

VOLUME NO. 37

OPINION NO. 56

UNEMPLOYMENT COMPENSATION BENEFITS - Award of back pay; DEPARTMENT OF LABOR AND INDUSTRY - Unemployment compensation benefits, award of back pay; HUMAN RIGHTS DIVISION - Unemployment compensation benefits, award of back pay; EMPLOYMENT SECURITY DIVISION - Unemployment compensation benefits, award of back pay; REVISED CODES OF MONTANA, 1947 - Sections 87-106(e) and 87-145(d).

HELD: The Human Rights Division is not required by section 87-145(d) to disclose to the Employment Security Division the award of back pay to a party who has filed a complaint with the Human Rights Division.

18 August 1977

Raymond D. Brown, Administrator
Human Rights Division
Power Block
Helena, Montana 59601

Dear Mr. Brown:

By your letter of May 3, 1977, you have asked for an opinion. I state your question in the following manner:

Is the Human Rights Division of the Department of Labor and Industry required by section 87-145(d), R.C.M. 1947, to disclose to the Employment Security Division of the Department of Labor and Industry the award of back pay to a party who has filed a complaint with the Human Rights Division?

This problem arises when the following facts occur: A person is discharged from his employment and files for unemployment compensation benefits with the Employment Security Division. The person is granted and paid such benefits and subsequently is also granted an award by the Human Rights Division. Employment Security would seek reimbursement of unemployment benefits paid to that person if he also received a back pay award covering the same time period. Employment Security is apparently relying on section 87-145(d), R.C.M. 1947, in requesting this information from Human Rights. Section 87-145(d) provides:

Any person who, by reason of the nondisclosure or misrepresentation by him or by another, of a material fact (irrespective of whether such nondisclosure or misrepresentation was known or fraudulent) has received any sum as benefits under this act while any conditions for the receipt of benefits imposed by this act were not fulfilled in his case, or while he was disqualified from receiving benefits, shall in the discretion of the division, either be liable to have such sum deducted from any future benefits payable to him

under this act, or shall be liable to repay to the division for the unemployment compensation fund, a sum equal to the amount so received by him, and such sum shall be collectable in the manner provided in this act for the collection of past due contributions.

Therefore an unemployment compensation benefit recipient who received benefits as a result of nondisclosure or misrepresentation can be required to reimburse Employment Security for those benefits.

In addition to section 87-145(d) the Employment Security Division can also seek reimbursement in certain instances under section 87-106(e), R.C.M. 1947. Section 87-106(e) requires a recipient of benefits to repay those benefits if he subsequently receives payments under Workmen's Compensation or Occupational Disease Acts or under Railroad Unemployment Insurance Acts.

Section 87-106(e) specifically lists those instances in which a benefit recipient must repay unemployment compensation benefits when he also receives benefits under other compensatory acts. The Human Rights Act is not among those listed. The express mention of one matter excludes other similar matters not mentioned. Helena Valley Irrigation District v. State Highway Commission, 150 Mont. 192, 433 P.2d 791 (1967). Employment Security cannot seek reimbursement under this section.

Of course, Employment Security claims that it can seek reimbursement under section 87-145(d). As I stated above, in order to seek reimbursement a recipient must have failed to disclose or misrepresented a material fact which thereby allowed him to receive the benefits under section 87-145(d). The Maryland Supreme Court in interpreting a section of its unemployment compensation act, which for our purposes is identical to section 87-145(d), R.C.M. 1947, found that an unemployment compensation recipient who was subsequently awarded back pay was not required to reimburse the state for benefits. Waters v. State, 220 Md. 337, 152 A.2d 811 (1959). Whether or not a recipient later receives back pay, the recipient did not fail to disclose or misrepresent his unemployed status at the time he made application for unemployment compensation benefits. Section 87-145(d) contemplates the nondisclosure of an existing fact, not something which may or may not occur in the future. Neither the statement that the claimant is unemployed nor a failure to

disclose the possibility of a future back pay award can be considered a nondisclosure or misrepresentation of fact. Waters v. State, supra.

There is a line of cases typified and culminated by Griggs v. Sands, 526 S.W.2d 441 (Tenn. 1975), which hold that back pay recipients are liable to the state for reimbursement of unemployment compensation benefits received for that period of time covered by the back pay awards. However, those cases deal with a specific statute which allows the agency, which administers unemployment compensation, to redetermine eligibility and seek reimbursement from a recipient who, subsequent to receiving unemployment compensation benefits, receives other compensation for the same time period. Montana does not have an equivalent statute and those cases are therefore not on point.

Since section 87-145(d) does not afford the Employment Security Division a means of seeking reimbursement from recipients of back pay awards, a disclosure of the existence of such an award would seem to be a violation of the recipients right of privacy. Article II, section 10, Constitution of Montana, 1972.

This would not prevent the Employment Security Division from requiring applicants to disclose complaints filed by such applicants with the Human Rights Division at the time they make application for Unemployment Compensation benefits.

However, the solution would seem to be in legislative action, either by allowing recovery of unemployment compensation benefits when a recipient also receives other compensation for the same time period or by requiring the Human Rights Division to award back pay less the amount paid by the Employment Security Division for that same time period.

THEREFORE, IT IS MY OPINION:

The Human Rights Division is not required by section 87-145(d) to disclose to the Employment Security Division the award of back pay to a party who has filed a complaint with the Human Rights Division.

Very truly yours,

MIKE GREELY
Attorney General