

No. A12-383

State of Minnesota
In Court of Appeals

ULANDA WILEY,

Relator,

vs.

DOLPHIN STAFFING-DOLPHIN CLERICAL GROUP,

Respondent,

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

Respondent.

RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX

BENJAMIN L. WEISS (#0278932)
SOUTHERN MN REGIONAL LEGAL
SERVICES, INC
55 EAST FIFTH STREET, SUITE 400
ST. PAUL, MINNESOTA 55101
(651) 222-5863
Attorney for Relator

DOLPHIN STAFFING-DOLPHIN CLERICAL GROUP
17 WASHINGTON AVENUE, SUITE 500
MINNEAPOLIS, MINNESOTA 55401-2093
(612) 371-7451
Respondent- Employer -Pro se

LEE B. NELSON (#77999)
AMY R. LAWLER (#0388362)
MINNESOTA DEPARTMENT OF EMPLOYMENT
AND ECONOMIC DEVELOPMENT
1ST NATIONAL BANK BUILDING
332 MINNESOTA STREET, SUITE E200
ST. PAUL, MINNESOTA 55101-1351
(651) 259-7117
Attorneys for Respondent-Department

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).

TABLE OF AUTHORITIES

CASES

| | |
|--|-------|
| <i>Bangtson v. Allina Medical Group</i> 766 N.W.2d 328 (Minn. App. 2009)----- | 7 |
| <i>Carlson v. Dep’t of Emp’t & Econ. Dev.</i> , 747 N.W.2d 367 (Minn. App. 2008) ---- | 8 |
| <i>Jackson v. Minneapolis Honeywell Regulator Co.</i> , 47 N.W.2d 449 (Minn. 1951) -3 | |
| <i>Jenkins v. Am. Express</i> , 721 N.W.2d 286 (Minn. 2006)----- | 5 |
| <i>Lolling v. Midwest Patrol</i> , 545 N.W.2d 372 (Minn. 1996)----- | 2, 3 |
| <i>Medek v. St. Peter Church and School</i> 2007 WL 3347476 (Minn. App. Nov. 13, 2007)----- | 8 |
| <i>Midland Electric Inc. v. Johnson</i> , 372 N.W. 2d 810 (Minn. App. 1985)----- | 5, 9 |
| <i>Moore Assocs., LLC v. Comm’r of Econ. Sec.</i> , 545 N.W.2d 389 (Minn. App. 1996) ----- | 5 |
| <i>Nichols v. Reliant Eng’g Mfg., Inc.</i> , 720 N.W. 2d 590 (Minn. App. 2006)----- | 6 |
| <i>Peppi v. Phyllis Wheatley Community Center</i> , 614 N.W. 2d 750 (Minn. App. 2000)----- | 5 |
| <i>Stagg v. Vintage Place</i> , 796 N.W.2d 312 (Minn. 2011)----- | 5 |
| <i>State v. Thompson</i> , 754 N.W. 2d 352 (Minn. 2008)----- | 6 |
| <i>Wiley v. Robert Half Internation, Inc.</i> , 2012 WL 2202977 (Minn.App. Jun 18, 2012)----- | 1, 11 |

STATUTES

| | |
|--|----------------|
| Minn. Stat. § 116J.401, subd. 1(18) (2011) ----- | 2 |
| Minn. Stat. § 268.031, subd. 1 (2011)----- | 5 |
| Minn. Stat. § 268.069, subd. 2 (2011)----- | 3, 5 |
| Minn. Stat. § 268.095, subd. 1 (2011)----- | 5, 6, 7, 9, 10 |
| Minn. Stat. § 268.095, subd. 2 (2011)----- | 6, 7 |

Minn. Stat. § 268.101, subd. 2(e) (2011) -----5

Minn. Stat. § 268.105, subd. 7 (2011)-----2, 3, 5

Minn. Stat. § 645.16 (2011) -----8

OTHER AUTHORITIES

OXFORD ENGLISH DICTIONARY ONLINE, *available at*
<http://oxforddictionaries.com/definition/because?q> ----- 10

Minn. R. Civ. App. P. 115 -----2

Legal Issue

Under the law, an individual who quits her employment within 30 days of starting, and quits because that employment is unsuitable, is eligible for benefits. Ulanda Wiley quit her temporary employment with Dolphin Staffing, Inc. (“Dolphin Staffing”) after six weeks, the time at which the initial assignment was supposed to end. Wiley did not want to accept an extended assignment because she did not think Dolphin Staffing was being sufficiently flexible in allowing absences, and did not want to be fired for accumulating too many. Does Wiley fall under any exception to ineligibility for quitting her employment?

