company due to the lack of demand for the company's product, such employees shall receive lay-off benefits as follows.

1/ The Board reversed the decision of the Referee who, subsequent to the testimony of the parties at the hearing, held that the claimant was entitled to receive the unemployment compensation benefits.

(1) Eligible employees shall continue to receive pay following such lay-off at their straight time hourly rate plus cost of living, excluding shift or premium pay in effect at the time of such lay-off commences as follows:"

Completed Years of Seniority	Maximum Length of Layoff Pay	Maximum Hours Of Pay
1 to 3 inclusive	1 week	40 hours

(R. 10, 15) 2/

Once laid off, appellant filed a claim for unemployment compensation benefits. This was granted by the Referee at the MESC hearing. Subsequently, however, the employer appealed and, upon review, the Board issued an adverse determination to appellant.

The Board ruled that the claimant was disqualified from receiving unemployment benefits as the lay-off payment constituted remuneration. The Board bases this finding on the premise that such payment was provided for in the collective bargaining agreement and therefore, because it is a legally enforceable right, must be classified as remuneration. Apparently, it is the Board's view that separation, dismissal or severance allowances are not enforceable contract rights and thus are not remuneration as defined by the Act. There is no authority for this position and it is erroneous. Separation pay may stem from

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2/ The collective bargaining agreement distinguishes between payments when a worker is permanently laid off and for when a worker is temporarily laid off. See R-15.

a collective bargaining agreement, as in the present case, or an individual contract between the employer and employee. Gaydos v White Motor Corp, 54 Mich App 143, 220 NW2d 697, (1974).[3/] As was noted by Southwestern Tel Co v Employment Sec Bd, 189 Kan 600 371 P2d 134 (1962) it is not a mere gratuity. Even though this Court initially concludes that the Board's decision is incorrect, the question of whether appellant is entitled to the unemployment compensation as well as his lay-off allowance still remains.

The issue thus before the Court is whether the lay-off pay constitutes remuneration and therefore precluded appellant from receiving unemployment benefits as well. Section 44 of the Act provides the definition for statutory remuneration:

> Sec. 44. (1) "Remuneration" means all compensation paid for personal services, including commissions and bonuses, and except for agriculture and domestic services, the cash value of all compensation payable in a medium other than cash.

Under the Act, an individual is not entitled to unemployment benefits if one is paid certain sums during the unemployment period, unless the payment falls within the exceptions delineated in §48. In part, §48 provides:

> . . . payments for a vacation or holiday made, or the right to which has irrevocably vested, after 14 days following such 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)

3/ See, also, 53 Am Jur 2d § 81 for a discussion of dismissal and severance pay and as to how these entitlements may be created.

This section also defines unemployment in the following manner:

> An individual shall be deemed "unemployed" with respect to any week during which he performs no services and with respect to which no remuneration is payable to him, or with respect to any week of less than full-time work if the remuneration payable to him is less than his weekly benefit rate.

Thus, before an individual will be deemed to be unemployed, two requirements must be met. First, no service may be performed for the employer and second, no remuneration may be paid. Hence, in the instant case, appellant will be considered unemployed if he did not work during the time he was laid off and received no remuneration for this period. That appellant did not perform any work for his employer is clear; however appellant had received an allowance from his employer pursuant to the collective bargaining agreement. The allowance that appellant received was labeled "lay off pay" and the question becomes whether this "lay off pay" is remuneration, as defined by the Act, or payment "in the form of termination, separation, severance or dismissal allowances."

Although this precise issue has not been previously presented to any Michigan courts, in a related matter, the Attorney General's office issued an opinion which may shed some light in this area. The opinion involved the question of supplemental unemployment benefit plans, whereby an unemployed worker during the lay-off period would receive money paid from

a trust fund created by the employer, and whether these payments disqualified a worker from receiving unemployment insurance. The Attorney General opined that they didn't and stated the following:

> . . . it is my opinion that the supplemental benefits provided are in the nature of allowances payable when the applicant is separated by his employer, whether temporarily because of lack of work or permanently because of discontinuance of operations, provided, of course, he meets the eligibility prerequisites of the Plan. As such, I believe such benefits fall within the class of payments exempt under Section 48 of the Act.

OA 6, 1955, No 2213, p. 364 (July 12, 1955) at p 366.

By analogy, lay-off allowances should also serve to fall with the exemptions of § 48. Although they are not similarly paid out from a trust fund, the intent of these payments is the same as that of the supplemental unemployment plan: that is to provide some relief for the unemployed worker and his family.

While not binding upon this court, several other jurisdictions have reached decisions where the receipt of severance or dismissal benefits will not serve to disqualify a claimant from receiving unemployment benefits as well. In allowing this, the courts have realized that the separation pay is not payment for past wages earned, but rather is considered recognition of services rendered.

Thus, the Court in Bolta Products Division v Director of Divg Eng. Sec, 356 Mas 684, 255 NE2d 357, 361 (1970) stated the following:

> Severance pay, . . . may be defined as a payment to an employee at the time of his separation in recognition and consideration of the past services he has performed for the employer and the amount is usually based on the number of years of service." [This definition is] substantially in accord with the accepted usage of the same words and phrases in similar statutes of other States.

