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IN THE SUPREME COURT

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STATE OF NORTH DAKOTA

AUG 18 2008

Micholene Strack ,)	STATE OF NORTH DAKOTA
Petitioner and Appellant,)	Supreme Court No. 20080163
)	
vs.)	District Court No. 09-07-C-03504
)	
Job Service of North Dakota and)	
Integreon Managed Solutions)	
)	
)	

Brief of Petitioner/Appellant Micholene Strack

The Memorandum Opinion and Order dated June 18, 2008 , in District Court, County of Cass, State of North Dakota, The Honorable Steven E. McCullough

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¶3 Statement of The Issues

Whether the District Court erred by failing to require Job Service North Dakota to pay Micholene Strack's reasonable attorney's fees and costs under NDCC §28-32-50.

¶4 Statement of the case

¶5 This is an appeal by Micholene Strack of the Memorandum Opinion and Order of the Honorable Steven E. McCullough, District Court Judge, dated June 18, 2008. (Appendix at p. 35)

¶6 This case arises out of Ms. Strack's September 14, 2007, Petition for Review she filed in District Court based on her denial of unemployment benefits by the Job Service Referee. (Appendix at pg. 2) Ms. Strack was not permitted by the Referee to subpoena documents necessary to establish her eligibility for benefits. (Appendix at p.2)

¶7 Pursuant to the Court's Order that the parties file briefs, Micholene Strack filed the Brief of Petitioner Micholene Strack on November 16, 2007. (Appendix at p. 27)

¶8 Job Service filed a Notice of Motion and Motion to Remand and Response Brief and Brief in Support of Motion dated December 6, 2007, to allow it to consider additional evidence requested by Ms. Strack. (Appendix at pp. 2 and 3) Micholene Strack filed a Response to Motion to Remand and Reply to Response Brief dated December 11, 2007. (See Record)

¶9 The district court granted the Job Service Motion and remanded to Job Service to allow Ms. Strack to obtain and offer additional evidence before the

referee by Memorandum Opinion and Order of Remand dated January 8, 2008. (Appendix at pg. 6) Job Service was also ordered to issue any necessary subpoenas to Ms. Strack to obtain the identified evidence and file with the Court a transcript of the additional evidence together with any new or amended findings of fact, conclusions of law, and order issued by Job Service as a result of the consideration of the new evidence and denied, at that time, Ms. Strack's request for attorney's fees. (Appendix at p. 10)

¶10 Following remand, a Job Service hearing was held on February 8, 2008. The Job Service Referee's decision on remand reversed its prior decision and determined Ms. Strack was entitled to benefits. (Appendix at p. 29)

¶11 Ms. Strack then filed a Motion and Brief for Entry of Final Order and Payment of Attorneys Fees and Costs dated March 10, 2008. (Appendix at p. 11) Job Service filed Job Service's Brief in Opposition to Motion for Attorney's Fees and Costs dated March 25, 2008. (Appendix at p. 15)

¶12 The District Court, the Honorable Steven E. McCullough presiding, issued its Memorandum Opinion and Order dated June 18, 2008, ordering the decision that Micholene Strack is eligible for unemployment insurance benefits is affirmed and further ordering Job Service to pay Ms. Strack \$1,263,60 in Attorney's Fees and Costs incurred. (Appendix at p. 27)

¶13 Ms. Strack filed her Notice of Appeal dated July 8, 2008. (Appendix at p. 35)

¶14 Statement of the facts

¶15 Micholene Strack began working for Respondent, Integreon Managed

Solutions (Integreon), October 10, 2006. (Appendix at p. 27) Strack was terminated from her employment with Integreon on May 27, 2007. (Appendix at p. 27) After she was terminated from Integreon, Strack applied for unemployment insurance benefits (benefits). (Appendix at p. 27) On June 13, 2007, Job Service North Dakota (Job Service) determined that Strack was discharged from her employment because Integreon was dissatisfied with her work. This determination qualified Strack for benefits. (Appendix at p. 27) Both Strack and Integreon were advised of Job Service's decision and given the opportunity to appeal that decision. (Appendix at p. 27)

