In the Supreme Court of the State of California

TAMARA SKIDGEL,

Plaintiff and Appellant,

v.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD,

Defendant and Respondent.

Case No. S250149

First Appellate District, Division Five, Case No. A151224
Alameda County Superior Court, Case No. RG16810609
Hon. Robert B. Freedman, Judge

ANSWER BRIEF ON THE MERITS OF RESPONDENT CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

XAVIER BECERRA
Attorney General of California
EDWARD DUMONT
Solicitor General
*JANILL L. RICHARDS
Principal Deputy Solicitor General
State Bar No. 173817

JULIE WENG-GUTIERREZ
Senior Assistant Attorney General
SUSAN M. CARSON
Supervising Deputy Attorney General
HADARA R. STANTON
Deputy Attorney General
State Bar No. 227040
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
(510) 879-0858
Janill.Richards@doj.ca.gov
Attorneys for Defendant and Respondent California Unemployment Insurance Appeals Board

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Regulations

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

ISSUE PRESENTED

Unemployment Insurance Code section 631 provides in relevant part that "employment" for purposes of non-disability-related unemployment compensation "does not include ... service performed by an individual in the employ of his son, daughter, or spouse ...."

The issue presented, as summarized in Plaintiff and Appellant's Opening Brief on the Merits, is whether "In-Home Supportive Services workers (Welf. & Inst. Code, § 12300 et seq.) who are providers for a spouse or a child [are] eligible for unemployment insurance benefits[.]" (Opening Brief on the Merits (OBM) 10.)

INTRODUCTION

Plaintiff and Appellant Tamara Skidgel is the caregiver for her disabled daughter under the In-Home Supportive Services (IHSS) program, Welfare & Institutions Code, § 12300 et seq. The IHSS program—funded by the federal, state, and local governments and administered by counties under state-agency supervision—provides no-cost, in-home domestic and related services to elderly, blind, and disabled persons so that they may live at home and avoid institutionalization. Appellant earns wages for her IHSS work, is protected by workers' compensation and wage laws, and can choose to opt into disability insurance coverage. But, as the California Unemployment Insurance Appeals Board held in a precedent benefit decision, *In re Mercedes W. Caldera*, P-B-507 (Oct. 13, 2015), Appellant is not covered by the State's unemployment insurance system.

The Appeals Board in *Caldera* interpreted and applied Unemployment Insurance Code section 631, which expresses the Legislature's intent that "employment" for purposes of unemployment insurance does not include "service performed by an individual in the employ of his son, daughter, or spouse ...." The close-family service

exclusion from unemployment insurance reduces the potential for collusion in this context, where a family-member employer would otherwise have the ability to confer benefits by terminating employment. This exclusion from unemployment benefits coverage has existed unchanged since 1935, even as the Legislature extended the option for *disability*-related unemployment insurance to close-family service, and added additional classes of service, including domestic work, to those covered by the unemployment compensation system. And the Legislature was aware of the close-family service exclusion when it defined the employer of an individual IHSS provider to be the service recipient, where (1) the recipient chooses her service provider, and (2) the government makes "direct payment" for that service, either by paying wages to the provider or paying reimbursement for wages to the recipient. (Unemp. Ins. Code, § 683, subd. (a).)[1]

By its terms, section 631's exclusion from unemployment insurance coverage applies whenever the circumstances of service it describes are present. Here, it is undisputed that a close-family IHSS caregiver chosen by the recipient and paid directly by the government—as is Appellant—is "in the employ of" the services recipient. (See OBM 33.) That is true as a legal matter, by operation of section 683, and as a practical matter, because the IHSS recipient has the power to hire, direct, and fire the provider.

While Appellant spends much of the opening brief arguing that the IHSS recipient and the government are both employers of the provider, any "joint employment" status is beside the point, because section 631's close-family service exclusion from the unemployment benefits program is *categorical*. The fact that government entities perform certain activities that may be associated with employer status—setting the ground rules for

---

[1] All further statutory references are to the Unemployment Insurance Code unless otherwise noted.

and overseeing service, paying wages, and providing payroll services—cannot serve to reinstate coverage where the close-family service exclusion applies. This reading of section 631 makes sense in light of the close-family exclusion's anti-collusion purpose, because even with government oversight and involvement, the IHSS recipient retains the ultimate right to terminate the provider's employment.

