

No. A09-895

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State of Minnesota  
**In Court of Appeals**

NATHANIEL P. MCNEILLY,

*Relator,*

vs.

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

*Respondent.*

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RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## **Legal Issue**

In order to be eligible for unemployment benefits, an applicant must at all times be able to work, be available for suitable employment, and be actively seeking suitable employment. Nathaniel McNeilly was a seasonal employee for Keenan & Sveiven, Inc., a landscaping company. McNeilly was laid off during the winters of 2007 and 2008. During that time he did not submit a single application for employment, and admitted during the hearing that he did not look for work because he did not believe that he had to do so.

The Unemployment Law Judge found that McNeilly was not available for suitable employment or actively seeking suitable employment for the period beginning December 16, 2007, and held that he was denied unemployment benefits from that date and continuing until conditions changed.

## **Statement of the Case**

The question before this court is whether Nathaniel McNeilly is entitled to unemployment benefits. McNeilly established a benefit account with the Minnesota Department of Employment and Economic Development (the "Department"). A Department adjudicator initially determined that McNeilly was eligible for benefits because he was seasonally laid off by Keenan & Sveiven, Inc. ("K&S").<sup>1</sup> After McNeilly gave answers during his weekly requests for benefits

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<sup>1</sup> E-1. Transcript references will be indicated "T". Exhibits in the record will be "E" with the number following.

that indicated he was not actively seeking work, the Department first warned him that he needed to seek work, and then found him ineligible for benefits

McNeilly appealed that determination, and Unemployment Law Judge (“ULJ”) Elizabeth Esser held a de novo hearing. The ULJ affirmed, finding that McNeilly was not actively seeking work during the winter of 2008, and further found that he was not actively seeking work during the winter of 2007.<sup>2</sup> McNeilly filed a request for reconsideration with the ULJ, who affirmed.<sup>3</sup>

This matter comes before the Minnesota Court of Appeals on a writ of certiorari obtained by McNeilly under Minn. Stat. § 268.105, subd. 7(a) (2008) and Minn. R. Civ. App. P. 115.

### **Department’s Relationship to the Case**

The Department is charged with the responsibility of administering and supervising the unemployment insurance program.<sup>4</sup> As the Supreme Court stated in *Lolling v. Midwest Patrol*, unemployment benefits are paid from state funds, the Minnesota Unemployment Insurance Trust Fund, and not from employer funds, the employer not being the determiner of entitlement.<sup>5</sup> This was later codified.<sup>6</sup> The Department’s interest therefore carries over to the Court of Appeals’ interpretation and application of the Minnesota Unemployment Insurance Law.

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<sup>2</sup> Appendix to Department’s Brief, A5-A8.

<sup>3</sup> Appendix A1-A4.

<sup>4</sup> Minn. Stat. § 116J.401, subd. 1(18).

<sup>5</sup> 545 N.W.2d 372, 376 (Minn. 1996).

<sup>6</sup> Minn. Stat. § 268.069, subd. 2.

The Department is thus considered the primary responding party to any judicial action involving an Unemployment Law Judge's decision.<sup>7</sup>

The Department does not represent the applicant in this proceeding and this brief should not be considered advocacy for K & S.

### **Statement of Facts**

Nathaniel McNeilly worked as a foreman for Keenan & Sveiven, Inc., from June 20, 2005, through December 2, 2008.<sup>8</sup> McNeilly was a seasonal employee, generally working from April through November, and worked 50 hours a week for \$18.50 an hour.<sup>9</sup> He was seasonally laid off during the winter.<sup>10</sup>

When McNeilly was laid off he did not search for work. He did not participate in any dislocated worker program or job reemployment service, and did not apply for any work because K & S did not want him to.<sup>11</sup> At hearing, McNeilly explained that he was not looking for work because his employer told him that he didn't have to look for work in order to collect unemployment, and because he believed someone from the Department had also told him that he did not have to seek work.<sup>12</sup> McNeilly collected unemployment during the four winter seasons from 2005 through 2008, and admitted that he did not apply for a single

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<sup>7</sup> Minn. Stat. § 268.105, subd. 7(e).

<sup>8</sup> T. 5.

<sup>9</sup> T. 5-6.

<sup>10</sup> T. 7.

<sup>11</sup> T. 7.