Unemployment Law Judge Elizabeth Kiechle found that Wiley quit, did not come under any statutory exception, and was therefore ineligible for unemployment benefits.

Statement of the Case

The question is whether Ulanda Wiley is entitled to unemployment benefits. Wiley established a benefit account with the Minnesota Department of Employment and Economic Development (the “Department”) in May of 2010, collecting benefits until she returned to work in May 2011 with Robert Half International, Inc. She quit that temporary employment within 30 days, the circumstances of which were the subject of this Court’s recent decision, and remand, in *Wiley v. Robert Half Intern., Inc.*¹ Wiley remained unemployed until August of 2011, when she took another temporary position at

¹ 2012 WL 2202977 (Minn. App. June 18, 2012). Wiley was represented by the William Mitchell Law Clinic in that appeal, and is scheduled to have her remanded hearing before ULJ Berninghaus.

Dolphin Staffing. After she quit that employment in September of 2011, a Department clerk determined that Wiley was ineligible for benefits because she quit her employment and did not fall under any statutory exception to ineligibility.² Wiley appealed that determination, and Unemployment Law Judge (“ULJ”) Elizabeth Kiechle held a de novo hearing in which both parties participated, with Wiley this time represented by attorney Benjamin Weiss. The ULJ held that Wiley quit, that she did not meet any of the statutory exceptions to ineligibility for quitting, and that she was therefore ineligible for any unemployment benefits.³ Wiley filed a request for reconsideration with the ULJ, who affirmed.⁴

This matter comes before the Minnesota Court of Appeals on a writ of certiorari obtained by Wiley 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.⁵ As the Supreme Court stated in *Lolling v. Midwest Patrol*, unemployment benefits are paid from state funds, the Minnesota

² E-1. Transcript references will be indicated “T.” Exhibits in the record will be “E-” with the number following.

³ Appendix to Department’s Brief, A5-A10.

⁴ Appendix, A1-A4.

⁵ Minn. Stat. § 116J.401, subd. 1(18).

Unemployment Insurance Trust Fund, and not from employer funds.⁶ This was later codified.⁷ 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 Insurance Law. The Department is thus considered the primary responding party to any judicial action involving an unemployment law judge's decision.⁸

Statement of Facts

Ulanda Wiley worked full-time for Dolphin Staffing from August 9 through September 23, 2011.⁹ She had only one assignment, as an insurance billing associate for Medtox, earning \$14.00 an hour.¹⁰ When Dolphin hired Wiley, it informed her that the assignment would last for about six weeks, but could be extended if she was in good standing.¹¹

During her first month at Dolphin Wiley accumulated multiple absences, due to illness, medical appointments, and a school appointment.¹² On September 6, 2011,

⁶ 545 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.

⁷ Minn. Stat. § 268.069, subd. 2.

⁸ Minn. Stat. § 268.105, subd. 7(e).

⁹ T. 14.

¹⁰ T. 14-15.

¹¹ T. 37-38, 46.

¹² E-10, T. 27, 41-42.