Because the Appeals Board has not clearly erred in construing section 631 as a categorical bar to unemployment benefits coverage, the court of appeal's decision denying Appellant's request to declare the *Caldera* precedent benefit decision invalid should be affirmed.

BACKGROUND

I. UNEMPLOYMENT INSURANCE AND SERVICES EXCLUDED FROM COVERED "EMPLOYMENT"

In 1935, in the midst of the Great Depression, California enacted a state unemployment insurance program "as a part of a National plan of unemployment reserves and social security, and for the purpose of assisting in the stabilization of unemployment conditions." (Stats. 1935, ch. 352, art. 1, § 2, p. 1227.) California "participates in a cooperative unemployment insurance program with the federal government, codified as the Federal Unemployment Tax Act." (*Am. Federation of Labor v. Unemp. Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1024, citing 26 U.S.C. § 3301 et seq. and § 101 [integration of state and national plans].) State unemployment programs certified by the Secretary of Labor—as California's program is—qualify for federal administrative funds. (*City of Sacramento v. State of Cal.* (1990) 50 Cal.3d 51, 58, citing 42 U.S.C. §§ 501-503.) Employers with obligations under California's program are required to make contributions to a state fund that pays out unemployment benefits. (§ 976,

et seq.)[2] An employee covered by the program may apply for benefits and has the burden of establishing eligibility. (*Am. Federation of Labor, supra*, 13 Cal.4th at p. 1024; see also §§ 1251, 1326; Cal. Code Regs., tit. 22, § 1326-1.) "The fundamental purpose" of the program "is to reduce the hardship of unemployment by 'providing benefits for persons unemployed through no fault of their own.'" (*Paratransit, Inc. v. Unemp. Ins. Appeals Bd.* (2014) 59 Cal.4th 551, 558, fn. omitted, quoting § 100.)

While its purpose has always been remedial and its reach broad, from its inception, California's unemployment insurance law excluded certain types of service from coverage. (See Stats. 1935, ch. 352, art. 1, § 7, pp. 1227-1228; Stats. 1953, ch. 308, art. 2, pp. 1471-1477; §§ 629-657 [excluded services].)[3] In 1935, the State's unemployment scheme excluded such things as "[a]gricultural labor," service performed in the employ of federal, state, or local government (with some exceptions), "domestic service in a private home," and relevant to this case, "[s]ervice performed by an individual in the employ of his son, daughter, or spouse ...." (Stats. 1935, ch. 352, art. 2, § 7, p. 1228; see also discussion at pp. 21-23, below.)[4]

---

[2] Because California's unemployment insurance program is federally certified, employers in this State may credit their contributions to the state system against the federal tax (up to 90 percent). (*City of Sacramento, supra*, 50 Cal.3d at p. 58, citing 26 U.S.C. §§ 3302–3304.)

[3] The State's unemployment insurance laws were consolidated into a comprehensive Unemployment Insurance Code in 1953. (Stats. 1953, ch. 308, pp. 1457-1553.)

[4] The close-family service exclusion from unemployment insurance coverage also extends to minor children in the employ of a parent. (Stats. 1935, ch. 352, art. 2, § 7, p. 1228 [previous law reflecting 21 as the age of majority]; see § 631 [current law reflecting 18 as the age of majority].) Because this part of the exclusion is not at issue in this case, it will not be discussed further.

