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August 17, 1992

ATTORNEY GENERAL OPINION NO. 92- 107

Joe Dick
Secretary of Human Resources
Kansas Department of Human Resources
401 S.W. Topeka Blvd.
Topeka, Kansas 66603-3182

Re: Labor and Industries--Employment Security
Law--Penalties for Violation of Act; Repayment of
Benefits Ineligible to Receive; Interest

Crimes and Punishments; Classification of Crimes
and Penalties--Sentencing--Authorized Dispositions;
Restitution

Synopsis: When a person is convicted of theft for obtaining
unemployment compensation for which he is
ineligible, the trial court may not order interest
pursuant to K.S.A. 1991 Supp. 44-719(b)(2) as part
of restitution. Cited herein: K.S.A. 21-3701;
K.S.A. 1991 Supp. 21-4603, as amended by L. 1992,
ch. 239, § 237; 21-4610; 22-3717; 44-719.

* * *

Dear Mr. Dick:

As secretary of human resources you request our opinion
whether, following a conviction for theft by obtaining
unemployment benefits by making a false statement [K.S.A. 1991
Supp. 44-719(a) and K.S.A. 21-3701], a court may include as
part of restitution interest as set forth in K.S.A. 1991 Supp.
719(d)(2).

K.S.A. 1991 Supp. 44-719(a) provides for theft prosecutions of individuals who obtain unemployment benefits by making false statements:

"(a) Any person who makes a false statement or representation knowing it to be false or knowingly fails to disclose a material fact, to obtain or increase any benefit or other payment under this act, either for such person or for any other person, shall be guilty of theft and shall be punished in accordance with the provisions of K.S.A. 21-3701 and amendments thereto."

Subsection (b) of this statute provides for penalties for employers who make false statements and subsection (c) provides for penalties for "[a]ny person who violates any provisions of this act. . . ."

Subsection (d) establishes a recipient's liability for overpayment. K.S.A. 1991 Supp. 44-719(d)(1) provides, in part:

"(d)(1) Any person who has received any amount of money as benefits under this act while any conditions for the receipt of benefits imposed by this act were not fulfilled in such person's case, or while such person was disqualified from receiving benefits, shall in the discretion of the secretary, either be liable to have such amount of money deducted from any future benefits payable to such person under this act or shall be liable to repay to the secretary for the employment security fund any amount of money equal to the amount so received by such person." (Emphasis added).

The rest of K.S.A. 1991 Supp. 44-719(d)(1) goes on to provide generally that under certain circumstances recovery of overpayment may be waived.

Subsection (d)(2) provides for interest:

"(2) Any benefit erroneously paid which is not repaid shall bear interest at the rate of 1.5% per month or fraction of a

month. If the benefit was received as a result of fraud, misrepresentation or willful nondisclosure of required information, interest shall accrue from the date of the final determination of overpayment until repayment plus interest is received by the secretary. If the overpayment was without fraud, misrepresentation or willful nondisclosure of required information, interest shall accrue upon any balance which remains unpaid two years after the final determination of overpayment is made and shall continue until payment plus accrued interest is received by the secretary. Interest collected pursuant to this section shall be paid into the special employment security fund, except that interest collected on federal administrative programs shall be returned to the federal government. Upon written request and for good cause shown, the secretary may abate any interest or portion thereof provided for by this subsection (d)(2). Interest accrued may not be paid by money deducted from any future benefits payable to such persons liable for any overpayment."

K.S.A. 1991 Supp. 44-719 does not expressly address restitution in criminal cases. Restitution is addressed in general terms in several criminal sentencing statutes. K.S.A. 1991 Supp. 21-4603(2), as amended by L. 1992, ch. 239, § 237 makes "full or partial restitution" an authorized disposition in connection with probation, suspended sentence, or assignment to community corrections. K.S.A. 1991 Supp. 22-3717(1) authorizes trial courts at the time of sentencing to order restitution as a condition of parole. K.S.A. 1991 Supp. 21-4610(4)(a) describes conditions of probation and suspended sentence and authorizes the trial court to order the defendant to "[m]ake reparation or restitution to the aggrieved party for the damage or loss caused by the defendant's crime, in an amount and manner determined by the court and to the person specified by the court, unless the court finds compelling circumstances which would render a plan of restitution unworkable."

The amount of restitution to be awarded is within the trial court's discretion. State v. Beecham, 251 Kan. 194 (1992). There are limits to a trial court's discretion, however. In State v. Hinckley, 13 Kan.App.2d 417 (1989), the court held that the trial court abused its discretion in awarding restitution based on the replacement costs of certain items, rather than on fair market value. The court described the appropriate standard for determining the amount of restitution to be awarded.

"Other states have held that the amount of restitution is to be based on general damage principles and cannot be established by showing what it costs to replace each item with a new article. See, for example, Norman v. State, 468 So.2d 1063 (Fla. Dist. App. 1985), and People v. Ensley, 477 N.E.2d 760 (Ill. App.3d 1985).

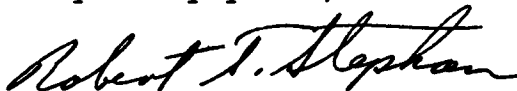
"We do not mean to imply that the same rigidness and proof of value that lies in a civil damage suit applies in a criminal case. Legislative intent is that restitution should make victims whole and provide both deterrents and rehabilitation to the person who commits the crime. The trial court would not abuse its discretion in making the victim whole by ordering restitution equal to the victim's loss." 13 Kan.App.2d at 418-19.

The limit to restitution is the amount of "the victim's loss."

In the case of unemployment compensation fraud, the victim is the state. It is possible that an order for some interest as part of restitution is permitted in order to compensate the state for interest lost on the money a defendant stole. However, the interest rate provided by K.S.A. 1991 Supp. 44-719(d)(2) -- 1.5% per month or 18% per year -- is so high that in the present economic climate it would more than

compensate the state for its actual loss and as such would not be properly awarded as restitution.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Steve Phillips
Assistant Attorney General

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