

No. A11-1135

State of Minnesota
In Court of Appeals

HEATHER ROWAN,

Relator,

vs.

DREAM IT, 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).

TABLE OF CONTENTS

| | |
|---|-----------|
| LEGAL ISSUE..... | 1 |
| STATEMENT OF THE CASE | 1 |
| STATEMENT OF FACTS | 2 |
| STANDARD OF REVIEW..... | 3 |
| ARGUMENT FOR INELIGIBILITY | 5 |
| CONCLUSION | 9 |
| APPENDIX..... | 11 |

TABLE OF AUTHORITIES

CASES

| | |
|--|-----------|
| <i>Beyer v. Heavy Duty Air, Inc.</i> , 393 N.W. 2d 380 (Minn. App. 1986) | -----4, 5 |
| <i>Jenkins v. Am. Express</i> , 721 N.W.2d 286 (Minn. 2006) | -----4 |
| <i>Jenson v. Dep't of Econ. Sec.</i> , 617 N.W.2d 627 (Minn. App. 2000), <i>review denied</i> (Minn. Dec. 20, 2000) | -----4 |
| <i>Midland Electric Inc. v. Johnson</i> , 372 N.W. 2d 810 (Minn. App. 1985) | -----4, 5 |
| <i>Moore Assocs., LLC v. Comm'r of Econ. Sec.</i> , 545 N.W.2d 389 (Minn. App. 1996) | -----4 |
| <i>Nelson v. Levy</i> , 796 N.W.2d 336 (Minn. App. 2011) | -----6 |
| <i>Nichols v. Reliant Eng'g Mfg., Inc.</i> , 720 N.W. 2d 590 (Minn. App. 2006) | -----4, 5 |
| <i>Peppi v. Phyllis Wheatley Community Center</i> , 614 N.W. 2d 750 (Minn. App. 2000) | -----4 |
| <i>Skarhus v. Davannis, Inc.</i> , 721 N.W.2d 340 (Minn. App. 2006) | -----4 |
| <i>Stagg v. Vintage Place</i> , 796 N.W.2d 312 (Minn. 2011) | -----4 |

STATUTES

| | |
|--|-----------|
| Laws Ch. 135, Art. 3, Sec. 42 | -----5 |
| Minn. Stat. § 116J.401, subd. 1(18) (2010) | -----2 |
| Minn. Stat. § 181.723 | -----6 |
| Minn. Stat. § 181.723, subd. 3 | -----5 |
| Minn. Stat. § 181.723, subd. 4 | -----6 |
| Minn. Stat. § 268.035, subd. 9a (2010) | -----6 |
| Minn. Stat. § 268.069, subd. 2 (2010) | -----2 |
| Minn. Stat. § 268.095, subd. 1 (2010) | -----4, 8 |

| | |
|---|------|
| Minn. Stat. § 268.095, subd. 2 (2010) | 5 |
| Minn. Stat. § 268.095, subd. 3 (2010) | 8 |
| Minn. Stat. § 268.095, subd. 5 (2010) | 5 |
| Minn. Stat. § 268.105, subd. 3a(b) (2010) | 1 |
| Minn. Stat. § 268.105, subd. 7 (2010) | 2, 3 |

RULES

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

Legal Issue

Under the law, an individual who quits employment for other than a defined set of reasons is ineligible for all unemployment benefits. Heather Rowan quit her employment as a painter for Dream It, Inc., at her employer's request, so that she could continue doing work for Dream It as an independent contractor. Did Rowan quit her employment? If so, does any exception to ineligibility apply?

Unemployment Law Judge Peder Nestingen found Rowan quit her employment, and was ineligible for unemployment benefits because she did not fall under any exception to ineligibility.

Statement of the Case

A Department adjudicator determined that Rowan was ineligible for benefits because she quit her employment.¹ Rowan appealed that determination, and ULJ Nestingen held a de novo hearing, in which both parties participated. The ULJ found that Rowan had quit, but that she did so for a good reason caused by Dream It, and was therefore eligible for benefits.² Dream It filed a request for reconsideration with the ULJ, who reversed, and found Rowan ineligible for benefits.³ This resulted in an overpayment of benefits that Rowan had previously received.⁴

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

² Appendix to Department's Brief, A6-A11.

³ Appendix, A1-A5.

⁴ Minn. Stat. § 268.105, subd. 3a(b).

This matter comes before the Minnesota Court of Appeals on a writ of certiorari obtained by Rowan under Minn. Stat. § 268.105, subd. 7(a) (2010) and Minn. R. Civ. App. P. 115. The Department is charged with the responsibility of administering and supervising the unemployment insurance program.⁵ Unemployment benefits are paid from state funds, the unemployment insurance trust fund, not by an employer or employer funds.⁶ Because unemployment benefits are state funds, the Department is the primary responding party in this case.⁷ The Department does not represent the co-respondent in this proceeding, and this brief should not be considered advocacy for Dream It, Inc.

Statement of Facts

Heather Rowan worked for Dream It, Inc. d/b/a Paul Davis Restoration and Remodeling Inc. from September 28, 2006, through November 6, 2010, as an interior and exterior painter and stainer.⁸ Dream it was a licensed general contractor, doing residential remodeling and fire and water clean-up.⁹ In September and October of 2010, Dream It's work began to decline. Rowan's supervisor, Jim Herman, encouraged Rowan to form her own LLC, so that she could work as an independent contractor for Dream It, instead of an employee.¹⁰ Rowan decided to do so, because Dream It had been cutting her hours recently,

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

⁶ Minn. Stat. § 268.069, subd. 2.