The Unemployment Insurance Code's many exclusions from unemployment insurance-eligible "employment" have evolved and changed over the ensuing eight decades—as these cited examples attest. The original exclusion of agricultural work was subject to multiple amendments and was eventually repealed in its entirety in 1975. (Stats. 1975, ch. 591, pp. 1304-1308 [repealing exclusions at §§ 625-628 and enacting § 611, expressly providing that "'[e]mployment' includes agricultural labor"].) The wholesale exclusion of domestic work, and the exclusion of most government work, ended in January 1978, when the Legislature amended section 629 to bring state law into conformance with the federal Unemployment Compensation Amendments of 1976. (See Respondent's Motion for Judicial Notice (MJN) 1[5] and 2.[6]) As of that date, "employment" for purposes of state unemployment and disability insurance has included "domestic service in a private home if performed for an employing unit or a person who paid in cash remuneration of one thousand dollars ($1,000) or more to individuals employed in the domestic service in any calendar quarter in the calendar year or the preceding calendar year."[7] (Stats. 1978, ch. 2, § 30, p. 16; § 629, subd. (a).)

In 1971, the Legislature tempered the effect of section 631, amending it to allow for unemployment *disability* coverage in the close-family service context, provided the parties to the arrangement (child and parent, or

---

[5] Assem. Office of Research, 3rd reading analysis of Assem. Bill 644 (1977-1978 Reg. Sess.) as amended Jun. 22, 1977, at pp. 1-4. The court of appeal took judicial notice of this document. (Order (5/3/2018).)

[6] Letter from U.S. Dept. of Labor to Emp. Dev. Dept., Aug. 8, 1977 [describing consequences should California fail to enact conforming legislation].

[7] "Employing unit" is defined in section 135 and can include an individual.

spouse and spouse) elect to make contributions to the Unemployment Disability Fund. (Stats. 1971, ch. 1447, § 1, p. 2858; § 631; see also § 702.5 [setting out election requirements].)[8] The Legislature left the close-family service exclusion from unemployment benefits coverage in place.

II. THE IN-HOME SUPPORTIVE SERVICES PROGRAM AND THE EVOLUTION OF EMPLOYMENT BENEFITS FOR SERVICE PROVIDERS

Responding to changes in federal law, and to qualify for federal funds, the Legislature in 1973 enacted legislation for supplemental payments and services for aged, blind, and disabled Californians. (Welf. & Inst. Code, § 12000 et seq., added by Stats. 1973, ch. 1216, § 37, pp. 2904-2918; see *County of Sacramento v. State of Cal.* (1982) 134 Cal.App.3d 428, 430-431 [summarizing changes in law]; *Basden v. Wagner* (2010) 181 Cal.App.4th 929, 933 [same].) California's In-Home Supportive Services program, included in this legislation, was part of a movement against institutionalization. (*Basden, supra*, 181 Cal.App.4th at p. 933.) The program, funded by the federal, state, and local governments, provides those eligible with "domestic services, heavy cleaning, personal care services" and a variety of "other supportive services" to "make it possible for the recipient to establish and maintain an independent living arrangement." (Welf. & Inst. Code, § 12300, subd. (b); see *County of Sacramento, supra,* 134 Cal.App.3d at p. 431 [explaining federal, state, and

---

[8] The Unemployment Compensation Disability Fund is not at issue in this lawsuit. (See Appellant's Opening Brief, No. A151224 (7/19/2017) at 28-29; CT 00361-00362 [Plaintiff's Points and Authorities in Support of Declaratory Relief, No. RG16810609 (7/6/2016)]; Hearing Transcript, No. RG16810609 (10/21/2016) at 6:17-20.) For discussion of the legislative history of this amendment, see p. 42, below.

local funding]; *Basden, supra*, 181 Cal.App.4th at p. 933, fn. 4 [explaining component programs and funding sources].)[9]

The California Department of Social Services (DSS or Department) "promulgates regulations that implement the program ...." (*Basden, supra*, 181 Cal.App.4th at p. 934, citing *Miller v. Woods* (1983) 148 Cal.App.3d 862, 868; see also Welf. & Inst. Code, §§ 10600 et seq. [DSS's powers and duties] and 12300 et seq. [IHSS program]; DSS, Manual of Policies and Procedures, Social Service Standards (DSS Manual), Ch. 30-700 [governing IHSS].)[10] Counties, in turn, administer the program under DSS's supervision. (*Guerrero v. Sup. Ct.* (2013) 213 Cal.App.4th 912, 922-923.) They "process applications for IHSS, determine the individual's eligibility and needs, and authorize services." (*Basden, supra*, 181 Cal.App.4th at p. 934.) In addition, they perform important quality-assurance functions, such as conducting background checks of prospective service providers, monitoring for fraud, and conducting home visits to confirm service delivery. (See, e.g., Welf. & Inst. Code, §§ 12305.71 [county QA/QC-related tasks], 12305.86 [background checks]; see generally DSS Manual, § 30-702.)