16 ¶ On June 21, 2007, Integreon appealed Job Service's decision to award Strack benefits. The appeal hearing was scheduled before an administrative referee (referee) on July 5, 2007. On July 2, 2007, Strack contacted the referee by telephone because she wanted documents subpoenaed for the hearing on July 5, 2007. (Appendix at p. 27) After the telephone conversation, Strack faxed a letter to the referee requesting that the referee subpoena certain documents from Integreon. (Appendix at p. 28) Strack included a description of each document she was requesting and the identity of the person she believed was the custodian of those documents within Integreon. (Appendix at p. 28) Strack requested project reports, a copy of her six-month review, and two emails between Strack and her supervisor. (Appendix at p. 28)

17 ¶ At the July 5, 2007 hearing, the referee indicated that he had received the fax from Strack regarding the documents Strack wanted subpoenaed. (Appendix at p. 28) The referee told the parties that he wanted to take testimony

before ruling on whether it was necessary to subpoena the documents requested by Strack. (Appendix at p. 28) The documents Strack requested were never subpoenaed and the referee did not explain why those documents were not subpoenaed. (Appendix at p. 28) On July 11, 2007, the referee issued his decision and determined that Strack was terminated from her position at Integreon for reasons constituting misconduct. (Appendix at p. 28) The referee reversed the decision of Job Service and held that Strack was not entitled to receive benefits because she was terminated for misconduct. (Appendix at p. 28)

18 ¶ On July 19, 2007, Strack requested Bureau Review of the referee's decision. (Appendix at p. 28) Strack specifically stated in her request for Bureau Review that the referee had not subpoenaed the documents she had requested for the appeal hearing. (Appendix at p. 28) On August 20, 2007, a Decision on Review was issued by the Bureau which affirmed the referee's decision based upon the record provided from the July 5, 2007 hearing and failed to consider new evidence or Strack's argument that the referee failed to subpoena documents for Strack. (Appendix at p. 28)

19 ¶ Following Job Service's determination, Ms Strack's only and last option was to petition for judicial review. (Appendix at p. 2) On September 14, 2007, Strack, through her attorney, appealed the referee's decision to this Court under the Administrative Agencies Practice Act. (Appendix at p. 2) In response to Strack's appeal to district court, Job Service filed a motion for the limited purpose of considering the evidence that Strack had requested the referee subpoena for the July 5, 2007 hearing and amending or rejecting its prior decision based upon that

evidence. (Appendix at p. 29) On January 8, 2008, the district court issued a Memorandum Opinion and Order of Remand which remanded the matter to Job Service to obtain and consider the documents requested by Strack for the July 5, 2007 hearing. (Appendix at p. 6)

20¶ The hearing on remand was held on February 8, 2008. (Appendix at p. 29) After examining the documentation that Strack had originally requested, the referee rejected its prior decision and affirmed the June 13, 2007 decision of Job Service which held Strack was not terminated for misconduct and therefore eligible for benefits. (Appendix at p. 29)

21¶ Ms. Strack then filed a Motion for Entry of Final Order and Payment of Attorney's Fees and Costs. (Appendix at pg. 11) Job Service opposed Strack's Motion for Attorney's Fees and Costs. (Appendix at pg. 11) The district court, relying upon NDCC §28-32-50 to award Ms. Strack attorney's fees and costs, found the Job Service referee's failure to issue a subpoena on behalf of Strack was not substantially justified under this set of facts. (Appendix at p. 33)

22¶ The district court held that Ms. Strack's attorney's fees and costs were limited to twenty percent of her total benefit, or \$1,263.60, as opposed to the actual and reasonable attorney's fees and costs incurred and requested by Ms Strack, \$2,965.88. (Appendix at p. 34) The district court ordered Job Service to pay Ms. Strack \$1,263.60 in attorney's fees and costs incurred. (Appendix at p. 34) Job Service sent a check to Ms. Strack's attorney for \$1,263.60 and her attorney deposited that check in his trust account pending this appeal.

23¶ The appeal followed.

¶24 LAW AND ARGUMENT

¶25 Standard of Review

¶26 Questions of law, its meaning, and the manner in which it is applied are reviewed de novo. Questions of fact are usually subject to the clearly erroneous standard. N.D. R. Civ Pro. 52(a). Based on this standard, a “finding” is considered to be clearly erroneous if induced by an incorrect view of the law, there is no evidence to support it, or if, although there may be some evidence to support it, the court reviewing it, based on the record as a whole, is left with the definite and firm conviction that a mistake was made. Klein v. Larson, 2006 ND 236 ¶6, 724 N.W.2d 565. There was no testimony taken or hearing in the district court. In the instant case, the district court’s determination as to payment of reasonable attorney’s fees was induced by an incorrect view and application of the law.

