

No. A12-68

State of Minnesota
In Court of Appeals

SHOUNA THAO,

Relator,

vs.

COMMAND CENTER, INC.,

Respondent,

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

Respondent.

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

Under the law, an individual who quits employment is ineligible for unemployment benefits unless the individual quits for a good reason caused by the employer. In order for there to be good reason caused by the employer for quitting, the individual must first complain to the employer about adverse working conditions and allow the employer a reasonable opportunity to correct the conditions. Shouna Thao quit her employment with Command Center, Inc. after her hours were drastically cut. Thao did not complain to her employer before quitting. Did Thao have good reason caused by Command Center to quit her employment?

Unemployment Law Judge Scott Mismash found that Thao quit without first complaining to her employer, and was therefore ineligible for unemployment benefits.

Statement of the Case

The question is whether Shouna Thao is entitled to unemployment benefits. Thao established a benefit account with the Minnesota Department of Employment and Economic Development (the "Department") in August of 2011. A Department clerk determined that Thao was eligible for benefits because she quit her employment after her hours were cut.¹ Consistent with the statute, the Department then paid Thao benefits.² Command Center appealed that determination of eligibility, and Unemployment Law Judge ("ULJ") Scott Mismash held a de novo hearing in which both parties participated.

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

² See Minn. Stat. § 268.069, subd. 1 (2011).

The ULJ held that Thao did not complain about the hours cut before quitting, and that she was therefore ineligible for any unemployment benefits.³ This resulted in an overpayment of benefits that Thao had previously received.⁴ Thao filed a request for reconsideration with the ULJ, who affirmed.⁵

This matter comes before the Minnesota Court of Appeals on a writ of certiorari obtained by Thao under Minn. Stat. § 268.105, subd. 7(a) 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.⁶ 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.⁷ This was later codified.⁸ In 2011, the Department paid out over \$940 million in regular state unemployment benefits, and an additional \$930 million in federally funded extended benefits, to over 295,000 Minnesotans. The Department's interest therefore carries over to the Court of Appeals' interpretation and application of the Minnesota Unemployment

³ Appendix to Department's Brief, A6-A9.

⁴ Minn. Stat. § 268.101, subd. 6.

⁵ Appendix, A1-A5.

⁶ Minn. Stat. § 116J.401, subd. 1(18).

⁷ 545 N.W.2d 372, 376 (Minn. 1996). *See also Jackson v. Minneapolis Honeywell Regulator Co.*, 47 N.W.2d 449 (Minn. 1951). Unemployment benefits are paid from state funds, even though taxes paid by employers helped create the fund.

⁸ Minn. Stat. § 268.069, subd. 2.

Insurance Law. The Department is thus considered the primary responding party to any judicial action involving an unemployment law judge's decision.⁹

Statement of Facts

Shouna Thao worked for Command Center, Inc., a staffing service, from July 26 through August 31, 2011, as a permanent staffing specialist.¹⁰ When she was hired she expected to work 32 hours a week, and hoped to work more than that.¹¹ After Command Center lost Thao's primary client, during her last week on the job, her hours were reduced to around 16 or 20 hours.¹² When she saw that her hours would be further reduced the following week, Thao resigned.¹³ She did not complain about the reduction in hours before quitting.¹⁴

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 Thao'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.¹⁵

⁹ Minn. Stat. § 268.105, subd. 7(e).

¹⁰ T. 15-16.

¹¹ T. 20.

¹² T. 17, 25.

¹³ T. 17-19.

¹⁴ T. 21.

¹⁵ Minn. Stat. § 268.105, subd. 7(d)(1)-(6) (2011).

There is no presumption of eligibility for unemployment insurance benefits.¹⁶ Eligibility is decided under a preponderance of the evidence standard, with no burden of proof assigned.¹⁷ The Court of Appeals has stated on a number of occasions that whether and why an applicant quit employment are questions of fact for the ULJ to determine.¹⁸

The Supreme Court recently stated in *Stagg v. Vintage Place*, that it views the ULJ's factual findings "in the light most favorable to the decision"¹⁹ and stated that it will not disturb the ULJ's factual findings when the evidence substantially sustains them.²⁰ "Substantial evidence" is that relevant evidence "a reasonable mind might accept as adequate to support a conclusion."²¹

In *Peppi v. Phyllis Wheatley Community Center*, the Court of Appeals reiterated that it reviews de novo the legal question of whether the applicant falls under one of the exceptions to ineligibility under Minn. Stat. § 268.095, subd. 1.²² In particular, "[t]he determination that an employee quit without good reason attributable to the employer is a legal conclusion," which the Court reviews de novo.²³

¹⁶ Minn. Stat. § 268.069, subd. 2.