Counties are "obligated to ensure that services are provided to all eligible recipients ...." (Welf. & Inst. Code, § 12302.) A county may meet its service delivery obligation through (1) county employees; (2) an agency contractor (such as a local agency or health district, a nonprofit agency, or a private agency); or (3) individual providers selected by the recipient. (DSS

---

[9] For a description of IHSS's predecessor programs, see <http://www.cdss.ca.gov/agedblinddisabled/res/VPTC2/1%20Introduction%20to%20IHSS/History_of_IHSS.pdf> [as of Jan. 10, 2019].

[10] The DSS Manual consists of regulations and is available at <http://www.cdss.ca.gov/ord/entres/getinfo/pdf/ssman2.pdf> [as of Jan. 10, 2019].

Manual, §§ 30-767.11 to 30-767.13; Welf. & Inst. Code, §§ 12302, 12302.2, subd. (a)(1).)

Recipients themselves "direct [the IHSS] authorized services." (Welf. & Inst. Code, § 12300.4, subd. (a).) They sign their service providers' timesheets and have the authority to hire, supervise, and fire the provider. (DSS Manual, §§ 30-761.215(c) and 30-769.723; Welf. & Inst. Code, § 12302.25, subd. (a); see also *id.*, §§ 12301.6, subds. (c)(1) & (c)(2)(B); 12302.2, subd. (a)(3); 12302.5, subd. (b); 12304, subd. (a).)

From the outset of the program, counties and recipients have gravitated toward individual providers in part because it "permits the disadvantaged person the most control over the care … provided." (Respondent's MJN 3.[11]) Individual providers may include friends or family members, including the recipient's spouse or parents.[12] These providers receive wages either through direct payment from the government to the provider, or through direct payment from the government to the recipient to purchase services. (DSS Manual, § 30-769.73; see also CT 0036 [DSS comment letter discussing the two direct-payment options].) For ease of reference, this brief will refer to services delivered by individual providers selected by recipients and paid by the government as the "direct-payment" option, as did the court of appeal. (*Skidgel v. Cal. Unemp. Ins. Appeals Bd.* (2018) 24 Cal.App.4th 574, 579.)

---

[11] Empl. Dev. Dept., analysis of Assem. Bill. 3028 (1978 Reg. Sess.) June 29, 1978 at p. 2.

[12] A parent who has a legal duty to care for the IHSS-eligible child cannot be paid through the program unless the parent has left full-time employment to care for the child, or is prevented from seeking full-time employment because of the child's need for the parent's care. (*Basden, supra*, 181 Cal.App.4th at pp. 934-935, citing Welf. & Inst. Code, § 12300, subd. (e).)

In the initial years of the IHSS program (as noted above), domestic work—including the work of service providers—was excluded from workers' compensation and unemployment and disability benefits. By 1978, federal and state law required some employment benefits for domestic workers in certain circumstances. (Respondent's MJN 3;[13] see also Stats. 1978, ch. 2, § 30, p. 16 [amending § 629, creating exception to exclusion from unemployment and disability coverage for domestic workers meeting $1,000-remuneration requirement].) At that time, over 80% of IHSS services were provided by individual providers selected by the services recipient and paid by the government. (Respondent's MJN 3.[14])

To ensure IHSS workers received the newly-enacted benefits, federal and state enforcement agencies increasingly took the position that counties were responsible for payment of taxes and premiums for individual service providers' employment benefits where the county paid the provider directly. (Respondent's MJN 3[15] and 4.[16]) In response, many counties threatened to move away from individual providers to the remaining two options—that is, contracting with agencies to provide in-home supportive services, or using county civil service workers for the same. (*Ibid.*) At the time, it was predicted that such shifts could result in significant additional

---

[13] Empl. Dev. Dept., analysis of Assem. Bill. 3028 (1978 Reg. Sess.) June 29, 1978 at p. 1.