¶27 The District Court erred by failing to require Job Service North Dakota to pay Micholene Strack’s reasonable attorney’s fees and costs under NDCC §28-32-50.

¶28 The application and interpretation of statutes are questions of law fully reviewable by this Court. Rojas, supra, at ¶13, citing Rydberg v. Rydberg, 2004 ND 73, ¶10, 678 NW2d 534.

¶29 The primary objective is for the Court to determine the legislature’s intent. Id. This Court, In Rojas, also found that “NDCC §28-32-50, however, generally applies to any civil proceeding against an administrative agency.” Id. at ¶14. A copy of NDCC §28-32-50 is attached as Addendum A.

¶30 The district court, quoting this court in Tedford v. Workforce Safety &

Ins., 2007 ND 142, ¶ 25, 738 NW 2d29, correctly noted in its decision that there is “a two part test which must be met in order to properly award attorney’s fees: first, the nonadministrative party must prevail, and second, the agency must have acted without “substantial justification.” (Appendix at p. 3) The district court correctly found Ms. Strack did prevail so the first part of the two part test was met. Id.

¶31 At pages 4 through 6 of its Memorandum Opinion and Order the Court explains in great detail the rationale for its ultimate and appropriate determination that “Strack is entitled to recovery of her attorney’s fees and costs because the referee’s failure to issue a subpoena on behalf of Strack was not substantially justified under this set of facts.” (Appendix at pp. 30-32)

¶32 However, the Court then proceeds to reference the North Dakota Administrative Code as limiting the amount of attorney’s fees that can be awarded against Job Service. The administrative code purports to limit Strack’s benefit to twenty percent of the amount of benefits at issue in the case. In the instant case, Ms. Strack incurred attorney’s fees and costs of \$2,965.88. The court found Strack was eligible for 18 weeks of benefits at a weekly benefit amount of \$350 for 18 weeks. Her maximum benefit was \$6,318.00. The Court then held “[u]nder 27-03-07-03 of the North Dakota Administrative Code, Strack is “entitled to recover twenty percent of her maximum benefits eligibility from Job Service for attorney’s fees. Twenty percent of Strack’s maximum benefit (\$6,318.00) is \$1,263.60. Thus, Strack is entitled to recover \$1,263.60 from Job Service for attorney’s fees and costs.” (Appendix at pp. 33-34)

¶33 The problem with the district court’s decision is that it is contrary to the

requirements of NDCC §28-32-50 that states “the court must award the party not an administrative agency reasonable attorney’s fees and costs if the court finds in favor of that party...” (Emphasis supplied) NDCC §28-32-50(1). There is no determination of a reasonable attorney’s fees made by the court in this case. Twenty percent of the amount of benefits at issue in the case is arbitrary, not reasonable, and not specifically determined by the Court to be reasonable. The Court’s erred in its determination as a matter of law.

¶34 This Court, in Rojas v. Workforce Safety & Insurance, 2006 ND 221, 723NW2d403, held that the purpose of §28-32-50 is “to ensure that private parties are not deterred from challenging unreasonable government action because of the expense involved, and to deter an administrative agency from taking a position that lacks substantial justification.” Senate Judiciary Comm., 49th Legis. Sess. (Feb. 6, 1985.) Id. (Appendix at pg. 12)

¶35 The district court found Job Service acted without substantial justification and then let them determine how much it should be required to pay the prevailing private party who was forced to bring an action for their attorney’s fees incurred. That is not consistent with the requirements of NDCC §28-32-50 requiring a Court to make an award of reasonable attorney’s fees. It also seems like the fox is guarding the henhouse in Job Service being ceded the power to arbitrarily decide what it has to pay private parties in attorney’s fees incurred by them as a result of their own behavior determined by a court not to be substantially justified.

¶36 This case with Job Service, by analogy, is similar to Rojas, which involved Workforce Safety. In Rojas this Court dealt with NDCC §65-02-08 and

§65-10-03 that have fee caps, intended by the legislature to control costs within the WSI system and reduce unwarranted litigation. Id. at ¶21.