Dolphin asked Wiley to sign an attendance warning, but Wiley refused.¹³ On September 8, 2011, Dolphin employee Cara Schwartz spoke with Wiley by phone, and told her that Medtox wanted Wiley to work for one more month.¹⁴ Wiley did not want to continue working and amassing unexcused absences, for fear that she would be fired.¹⁵ She had also wanted to take a vacation mid-September.¹⁶ She therefore told Schwartz that she would not continue working on the assignment for the duration, and that September 23 would be her last day.¹⁷ Wiley also confirmed her resignation effective September 23 with Dolphin employees Amanda Cooper and Rebecca Anderson, because she did not want to sign the attendance warning, and did not want to continue working under that attendance policy.¹⁸ Wiley later attempted to rescind the resignation, and asked to be allowed to make up for absences while continuing to work on the assignment at Medtox, but Dolphin did not allow her to rescind her resignation.¹⁹

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 Wiley's substantial rights were prejudiced because the decision of the ULJ violated the

¹³ T. 29, 38, 57, 59, 60, 66.

¹⁴ E-10, T. 29, 42

¹⁵ T. 30.

¹⁶ T. 19.

¹⁷ E-10, T. 42-43.

¹⁸ T. 42-43, 59.

¹⁹ T. 50, 59-60.

constitution, was based on an unlawful procedure, was affected by error of law, was unsupported by substantial evidence, or was arbitrary or capricious.²⁰

There is no presumption of eligibility for unemployment insurance benefits.²¹ Eligibility is decided under a preponderance of the evidence standard, with no burden of proof assigned.²² 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.²³

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"²⁴ and stated that it will not disturb the ULJ's factual findings when the evidence substantially sustains them.²⁵ "Substantial evidence" is that relevant evidence "a reasonable mind might accept as adequate to support a conclusion."²⁶

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. 1.²⁷ In particular, "[t]he

²⁰ Minn. Stat. § 268.105, subd. 7(d) (2012).

²¹ Minn. Stat. § 268.069, subd. 2.

²² Minn. Stat. § 268.101, subd. 2(e); Minn. Stat. § 268.031, subd. 1.

²³ *Midland Electric Inc. v. Johnson*, 372 N.W.2d 810, 812 (Minn. App. 1985).

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

²⁵ *Id.* (citing Minn. Stat. § 268.105, subd. 7(d)).

²⁶ *Moore Assocs., LLC v. Comm'r of Econ. Sec.*, 545 N.W.2d 389, 392 (Minn. App. 1996).

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

determination that an employee quit without good reason attributable to the employer is a legal conclusion,” which the Court reviews de novo.²⁸

Statutory interpretation and application is a question of law that the courts review de novo.²⁹

Argument for Ineligibility

This is the second time that Wiley has come before this Court after quitting her employment at a temporary staffing service. Wiley again cites compelling personal reasons for quitting, but does not fall under any statutory exceptions to ineligibility.

First, there is no question that Wiley quit her employment. The statute provides in pertinent part:

Subd. 1. **Quit.** An applicant who quit employment is ineligible for all unemployment benefits according to subdivision 10...³⁰

The statute defines “quit” as follows:

Subd. 2. Quit defined.

(a) A quit from employment occurs when the decision to end the employment was, at the time the employment ended, the employee's.³¹

Relator does not dispute that she quit her employment. While she argues that she quit within 30 days of starting her employment, and that the work was unsuitable for her, these arguments are unavailing.

²⁸ *Nichols v. Reliant Eng'g Mfg., Inc.*, 720 N.W.2d 590, 594 (Minn. App. 2006).

²⁹ *State v. Thompson*, 754 N.W.2d 352, 355 (Minn. 2008).

³⁰ Minn. Stat. § 268.095, subd. 1 (2010).

³¹ Minn. Stat. § 268.095, subd. 2.

1. The statutory exception set forth by Minn. Stat. § 268.095, subd. 1(3) does not apply, because Wiley did not quit within 30 days.

About ten years ago, the Department sought to change the statute so that individuals who took a job outside of their normal fields would not be penalized if they quickly found that taking it was a mistake. Prior to the amendment, these individuals would have been denied benefits. Under this provision, an applicant who quits her employment “within 30 calendar days of beginning the employment because the employment was unsuitable for the applicant” may be eligible for benefits based on her separation from that employment.³²

Wiley does not qualify for this exception, first and foremost because she did not quit within 30 days of starting her position at Dolphin. Wiley started her employment on August 9, gave her notice on September 8, and ended her employment on September 23. The statutory definition of “quit” does not tie the date of quitting to the date of giving notice. Instead, it specifically states that a quit occurs “when the decision to end the employment was, at the time the employment ended, the employee's.” The statute, separately in Minn. Stat. § 268.095, subd. 2(c), also references “notice of quitting,” indicating that the terms “quit” and “notice of quitting” are not one and the same.