[14] Empl. Dev. Dept., analysis of Assem. Bill. 3028 (1978 Reg. Sess.) June 29, 1978 at p. 2.

[15] Assem. Comm. on Ways and Means, staff analysis of Assem. Bill 3028 (Reg. Sess. 1978) as amended June 8, 1978, at p. 2. The court of appeal took judicial notice of this document. (Order (5/3/2018).)

[16] Empl. Dev. Dept., analysis of Assem. Bill 3028 (Reg. Sess. 1978) June 29, 1979, p. 2.

costs to the State—the first option imposing approximately $80 million, and the second imposing approximately $116 million in additional state expenses. (*Ibid.*)

In response, the Legislature amended the law to make clear that for unemployment and disability insurance purposes, where the section 629 remuneration requirement is met, the services *recipient* is the employer "if the state or county makes or provides for direct payment to a provider chosen by the recipient or to the recipient of such services for the purchase of services, subject to the provisions of Section 12302.2 of the Welfare and Institutions Code." (§§ 683 [unemployment] and 685 [disability]; see also Respondent's MJN 5, 6, 7, and 8.[17])[18] Welfare and Institutions Code section 12302.2, one of the laws governing the administration of the IHSS program, was amended to provide that in the direct-payment circumstance, the State (not the county) would process and make all necessary withholdings, contributions, and payments related to provider-employee

---

[17] Assem. Office of Research, 3rd reading analysis, Assem. Bill 3028 (1978 Reg. Sess.) as amended June 8, 1978, at p. 1; Dept. of Social Services, enrolled bill report, Assem. Bill 3028 (1978 Reg. Sess.) July 7, 1978; Emp. Dev. Dept., enrolled bill report, Assem. Bill 3028 (1978 Reg. Sess.) July 10, 1978; Dept. of Finance, enrolled bill report, Assem. Bill 3028 (1978 Reg. Sess.) July 13, 1978. The court of appeal took judicial notice of these documents. (Order (5/3/2018).)

[18] For workers' compensation purposes, the Legislature amended the Labor Code to provide that a covered domestic service employee "shall be deemed an employee of the recipient of such services for workers' compensation purposes if the state or county makes or provides for direct payment to such person or to the recipient of in-home supportive services for the purchase of services, subject to the provisions of Section 12302.2 of the Welfare and Institutions Code." (Lab. Code, § 3351.5, subd. (b); see pp. 47-48, below.)

benefits, including unemployment compensation, on behalf of the *recipient as employer.*[19]

Where section 631 applies, the Department of Social Services does not make unemployment insurance contributions on the recipient's behalf. (See Welf. & Inst. Code, § 12302.2; CT 0078; see also Emp. Dev. Dept., Information Sheet, Exempt Employment, available at <https://www.edd.ca.gov/pdf_pub_ctr/de231fam.pdf> [as of January 10, 2019].)[20]

III. THE EMPLOYMENT DEVELOPMENT DEPARTMENT AND THE CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

The Employment Development Department is charged with administering the State's unemployment benefits system. It "may adopt, amend, or repeal such regulations as are reasonably necessary" to enforce the Department's functions under the Unemployment Insurance Code. (§ 306.)[21] In addition, the Department receives and processes claims for unemployment benefits. (*Am. Fed. of Labor, supra,* 13 Cal.4th at p. 1024.)[22] The Department "investigates the [unemployment benefits] claim and makes an initial eligibility determination in a nonadversarial setting." (*Id.*, citing §§ 301, 1326 et seq.) If it "denies an application for benefits, a claimant may file an administrative appeal, which is heard by an

---

[19] For additional legislative history, including a recent bill that was enacted but vetoed, see pp. 41-44, below.

