

New York State Department of Labor
Unemployment Insurance Division
Adjudication Services Office

October – 2015
Interpretation Services – Benefit Claims
Total or Partial Unemployment
Separation Payments

Dismissal Pay or Settlement

The fact that the claimant signed a separation agreement purporting to waive any claims against the employer that can be waived, does not preclude a finding that the payment upon separation constitutes dismissal pay, provided that there is no evidence of any existing lawsuit or potential lawsuit that the claimant agreed not to pursue under the terms of the agreement and in exchange for the severance amount paid to him/her.

A.B. 580,782

The Department of Labor issued the initial determination holding the claimant ineligible to receive benefits, effective April 14, 2014, pursuant to Labor Law § 591(6), due to receipt of dismissal pay. The claimant requested a hearing.

The Administrative Law Judge held a hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There was an appearance by the claimant. By decision filed June 9, 2014 (A.L.J. Case No. 014-14303), the Administrative Law Judge overruled the initial determination.

The Commissioner of Labor appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statement submitted on behalf of the Commissioner of Labor.

Based on the record and testimony in this case, the Board makes the following:

Findings of Fact: The claimant was employed by the employer bank for eight years. At the time of her separation from employment, the claimant held the position of sales and service associate; her gross weekly pay was \$699.52.

In November 2013, the claimant was advised by the employer that her position was being eliminated as of January 1, 2014, but that the claimant would remain on the payroll until April 2, 2014. When an employee's position is eliminated or the employment ends through no wrongdoing of the employee's, it is this employer's policy and practice to pay a severance amount, in a lump sum, equal to two weeks' pay for every year of service with the bank.

By Notice Letter dated February 17, 2014, the employer set forth its calculation for the severance payment to the claimant, and the number of weeks for which the claimant qualified depending upon her years of service. On March 24, 2014, the claimant signed a "Release Agreement" which provided that it was being signed in exchange for the severance pay and severance related benefits being paid in accordance with a Notice Letter dated February 17, 2014. The Release Agreement also includes a general release by the claimant of any and all claims that she might have against the employer that can be waived, and excludes any claims that cannot be released under agreement or applicable law, including unemployment benefits.

By check dated April 15, 2014, the claimant was paid severance in the gross amount of \$11,192.31, equal to two weeks pay for every year of the claimant's service with the employer ($\$699.52 \times 2 = \$1,399.04$. $\$1,399.04 \times 8 \text{ years of service} = \$11,192.31$). Had the claimant continued working for the employer, no such payment would have been made.

The claimant filed a claim for unemployment benefits on April 21, 2014.

Opinion: Pursuant Labor Law § 591 (6) (a), "No benefits shall be payable to a claimant for any week during a dismissal period for which a claimant receives dismissal pay, nor shall any day within such week be considered a day of total unemployment under section five hundred twenty-two of this article, if such weekly dismissal pay exceeds the maximum weekly benefit rate." Subsection (d) provides further that the provisions of this subdivision shall not apply during any weeks in which the initial payment of dismissal pay is made more than thirty days from the last day of the claimant's employment.

The term "dismissal pay" is defined under subsection (b) of Labor Law § 591 as "one or more payments made by an employer to an employee due to his or her separation from service of the employer regardless of whether the employer is legally bound by contract, statute or otherwise to make such payments. The term does not include payments for pension, retirement, accrued leave, and health insurance or payments for supplemental unemployment benefits."

Since the claimant continued to be employed until April 2, 2014, the lump sum of \$11,192.31 paid to the claimant on April 15, 2014 was within the 30-day statutory period. The payment was calculated using the claimant's gross weekly earnings of \$699.52, which exceed the state's maximum weekly unemployment benefit rate of \$405.

The evidence establishes that the lump sum paid to the claimant was made solely as a result of her separation from employment. The claimant acknowledged that she would not have received this money had her employment relationship not been severed, and that such payments were the employer's practice when employment was ended through no fault of the

employee. The fact that the claimant also signed a general “Release Agreement” purporting to waive any claims against the employer that can be waived does not preclude a finding that the payment upon separation constitutes dismissal pay. Significantly, there is no evidence of any existing lawsuit or potential lawsuit that the claimant agreed not to pursue under the terms of the agreement and in exchange for the severance amount paid. We note that the statute excludes certain payments from consideration as dismissal pay, and the amount paid to the claimant does not fit into any of those categories. Moreover, to the extent that the “Release Agreement” signed by the claimant would be construed as waiving her rights to unemployment, the agreement would not be valid. See, Labor Law §595.

Accordingly, we conclude that the payment made to the claimant due to her separation from employment constitutes dismissal pay, and find the claimant is ineligible to receive unemployment benefits. The “dismissal period” when there has been a lump sum payment, is determined by dividing the lump sum by the claimant’s actual weekly pay. Labor Law § 591(6) (c). The claimant’s lump sum dismissal pay divided by her actual weekly pay (\$11,192.31 divided by \$699.52) results in a sixteen (16) week period of ineligibility, through July 20, 2014.

Decision: The decision of the Administrative Law Judge is reversed.

The initial determination, holding the claimant ineligible to receive benefits, effective April 14, 2014, pursuant to Labor Law § 591(6), due to receipt of dismissal pay, is sustained.

The claimant is denied benefits with respect to the issues decided herein.

Comments

The Commissioner of Labor’s appeal in this, and two other cases (AB 580,740 and AB 580,783), resulted from decisions in ALJ cases that held that since separation agreements extracted a promise from claimants not to sue their former employer, the money the claimants received were not severance pay, but a settlement. However, settlements generally occur when an employee makes a claim of wrong doing against an employer, then separates from his/her employment and then there is a monetary payment.

Based on these cases there are two questions to ask in determining if a payment made to a claimant by a former employer is dismissal pay or a settlement:

1. Did the claimant file a lawsuit or consider filing a lawsuit?
2. Did the claimant inform the employer of the lawsuit prior to receiving the payment?

If the employer did not know of the legal action prior to making the payment, then the payment cannot be designated as a settlement. It is dismissal pay. However, if there is an actual lawsuit, or the claimant threatened to sue, and the employer was aware of this and then paid the claimant, then the payment might be a settlement. Department staff should carefully examine the separation agreement to see if there is a clause that states that the payment was made to settle an actual, or potential, lawsuit.