This is like the situation pondered by this Court in *Bangtson v. Allina Medical Group*, where an applicant argued that he was discharged at the moment he was given notice that he would be discharged in the near future.³³ The Court rejected this argument, holding that the statute distinguishes between discharge and notice of discharge, and

³² Minn. Stat. § 268.095, subd. 1(3) (2011).

³³ 766 N.W.2d 328 (Minn. App. 2009).

concluding that “a notice of discharge does not constitute an immediate discharge when continuing employment in any capacity is still available to the employee who receives the notice of discharge.”³⁴

The statutory provision defining “quit” references the date on which the employment ended, not the date on which notice was given. At the time the employment ended, on September 23, the decision was Wiley’s. The quit did not occur on September 8, but rather on September 23, the date that Wiley chose. When a statute is unambiguous, as is this provision, the Court will apply its plain language to determine its meaning.³⁵ “The time the employment ended” is not ambiguous. Wiley was employed from September 8 (the date she gave notice) through September 23 (the date the employment ended).

Relator’s brief argues that applicants should fall under this exception to ineligibility when they give notice within the first 30 days of employment, even if they work after that date, and cites this Court’s unpublished decision in *Medek v. St. Peter Church and School* to that effect.³⁶ In *Medek*, an employee with 30 years of experience as a steel fabricator took a position that required extensive computer knowledge, which he did not have. Within 30 days of starting his employment, Medek talked to his supervisors about quitting, and then asked to be replaced.³⁷ Medek did not go to his

³⁴ *Id.* at 333.

³⁵ Minn. Stat. § 645.16 (2011); *Carlson v. Dep’t of Emp’t & Econ. Dev.*, 747 N.W.2d 367, 371 (Minn. App. 2008).

³⁶ Relator’s brief, p. 13-14, 16, citing *Medek v. St. Peter Church and School* 2007 WL 3347476 (Minn. App. Nov. 13, 2007).

³⁷ 2007 WL 3347476, at *2.

supervisors in order to give a specific notice period, or to ask to be allowed to work for a lengthier amount of time. He went to his supervisors within 30 days, and attempted to end his employment immediately. As the Court's decision notes, St. Peter then asked Medek to stay on until it could find his replacement, and expressed extreme gratitude at his willingness to do so. The case was unpublished, and was therefore not precedential. But even if this Court were to find its analysis persuasive, Medek was entirely unlike Wiley. When Medek went to his supervisors to quit, he wanted to end his employment immediately. Unlike Wiley, he did not want to continue working for two weeks, and he certainly never attempted to rescind his resignation. He went to his employer and announced that he was ending his employment, and then agreed to stay on solely as a favor to the employer while it found a replacement for Medek. An employee's attempt to tender an immediate notice of resignation cannot be compared to an employee who tenders a two-week notice, taking her outside the 30-day period allowed by statute.

2. The statutory exception set forth by Minn. Stat. § 268.095, subd. 1(3) does not apply, because Wiley did not quit because the work was unsuitable.

Even if this Court were to find that Wiley quit her employment within 30 days of starting, she did not do so because the work was unsuitable. As this Court has stated previously, on numerous occasions, why an applicant quit employment is question of fact for the ULJ to determine.³⁸ In order to accept relator's argument that Wiley met the statutory exception under Minn. Stat. § 268.095, subd. 1(3), the Court must reject the

³⁸ *Midland Electric Inc. v. Johnson*, 372 N.W.2d 810, 812 (Minn. App. 1985).

ULJ's finding that Wiley quit because she wanted to avoid further disciplinary action due to her absences. Because the substantial evidence, however, supports the ULJ's finding that Wiley quit for this reason, and not because the employment was unsuitable, Wiley's argument is not compelling.