[20] Appellant's assertion that DSS makes unemployment insurance contributions on behalf of "all IHSS workers" is not supported. (OBM 25; see also *id.* at p. 16.)

[21] The Department has adopted a regulation interpreting section 631. (Cal. Code Regs., tit. 22, § 631-1; see CT 0040.) The regulation is discussed at pp. 37-38, below.

[22] The Department was previously under the Health and Welfare Agency, but now resides in the Labor and Workforce Development Agency. (See <https://labor.ca.gov/> [as of Jan. 10, 2019].)

administrative law judge. (*Id.* at pp. 1025-1025, citing §§ 1334, 1335, subd. (c) and Cal. Code Regs., tit. 22, § 5100 et seq.) And "[i]f the administrative law judge denies eligibility on reconsideration, a claimant may … appeal to the [California Unemployment Insurance Appeals] Board …" (*Id.* at p. 1025; see §§ 1336 [proceedings by Appeals Board], 401 et seq. [provisions governing Appeals Board]; see also <https://www.cuiab.ca.gov/#> [as of Jan. 10, 2019].)

The Appeals Board's administrative law judges sit in review of unemployment insurance decisions. (§§ 1336, 401 et seq.) In addition, the Appeals Board as a whole may "consider and decide cases that present issues of first impression or that will enable the appeals board to achieve uniformity of decisions by the respective members." (§ 409.) Toward that end, the whole Board may designate certain of its decisions as precedents. (*Ibid.*; see also Gov. Code, § 11425.60 [discussing effect of precedent decisions].) "The director [of the Employment Development Department] and the appeals board administrative law judges shall be controlled by those precedents except as modified by judicial review." (§ 409.) Further, "[a]ny interested person or organization may bring an action for declaratory relief in the superior court in accordance with the provisions of the Code of Civil Procedure to obtain a judicial declaration as to the validity of any precedent decision of the appeals board …." (§ 409.2.)

STATEMENT OF THE CASE

In February 2015, the Appeals Board issued a proposal to adopt a precedent decision addressing how the close-family service exclusion from unemployment insurance coverage in section 631 applies in the IHSS context. (CT 0031.) It noted that an Appeals Board panel in a non-precedent decision had recently "announced a new theory" to justify providing unemployment benefits to an IHSS provider, notwithstanding

section 631. (*Id.*, citing *In re Nellay Ostenpenko*, AO-33619 (Aug. 27, 2014).) The *Ostenpenko* majority concluded that both the claimant's son and the public authority under contract with the county were the caregiver's employers, and therefore section 631 did not apply. (CT 00139, 00149-00150.)[23] At the time of the proposal, the Appeals Board had received three additional appeals (CT 00031), requiring it to resolve whether or not the panel's new joint-employer theory was a correct reading of the law and should be applied in all unemployment benefits claims by close-family IHSS providers. In all three of the pending appeals, the Employment Development Department had denied benefits; the intermediate reviewing administrative law judge affirmed the denial in two of the cases, but reversed and awarded benefits in one case (*In re Mercedes W. Caldera*, AO-359822 (Mar. 30, 2015)). (CT 00031.)

The Appeals Board stated in its proposal that "additional input on the issues presented ... will be beneficial to its consideration of the appeals pending in these matters." (CT 0032.) It announced that it would take judicial notice of comments it had previously received from the Employment Development Department and the Department of Social Services. Both entities expressed the view that sections 631 and 683 precluded unemployment benefits where a parent is the IHSS provider for his or her child, or a spouse is the provider for his or her spouse. (CT 0035-0044.) The Board also called for public comment on the application of sections 631 and 683 in the IHSS context. (CT 0032.) Many of the

---

[23] The dissenting judge on the *Ostenpenko* panel would have held that theories of joint employment were irrelevant in light of the "unambiguous" language of sections 631 and 683. "[T]he claimant's son is, if not her only employer, at least one of two employers. The claimant is therefore performing services in the employ of her son and her wages from that service cannot be counted toward the amount needed to be eligible for [unemployment] benefits." (CT 00151.)