<sup>12</sup> T. 8.

job during any of those seasons.<sup>13</sup> McNeilly did “ask around” for work, but believed that “nobody had any work in the winter.”<sup>14</sup> He did not make any effort to find employment during the winter months because he “didn’t know that [he] had to obviously search for work.”<sup>15</sup>

The ULJ conducted the hearing because McNeilly twice, in December of 2008, indicated in his weekly benefit request that he had not been seeking work. Following the hearing, the ULJ concluded that McNeilly had also not been actively seeking work in 2007 and early 2008, and found him ineligible retroactive to December 16, 2007.<sup>16</sup> This finding resulted in an overpayment of \$8,775, which McNeilly must repay to the Department.<sup>17</sup>

### **Standard of Review**

When reviewing an unemployment-benefits decision, the Court of Appeals may affirm the decision, remand for further proceeding, reverse, or modify the decision if McNeilly’s substantial rights were prejudiced because the decision of the ULJ violated the constitution, was based on an unlawful procedure, was affected by error of law, was unsupported by substantial evidence, or was arbitrary or capricious.<sup>18</sup>

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<sup>13</sup> T. 9.

<sup>14</sup> T. 9.

<sup>15</sup> T. 11.

<sup>16</sup> Return-3(3).

<sup>17</sup> *Id.*

<sup>18</sup> Minn. Stat. §268.105, subd. 7(d)(3)-(6) (2008).

The Court of Appeals held in *Skarhus v. Davannis* that it views the ULJ's factual findings "in the light most favorable to the decision,"<sup>19</sup> and gives deference to the ULJ's credibility determinations.<sup>20</sup> The Court also stated that it will not disturb the ULJ's factual findings when the evidence substantially sustains them.<sup>21</sup> The Supreme Court in *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency* defined substantial evidence as "such evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>22</sup>

### **Argument for Ineligibility**

McNeilly seeks benefits from the Minnesota Unemployment Insurance Trust Fund, which is a state fund, and not an employer fund.<sup>23</sup> The statute provides that unemployment benefits are payable from the trust fund only if each of five enumerated requirements are met, one of which is that the applicant meets "the ongoing weekly eligibility requirements under sections 268.085 and 268.086."<sup>24</sup> The evidence in the record reasonably supports a determination that McNeilly did not meet these eligibility requirements because he was not "available for suitable

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<sup>19</sup> 721 N.W.2d 340, 344 (Minn. App. 2006) (citing *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 377 (Minn. 1996)).

<sup>20</sup> *Id.* (citing *Jenson v. Dep't of Econ. Sec.*, 617 N.W.2d 627, 631 (Minn. App. 2000), *review denied* (Minn. Dec. 20, 2000)).

<sup>21</sup> *Id.* (citing Minn. Stat. §268.105, subd. 7(d)).

<sup>22</sup> 644 N.W.2d 457, 466 (Minn. 2002).

<sup>23</sup> Minn. Stat. §268.069, subd. 2.

<sup>24</sup> Minn. Stat. § 268.069, subd. 1.

employment” or “actively seeking suitable employment.”<sup>25</sup> Minn. Stat. § 268.085

provides:

**Subd. 1. Eligibility conditions.** An applicant may be eligible to receive unemployment benefits for any week if:

\* \* \*

(4) the applicant was able to work and was available for suitable employment, and was actively seeking suitable employment. The applicant's weekly unemployment benefit amount is reduced one-fifth for each day the applicant is unable to work or is unavailable for suitable employment. If the computation of the reduced unemployment benefits is not a whole dollar, it is rounded down to the next lower whole dollar...

\* \* \*

**Subd. 16. Actively seeking suitable employment defined.**

(a) "Actively seeking suitable employment" means those reasonable, diligent efforts an individual in similar circumstances would make if genuinely interested in obtaining suitable employment under the existing conditions in the labor market area. Limiting the search to positions that are not available or are above the applicant's training, experience, and qualifications is not "actively seeking suitable employment."

\* \* \*

(c) If reasonable prospects of suitable employment in the applicant's usual or customary occupation do not exist, the applicant must actively seek other suitable employment to be considered "actively seeking suitable employment." This applies to an applicant who is seasonally unemployed.

\* \* \*

Relator's brief essentially makes three arguments: 1) that seasonal employees are entitled to benefits; 2) that McNeilly is entitled to benefits because

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<sup>25</sup> Minn. Stat. § 268.085, subd. 1(4) and subd. 16 (2008).

his employer has paid into the benefit fund; and 3) that McNeilly has been actively seeking work. The Department addresses each in turn.

**1. The law does not exempt seasonal employees from the requirement that they actively seek work.**

Relator's brief rests entirely on *Herbst v. Northern States Power Co.*, which indicates that "industry custom" allows construction workers to receive unemployment benefits in the winter months.<sup>26</sup> That argument inaccurately represents the *Herbst* holding. *Herbst* was not an unemployment insurance case; it involved a construction employee who was badly burned on the job, and filed a civil suit against her employer seeking, among other damages, lost wages.<sup>27</sup> The court of appeals upheld the lower court's damages calculation that included projected seasonal wages and unemployment benefits, rather than a projection of year-round employment and wages.<sup>28</sup> The calculation made sense in light of the fact that *Herbst* would either have been working at another job *or* receiving unemployment benefits during the winter months; the case in no way indicates that *Herbst* was somehow exempt from the requirement that she seek work during the winter months.