This view of lay-off allowance was also enunciated in Western Electric Co v Hussey, 35 NJ 250, 259, 172 A2d 645, 650, (1961) where the court said:

> "It is true that the right of the worker to the lay-off allowance is not absolute. He builds it by service, but it may be withheld if he is discharged for cause, and presumably if he quits of his own accord. Hence, it is not 'wages earned,' since wages earned by a worker must be paid, regardless of the reason for termination of employment.

Severance pay was considered by the Court as compensation for the loss of employment and used the term remuneration to label such a loss. It was not meant to be used in the way the MES Act has defined it; i.e., compensation for services rendered. In this regard, the Court stated:

> "We agree that dismissal compensation is 'remuneration for the service rendered during the period covered by the agreement' with the reservation that, in so characterizing it the payment is not 'wages' for such period. It is merely compensation for the loss of the job, measured by length of service, because experience has shown that, in general, the longer the service with

> one employer the more difficult it is for the worker to make a satisfactory adjustment. If it is not such in fact, it comes very close to being an indemnity for the loss of the job.

Id., at 260, 172 A2d at 651.

Hence, the payment relates back to the services previously performed but it must be emphasized that it is not deferred payment for such services, but rather, payment in recognition of past performance. The past service serves as a qualification in order to receive the allowance. This was emphasized in Southwestern Bell Tele Co v Employment Sec Bd, supra, where the Court said:

> It must be borne in mind that in order to receive a termination allowance, definite services must have been performed. In no sense of the word is a termination allowance a mere gratuity. The prerequisite to qualify for such an allowance is the performance of services, which entails regular employment, for a definite number of years, and so forth, all of which were provided for in the employees' contractual rights to receive such payments.

Id., 371 P2d at 137.

The Court affirmed the lower court's ruling that the claimants were therefore entitled to collect unemployment compensation.

If the allowance was simply remuneration for past services, then a claimant having earned it, would be entitled to it, regardless of the reason for separation. This was recognized by the Court in Ackerson v Western Union Tel Co, 234

Minn 271, 48 NW2d 338 (1951) where the Court, allowing the claimant to receive unemployment benefits as well as the severance pay, applied the following reasoning:

> If the employe had been discharged for cause, or had voluntarily resigned, or had died before separation, she would have received nothing. If, as the appeal tribunal holds, she had earned this money and it had simply been held back, it is difficult to see how she would lose the right to collect it in case either of the above-mentioned events occurred. Then, too, if she had elected to avail herself of one of the other options mentioned in the contract, she would have received no severance pay. If it had been earned as past wages, it should have been payable in any event.
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> * * *
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> If she procured a new position the day after separation, she would retain her severance pay and the wages so earned, and no one would contend that she should not be allowed to retain both. Unemployment compensation is merely intended to take the place of wages which could have been earned had she been employed.

Id., at 275, 276, 48 NW2d at 341, 342.

This result has been reached again and again in numerous cases of other jurisdictions.[4/] While some dissent has been voiced, it has become a well established majority view that one receiving separation pay will not be precluded from also receiving unemployment benefits.

4/ See, e.g., Industrial Comm of Colo v Sivokman, 134 Colo 481, 306 P2d 669 (1957); Balding v Tennessee Dept of Employ Security, 212 Tenn 517, 370 SW2d 546 (1963); Meakins v Huiet, 100 Ga App 557, 112 SE2d 167 (1959); and the cases cited within the text of this opinion.

As the court in Dingleberry v Bd of Review Dept of L & I, 145 NJ Super. 415, 417, 381 A2d 809, 810 (1977) noted:

> Clearly, receipt of the severance pay did not per se operate to disqualify claimant from receiving unemployment compensation benefits for any of the weeks following her permanent layoff.

Thus, it is this court's opinion that the lay-off payment constituted separation pay and therefore falls within the § 48 exemptions from remuneration. The payment served as compensation for job loss in recognition of past employment and not as remuneration for past services rendered.[5/]

Based on the foregoing, this Court is of the opinion that the decision by the Board of Review must be reversed. Appellant is entitled to receive unemployment compensation insurance. An order consistent with this opinion shall be signed upon presentation.

Date:
February 8, 1983

THOMAS J. BRENNAN
Circuit Judge
Thomas J. Brennan (P-11173)

5/ This Court granted leave to the UAW to file an amicus curaie brief, but due to the disposition of the case, it is not necessary to address the issues raised therein. Nor is it necessary to address the alternative argument raised by appellant in his brief, having already reached a favorable disposition based on his first argument.

STATE OF MICHIGAN
EMPLOYMENT SECURITY BOARD OF REVIEW

In the Matter of the Claim of

DAVID MIKO, Appeal Docket No. B81-07873-78457

Claimant Social Security No. [redacted]

WYANDOTTE CEMENT, INC.,

Employer

ORDER DENYING APPLICATION FOR REHEARING

This case is before the Board of Review upon application of the Commission for a rehearing by the Board in respect to its decision dated May 17, 1982. The Board of Review, having read and considered said application, and having reviewed the record in the matter, is of the opinion that said application should be denied.

IT IS THEREFORE ORDERED that said application shall be and the same is hereby denied.

James L. Kelley, Member

James Viventi, Member

MAILED AT DETROIT, MICHIGAN August 25, 1982

This order will become final unless a written appeal therefrom is RECEIVED by the clerk of the appropriate circuit court on or before

September 14, 1982

TO PROTECT YOUR RIGHTS, YOU MUST BE ON TIME.