¹⁷ Minn. Stat. § 268.101, subd. 2(e); Minn. Stat. § 268.031, subd. 1.

¹⁸ *Midland Electric Inc. v. Johnson*, 372 N.W.2d 810, 812 (Minn. App. 1985).

¹⁹ 796 N.W.2d 312, 315 (Minn. 2011) (citing *Jenkins v. Am. Express*, 721 N.W.2d 286, 289 (Minn. 2006)).

²⁰ *Id.* (citing Minn. Stat. § 268.105, subd. 7(d)).

²¹ *Moore Assocs., LLC v. Comm'r of Econ. Sec.*, 545 N.W.2d 389, 392 (Minn. App. 1996).

²² 614 N.W. 2d 750, 752 (Minn. App. 2000).

²³ *Nichols v. Reliant Eng'g Mfg., Inc.*, 720 N.W.2d 590, 594 (Minn. App. 2006).

Statutory interpretation and application is a question of law that the courts review de novo.²⁴

Argument for Ineligibility

Thao quit her employment because Command Center cut her hours, but she did not complain to Command Center before doing so. An applicant who quits employment is generally ineligible for unemployment benefits under Minn. Stat. § 268.095, subd. 1. Under Minn. Stat. § 268.095, subd. 1(d), an applicant who quits employment “because of a good reason caused by the employer as defined in subdivision 3” is not ineligible for benefits. Thao does not fall under this statutory exception. The relevant portion of the statute provides:

Subd. 3. Good reason caused by the employer defined.

- (a) A good reason caused by the employer for quitting is a reason:
 - (1) that is directly related to the employment and **for which the employer is responsible;**
 - (2) that is adverse to the worker; and
 - (3) **that would compel an average, reasonable worker to quit and become unemployed rather than remaining in the employment.**
- (b) The analysis required in paragraph (a) must be applied to the specific facts of each case.
- (c) If an applicant was subjected to adverse working conditions by the employer, **the applicant must complain to the employer and give the employer a reasonable opportunity to correct the adverse working conditions before that may be considered a good reason caused by the employer for quitting.**

* * *

- (g) The definition of a good reason caused by the employer for quitting employment provided by this subdivision is exclusive and no other definition applies.²⁵ (Emphasis added)

²⁴ *State v. Thompson*, 754 N.W.2d 352, 355 (Minn. 2008).

²⁵ Minn. Stat. § 268.095, subs. 1 and 3 (2011).

As a preliminary matter, the ULJ did not make a decision as to whether or not Thao's working conditions were actually adverse to her, or whether they would have caused an average, reasonable worker to quit rather than remain in employment. Relator's brief contends categorically that a cut in hours from 32 in one week to 16 or 20 in the next will automatically constitute a good reason to quit caused by the employer. The ULJ's decision made no factual findings as to whether Command Center had actually hired Thao to work full time, or whether, as the employer's witness testified, she was actually hired to work part time. The ULJ's decision focused entirely on whether Thao complained, and this brief must necessarily do so as well.

However, the Department must note that the statute does not create a categorical good reason to quit because of a cut in hours. An employee who drops from four or five days a week to two could still conceivably launch a thorough search for full time work during those days in which she is not working. Her position would be entirely unlike an individual who is expected to work the same hours for substantially less money, as such an individual would simply not have the hours in the day needed to actively search for more suitable employment. This is particularly true in a case such as this one, where the applicant's stated reason for quitting was that she felt bad for her employer for paying her when there wasn't much work to be done.²⁶ Minn. Stat. § 268.095, subd. 3(b) requires an individualized consideration of all cases, including those involving cuts in hours.

Relator's brief then focuses heavily on the fact that Thao did not complain to her employer before quitting. Relator does not contend that Thao actually complained, but

²⁶ T. 18.

instead that she was exempt from having to do so, and argues that an employee who has her hours reduced need not complain in order to fall under the statutory exception to ineligibility. Relator's brief, as a whole, attempts to rewrite a statute that is clear and understandable, and has been consistently applied by both the Department and this Court.

When a statute is unambiguous, as is this provision, the Court will apply its plain language to determine its meaning.²⁷ The statute at issue here is terribly plain, and allows benefits only to those applicants who complain about adverse working conditions and give the employer the opportunity to remedy them. The statute has not always contained this complaint requirement. The statute was amended in 1999 to include the requirement that the applicant complain to her employer before quitting,²⁸ and did so because "[t]he legislature sought to ensure that employers were given an opportunity to address problems encountered by employees."²⁹

Relator's brief argues that this Court need not apply the requirements of subd. 3(c) to all cases, because unlike subd. 3(b) it does not contain language requiring decisionmakers to apply the subdivision to "the specific facts of each case."³⁰ The Department is aware of no caselaw or statute that exempts applicants from statutory provisions solely because they do not contain admonishments found in nearby subdivisions. No Minnesota court has ever reached such a conclusion, nor has any Minnesota court ever issued a decision holding that applicants need not complain to their

²⁷ Minn. Stat. § 645.16 (2010); *Carlson v. Dep't of Emp't & Econ. Dev.*, 747 N.W.2d 367, 371 (Minn. App. 2008).