Relator notably fails to cite a single unemployment insurance case indicating that seasonal employees are somehow exempt from a requirement that

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<sup>26</sup> Relator's brief, p. 3, citing 423 N.W.2d 463, 468 (Minn. App. 1988).

<sup>27</sup> *Id.* at 466.

<sup>28</sup> *Id.* at 468.

they actively seek work. Indeed, Minnesota courts have concluded otherwise.<sup>29</sup> Minn. Stat § 268.085, subd. 16(c) also specifies that seasonally unemployed applicants who cannot find employment in their usual or customary occupation “must actively seek other suitable employment.” Every year McNeilly, like all applicants, received an informational handbook from the Department laying out his obligation to seek work while receiving benefits. Nowhere in this book, or indeed anywhere in any Department publication or on the Department website, does the Department excuse a seasonally unemployed applicant from his obligation to seek work. To the contrary, at every turn the Department reminds applicants of their obligation, and every week asks applicants if they are fulfilling this obligation. This obligation is at the heart of the program, and exempting a seasonal employee from the statute’s requirements would run contrary to the entire unemployment benefits scheme. There is no statute or case law that exempts McNeilly, or any other seasonally unemployed applicant, from seeking work while unemployed.

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<sup>29</sup> *Bushard v. Contractors Edge, Inc.*, 2008 WL 2885948, at \*3 (Minn. App. July 29, 2008) (relator was ineligible where he “did not apply for a single job until May 2, 2007, six months after he was seasonally laid off from Contractors Edge.”).Appendix, A9-A11

**2. K & S' contributions to the unemployment insurance fund do not entitle McNeilly to benefits.**

Relator argues that his employer “pays into unemployment,” and provides an affidavit from the owner of K & S to that effect.<sup>30</sup> As discussed above, unemployment benefits are paid from the Minnesota Unemployment Insurance Trust Fund, and not by K & S. K & S, like many employers who seasonally lay off employees, does not pay taxes in an amount sufficient to cover the cost of McNeilly’s unemployment benefits. K & S’ taxes for McNeilly’s wages amounted to \$2,568.48 for his 2007 wages, and \$2,675.50 for his 2008 wages. By comparison, McNeilly received \$8,775 in benefits from December of 2007 through February 28, 2009, an amount he must now repay to the Department. K & S’ tax payments did not even begin approach the full cost of McNeilly’s benefits; the remainder of the cost was borne by the Fund, and thus subsidized by other taxpayers. Employers who seasonally lay off their employees can be an enormous burden to the unemployment system, which is why those employees are not exempt from the requirement that they actively seek work during that time.

K & S cannot decree that McNeilly deserves unemployment benefits, nor do its tax payments guarantee McNeilly benefits. If K & S would like McNeilly to receive a weekly check during the winter months, it is certainly welcome to pay McNeilly directly. Otherwise, in order to receive an unemployment benefit check,

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<sup>30</sup> Relator’s brief, A-1, A-3.

McNeilly must be actively seeking work during each week that he requests benefits. An employer's tax payments into the fund do not excuse the applicant's obligation to seek work; if they did so, no applicant would ever have an obligation, or even an incentive, to look for work. K & S' tax payments allow McNeilly to collect benefits, but the payments do not in and of themselves guarantee benefits. McNeilly must meet the statutory eligibility requirements, including his obligation to seek work, in order to collect benefits.

### **3. McNeilly was not actively seeking work.**

The statute is clear that in order to be eligible for unemployment benefits, an applicant must actively look for work that is available to him. McNeilly admittedly did not do this. McNeilly's hearing was triggered by his answers to the weekly Department questionnaire asking if he was seeking work. When he answered that he was not, he received a warning that he must do so; when he again answered that he was not, the following week, the Department found him ineligible for benefits and scheduled him for a hearing. A further review of McNeilly's weekly questionnaires from December of 2007 through April of 2008 shows that, every week, McNeilly answered that he was not actively seeking employment.<sup>31</sup> McNeilly confirmed these answers, testifying during the hearing that he was not seeking work, and that he did not believe that he had to.

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<sup>31</sup> Appendix, A12-A30.

McNeilly argues that he did look for work, but the ULJ specifically found that he did not look for work he could perform that was available to him, and that McNeilly did not apply for a single position during the four months that he was unemployed each year. McNeilly does not contest this finding, and did not argue that he ever applied for a single position. As this Court held in *Skarhus*, whether an applicant committed a certain act is a factual finding that the Court views in the light most favorable to the decision, and the ULJ's credibility determinations are given deference.<sup>32</sup> Therefore, because substantial evidence on record supports the ULJ's findings, those findings should not be disturbed. McNeilly asks this Court to reweigh the evidence and find different facts, but because the facts as found by the ULJ are supported by substantial testimony and documentation on record, those findings should not be disturbed on appeal.