¶37 In Rojas, this court held that “where an injured employee alleges WSI acted without substantial justification in reducing or denying benefits, we cannot conclude the intent of the legislature is met by limiting the award of the attorney’s fees. The statutory fee caps will not reduce unwarranted litigation, since the litigation is in response to WSI’s unjustified conduct, and the fee cap would harm the employee by encouraging WSI to act in an unreasonable manner in the hopes that the employee will not pursue litigation due to the high cost.” Id. at p. 15.

¶38 NDCC §28-32-50 “was based on the language used in the EAJA for the specific purpose of using federal interpretations of the statute as a guide for interpreting our statute...because the purpose of the legislation is to ensure individuals will not be deterred from seeking review of unjustified governmental action because of the expense involved and that strong deterrent requires the burden of proof rest with the Government.” Citations omitted. Rojas, at ¶17.

¶39 This court concluded by noting that a prevailing injured employee is entitled to an award of attorney’s fees under the above referenced WSI statutes up to the statutory limit “but when WSI denies or reduces the employee’s benefits without substantial justification, NDCC §28-32-50 may be appealed to award the employee reasonable attorney’s fees.” Id. at ¶16.

¶40 In the instant case, Job Service has a twenty percent cap on prevailing party attorney fees under NDCC §52-06-32 (copy attached as Addendum B) and the North Dakota Administrative Code §27-03-07-03 (copy attached as Addendum

C) as incorrectly relied upon by the district court to limit Ms. Strack's attorney fee award to twenty percent of the amount of benefits at issue. In the instant case, the district court held "[t]herefore Strack is entitled to recovery of her attorney's fees and costs because the referee's failure to issue a subpoena on behalf of Strack was not substantially justified under this set of facts." (Appendix at pg. 33)

¶41 Once the district court determined the actions of Job Service were not substantially justified, Ms. Strack was entitled under NDCC §28-32-50 (1), to her reasonable attorney's fees, \$2,965.88, not the twenty percent limitation, \$1,263.88, as ordered by the district court and consistent with this Court's decisions in Rojas and Tedford.

¶42 Furthermore, Ms. Strack's request for payment of her reasonable attorney's fees and costs under NDCC §28-32-50 is consistent with this Court's more recent holding in Tedford v. Workforce Safety & Insurance, 2007ND142, 738NW2d 29. In Tedford, this Court held "§28-32-50(1) requires an award of attorney's fees and costs to a prevailing party claimant if an administrative agency has acted without substantial justification." Id. at ¶24.

¶43 As the district court found in this case, "[i]f the referee would have subpoenaed the documents requested by Stack for the original hearing on July 5, 2007, Strack would not have incurred the amount of attorney's fees and costs she incurred. Strack endured a Bureau Review, an appeal to this Court, and a remand from District Court to the referee to obtain the evidence requested for the July 5, 2007 hearing. Based upon affidavits Strack has incurred \$2,965.98 in attorney's fees for legal representation." (Appendix at p. 32)

¶44 This Court held in Rojas that NDCC §28-32-50 “represents a middle ground between an automatic award of attorney’s fees to a party who prevails in a judicial action against an administrative agency and an award of attorney’s fees for claims that are essentially frivolous or meritless.” Rojas at ¶14. NDCC §28-32-50 requires a party to “not only prevail but also requires proof that the agency acted without substantial justification.” *Id.*

¶45 In the instant case, the district court correctly determined Micholene Strack prevailed and that Job Service acted without substantial justification fulfilling all the requirements to be entitled to payment of her reasonable attorney’s fees, not a limited award of twenty percent of her benefits as the district court ordered. Micholene Strack requests she receive all of her reasonable attorney’s fees and costs as she is entitled to under §28-32-50 and that Job Service be ordered to pay her the remaining \$1,702.28 she incurred in reasonable attorney’s fees at the district court. To do otherwise would have a chilling effect on others denied their rightful Job Service benefits without substantial justification.

¶46 Conclusion

¶47 The district court order should be affirmed insofar as to the determination that Micholene Strack is eligible for unemployment benefits. The district court order should be reversed insofar as it orders Job Service to pay Micholene Strack \$1,263.60 in attorney’s fees and costs and Job Service should be ordered to pay Micholene Strack an additional \$1,702.28 for a total of \$2,965.88 in attorney’s fees and costs reasonably incurred by her in the district court action.

Respectfully submitted this 18th day of August, 2008.

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