²⁸ Minn. Laws 1999, ch. 107, § 44.

²⁹ *Nichols v. Reliant Engineering & Mfg., Inc.*, 720 N.W.2d 590, 595 (Minn. App. 2006).

³⁰ Relator's brief, p. 10.

employers about changes in wages or hours before quitting and collecting benefits. The language of subd. 3(c) is entirely clear: an applicant must complain about any adverse working conditions before quitting, in order to give the employer an opportunity to remedy the adverse conditions, or she will not be eligible for benefits.

Similarly, relator's argument that the "good cause" definition contained in subd. 3(a) and the complaint requirements in subd. 3(c) are somehow disjunctive or unrelated.³¹ Contrary to relator's assertion, this Court has time and time again interpreted subd. 3(c)'s requirement as conjunctive to the definition in subd. 3(a).³² But relator's brief argues that, if the legislature had wanted subd. 3(c) to be read as an additional requirement to those who meet the definition of subd. 3(a), it would have used the phrase "terms and conditions of employment," rather than "adverse working conditions."³³

There is a specific reason why the statute specifies "adverse working conditions" in both subd. 3(a) and 3(c), and not simply "terms and conditions of employment." Prior to the addition of this language, the Department would not infrequently see cases in which applicants quit their employment upon being offered financial and/or retirement incentives for doing so. These were incentives that would have enticed an average reasonable employee to quit. In 1997, in *Kehoe v. Minn. Dept. of Econ. Sec.*, this Court found ineligible an applicant who quit in order to accept an early retirement incentive, noting that "there was no evidence of a significant adverse action by Kehoe's

³¹ Relator's brief, p. 11.

³² See, e.g., *Polley v. Gopher Bearing Co.*, 478 N.W.2d 775, 779 (Minn. App. 1991), review denied Jan. 30, 1992 (noting that applicant was eligible for benefits because she complained to her employer about a reduction in hours before quitting).

³³ Relator's brief, p. 12.

employer.”³⁴ And in 2004, the legislature amended the statute to clarify that only adverse working conditions could constitute a good reason to quit.³⁵ Relator’s brief takes a great logical leap when it asserts that the legislature, by opting to specify “adverse working conditions” instead of simply “terms or conditions of employment,” means that subd. 3(c) “cannot be read as covering every reason for quitting that is adverse to the worker.”³⁶

The statute is not ambiguous. “Adverse working conditions” may not be a defined statutory term, but this Court has never struggled to identify such conditions. In the hundreds of unpublished cases this Court has considered an extraordinarily broad range of such conditions, from wage and hour cuts to demotions, from mean supervisors to office relocations. A statutory phrase is not ambiguous simply because it encompasses a broad category.

Finally, relator’s brief argues that Thao need not have complained because Command Center was responsible for cutting her hours, and therefore knew that her hours had been cut.³⁷ It is of course true that Command Center knew it reduced Thao’s hours. But until Thao resigned it did not know – and could not have known – how Thao felt about this reduction. Mark B , branch manager and Thao’s direct supervisor, did not know that Thao expected to work 32 hours or more a week, and in fact thought that she had been expecting part-time work. He testified at hearing that Command Center had actively worked to recruit more clients, and that if Thao had stayed on she could have

³⁴ 568 N.W.2d 889, 891 (Minn. App. 1997).

³⁵ Minn. Laws 2004, ch. 183, § 62.

³⁶ Relator’s brief, p. 13.

³⁷ Relator’s brief, p. 15.

been working up to 30 hours a week. Thao, by quitting without first complaining, foreclosed the possibility that Command Center might be able to accommodate her request to work more. The statute requires such conversations because applicants seek money from the public fund. The statute institutes such rigorous requirements because quitting and collecting such benefits should be a last resort reserved for those whose working conditions are truly untenable. Otherwise, the expectation is that individuals will fund their own work searches.

Thao failed to alert Command Center of her concerns, and as she did not complain before quitting, Command Center had no opportunity to attempt to keep her as an employee. If Thao had complained, Command Center may well have found a way to keep her hours closer to the 32 she testified she expected.

Conclusion

Unemployment Law Judge Scott Mismash correctly concluded that Shouna Thao quit her employment and that no statutory exception to ineligibility applied. She is therefore ineligible for benefits. The Department asks that the Court affirm the decision of the Unemployment Law Judge.

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