The Department must also address McNeilly's decision to attach affidavits to his request for reconsideration, which indicated that he had sought work with several employers. First, these submissions were untimely. Minn. Stat. §268.105, subd. 2(c) explains:

In deciding a request for reconsideration, the unemployment law judge must not, except for purposes of determining whether to order an additional evidentiary hearing, consider any evidence that was not submitted at the evidentiary hearing conducted under subdivision 1.

The same statute explains that the ULJ must order an additional evidentiary hearing only if the newly-submitted evidence "would likely change the outcome of

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<sup>32</sup> 721 N.W. 2d at 344.

the decision and there was good cause for not having previously submitted that evidence,” or where it “would show that the evidence that was submitted at the evidentiary hearing was likely false...”<sup>33</sup> Neither is true in this case. The additional affidavits show that McNeilly contacted a few acquaintances during the winters of 2007 and 2008, and found that they had no work available for him. This does not contradict McNeilly’s testimony, sworn under oath, that he did not apply for other jobs, that his seasonal employer did not want him to apply for other jobs, and that he did not believe he had to look for work. The affidavits also do not contradict McNeilly’s weekly statement to the Department that he was not seeking work. The ULJ properly declined to hold an additional evidentiary hearing, and the affidavits are not part of the record before this court.

Even if the affidavits were part of the record, though, it does not change the fact that McNeilly’s scant efforts do not fulfill the statutory requirements. The statute is explicit that looking for jobs that are not available is not a search for work. Thus, McNeilly’s contact with a few car dealerships and construction companies that did not have any available positions was not a diligent search for work. Furthermore, McNeilly admittedly failed to submit job applications for any positions at all. This simply does not constitute actively seeking work under the statute. Accordingly, the ULJ correctly concluded that McNeilly was not actively seeking work and was ineligible for benefits.

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<sup>33</sup> Minn. Stat. § 268.105, subd. 2(c).

There are any number of ways in which McNeilly could have demonstrated that he was actively seeking work. He could have contacted a workforce center, joined a temporary job placement service, or applied for job postings that he found in newspapers or in online listings. Even networking can be a valuable means by which an unemployed individual can seek work. McNeilly's contact with a few acquaintances, though, cannot properly be characterized as "networking." For two winter seasons, McNeilly tells us, he checked in regularly with these individuals to see if they had employment, and they did not. These individuals gave no representation to McNeilly that work was forthcoming, and indeed none ever was. McNeilly's request for reconsideration indicates that approximately once a week he had such "networking" contact, in which he contacted an acquaintance and was told that no work was available. When McNeilly learned that no work was available, he had an obligation to do more. Spending a few minutes once a week to confirm that a friend still has no work to offer is not "actively seeking" work under any possible interpretation of the statute.

This is particularly true given that Minnesota law is clear that if prospects are unfavorable for an applicant to receive work that he had been performing, "employment at lower skill or wage levels is suitable if the applicant is reasonably suited for the employment considering the applicant's education, training, work experience, and current physical and mental ability."<sup>34</sup> McNeilly could not

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<sup>34</sup> Minn. Stat. §268.035, subd. 23b (2008).

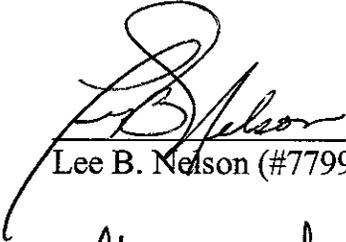
perform his usual duties as a landscaper during the winter months, but under the statute he needed to expand his work search to jobs he could perform, and possibly be willing to take a lower salary or work in an unfamiliar field. When McNeilly learned that his acquaintances could not offer him seasonal work in construction or in a car dealership, he had an obligation to broaden his search, and he failed to do so.

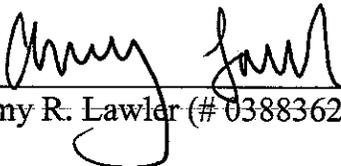
Substantial evidence supports the ULJ's decision that McNeilly did not actively look for suitable work that he was able to perform. Accordingly, the ULJ's decision should be affirmed.

### **Conclusion**

Unemployment Law Judge Elizabeth Esser correctly concluded that McNeilly was not actively seeking work, and was thus not eligible for benefits. The Department requests that the Court affirm the decision of the Unemployment Law Judge.

Dated this 8<sup>th</sup> day of September, 2009.

  
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