Minn. Stat. § 268.035, subd. 23a(h), explains that "A job assignment with a staffing service is considered suitable only if 25 percent or more of the applicant's wage credits are from job assignments with clients of a staffing service and the job assignment meets the definition of suitable employment under paragraph (a)." Here, because Wiley was collecting federal extended benefits from a 2010 benefit account, she had no wage credits from a staffing service. That raises a question of whether she falls under the statutory exception to ineligibility under Minn. Stat. §268.095, subd. 1(3), which states that applicants are eligible where "the applicant quit the employment within 30 calendar days of beginning the employment because the employment was unsuitable for the applicant."

Here, the word "because" must be interpreted plainly. According to the *Oxford English Dictionary*, "because" means "for the reason that; since. . . ."³⁹ Accordingly, this provision clearly states that the applicant must have quit *for the reason that* the employment was unsuitable. But Wiley's reasons for quitting revolved around her absences, and her frustration at receiving warnings for absences she felt were beyond her control.

³⁹ OXFORD ENGLISH DICTIONARY ONLINE, *available at* <http://oxforddictionaries.com/definition/because?q=because>.

In the other case involving Wiley's quit from a temporary staffing service, *Wiley v. Robert Half Intern., Inc.*, this Court issued an unpublished decision remanding the case to the ULJ for consideration of the suitability question. In this decision, the Court acknowledged that the issue had not been developed at hearing, and had not been fully briefed, but stated that "We can find no basis for DEED's argument that the two definitional provisions must be read and applied in tandem rather than separately, as the text suggests."⁴⁰ The Department respectfully posits that the language of the statutory provision governing quits is clear, and that the word "because" cannot be ignored.

The statute does not read that an applicant is eligible where "the applicant quit the employment within 30 calendar days of beginning unsuitable employment." Instead, it reads that an applicant is eligible where "the applicant quit the employment within 30 calendar days of beginning the employment because the employment was unsuitable for the applicant." Analogously, this Court has considered hundreds, if not thousands, of cases in which employees claimed that they quit because of a good reason caused by the employer, and in each of those cases has considered the question of why the applicant actually quit. It is not enough, under that "good reason" statutory provision, to quit employment for a reason unrelated to the good reason caused by the employer. To fall under that statutory exception to ineligibility, the applicant must quit because of the good reason caused by the employer. The word "because" is crucial to the analysis, both in those "good reason caused by the employer" cases and in the case at hand.

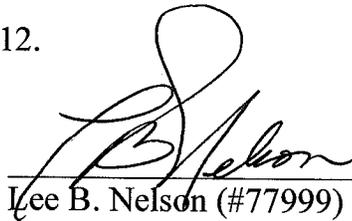
⁴⁰ 2012 WL 2202977, at *3.

Here, Wiley did not quit because the employment was unsuitable. This was her second temporary staffing position in 2011, and she was assigned to do medical billing, work she had previously done. She found the work sufficiently tolerable to stay at Dolphin for six weeks, and then sought to withdraw her resignation altogether. This is not a situation where Wiley quit *because* the work was, as a temporary staffing assignment, unsuitable. It was not a situation where she quit because the temporary nature of the assignment, for example, hindered her efforts to find permanent work. The reasons for which Wiley quit had nothing to do with the temporary nature of the assignment, and everything to do with issues that this Court sees with some frequency: frustration over a rigid absenteeism policy, and fear of future discipline or discharge. Those may well be good personal reasons for quitting, but they do not show that Wiley quit *because* her position was at a temporary staffing agency. Most employers have attendance policies, and many have extraordinarily rigid ones. This has nothing to do with the temporary nature of the work that Wiley took. Wiley did not quit because the work was unsuitable for her.

Conclusion

Unemployment Law Judge Elizabeth Kiechle correctly concluded that Ulanda Wiley 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.

Dated this 9th day of July, 2012.



Lee B. Nelson (#77999)

Amy Lawler (# 0388362)

Department of Employment and Economic
Development

1st National Bank Building

332 Minnesota Street, Suite E200

Saint Paul, Minnesota 55101-1351

(651) 259-7117

Attorneys for Respondent Department