⁷ Minn. Stat. § 268.105, subd. 7(e).

⁸ T. 8.

⁹ T. 10.

¹⁰ T. 11-12.

and she thought she could earn the same amount of money in less time.¹¹ On November 9, 2010, Rowan formed her LLC.¹² Dream It then demanded a letter of resignation from Rowan, although she continued to come in to work every day, and did the exact same work that she had previously done.¹³ Rowan did not believe that she could do work for any other company besides Dream It.¹⁴

A month later, on December 9, Rowan turned down a Dream It painting job, because the amount it offered to pay Rowan did not match the square footage of the job.¹⁵ Dream It has not offered Rowan any work since that time, and Rowan has not worked for anyone else since incorporating her LLC.¹⁶

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 Rowan'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.¹⁷

¹¹ T. 11-13.

¹² T. 14.

¹³ T. 10, 14, 34.

¹⁴ T. 15-16, 25.

¹⁵ T. 23-24.

¹⁶ T. 24, 40.

¹⁷ Minn. Stat. § 268.105, subd. 7(d)(1)-(6) (2010).

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 also held in *Stagg v. Vintage Place* that it views the ULJ's "factual findings in the light most favorable to the decision," and that it will not disturb the findings when the evidence substantially sustains them.¹⁹ "Substantial evidence" is the relevant evidence that "a reasonable mind might accept as adequate to support a conclusion."²⁰ The Court of Appeals explained in *Skarhus v. Davannis* that it gives deference to the ULJ's credibility determinations.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 *Nichols v. Reliant Eng'g Mfg., Inc.*, the Court of Appeals made clear that whether an employee quit with a good reason caused by the employer is a legal question, which the Court reviews de novo.²³

¹⁸ *Beyer v. Heavy Duty Air, Inc.*, 393 N.W. 2d 380, 382 (Minn. App. 1986);

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

²¹ 721 N.W.2d 340, 344 (Minn. App. 2006) (citing *Jenson v. Dep't of Econ. Sec.*, 617 N.W.2d 627, 631 (Minn. App. 2000), *review denied* (Minn. Dec. 20, 2000)).

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

²³ 720 N.W. 2d 590, 594 (Minn. App. 2006).

Argument for Ineligibility

An applicant who quits employment is ineligible for all unemployment benefits unless she falls under a statutory exception to ineligibility. This Court has held on multiple occasions that whether an applicant for benefits quit or was discharged is a question of fact.²⁴ The law explains:

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.

Subd. 5. Discharge defined.

(a) A discharge from employment occurs when any words or actions by an employer would lead a reasonable employee to believe that the employer will no longer allow the employee to work for the employer in any capacity...²⁵

Here, Rowan quit her employment at Dream It in order to become an independent contractor and incorporate her own LLC. Indeed, Rowan followed thousands of other construction and remodeling employees who incorporated LLCs in 2009 and 2010, in reaction to a change in the law. Minn. Stat. § 268.035, subd. 9, was repealed effective January 1, 2009, by 2007 Laws Ch. 135, Art. 3, Sec. 42. In its place, the legislature adopted Minn. Stat. § 181.723, subd. 3, which explains that "...for purposes of chapter[] ...268, as of January 1, 2009, an individual who performs services for a person that are in the course of the person's trade, business, profession, or occupation is an employee of that person and that

²⁴ *Nichols v. Reliant Eng. & Mfg.*, 720 N.W.2d 590, 594 (Minn. App. 2006); *Beyer*, 393 N.W. 2d at 382; *Midland*, 372 N.W. 2d at 812.

²⁵ Minn. Stat. § 268.095, subs. 2 and 5 (2010).

person is an employer of the individual.” The amended unemployment insurance statute now contains a cross-reference, under Minn. Stat. § 268.035, subd. 9a, explaining that “[f]or purposes of this chapter, section 181.723 determines whether a worker is an independent contractor or an employee when performing public or private sector commercial or residential building construction or improvement services.”

Minn. Stat. § 181.723, subd. 4 lays out the definitions for employers and independent contractors in the construction industry:

An individual is an independent contractor and not an employee of the person for whom the individual is performing services in the course of the person's trade, business, profession, or occupation only if (1) the individual holds a current independent contractor exemption certificate issued by the commissioner; and (2) the individual is performing services for the person under the independent contractor exemption certificate as provided in subdivision 6. The requirements in clauses (1) and (2) must be met in order to qualify as an independent contractor and not as an employee of the person for whom the individual is performing services in the course of the person's trade, business, profession, or occupation.

This case largely turns on this Court’s decision from earlier this year in *Nelson v. Levy*,²⁶ in which the Court considered the language of Minn. Stat. § 181.723 for the first time. There, the Court held that an individual who incorporates himself as a limited liability corporation, and does work in the construction industry, is not considered an employee of the corporation for which he is doing the work, but is instead considered an independent contractor. In so

²⁶ 796 N.W.2d 336 (Minn. App. 2011).

holding, the Court rejected the Department's analysis and position, and opened the door for any number of employers to suggest, demand, or require its employees to form LLCs and begin working for them as independent contractors.

The Department, as well as other state agencies, have thus watched thousands of individual employees incorporate themselves as LCCs, overnight transforming themselves from employees to independent contractors. These individuals have thus been left without any number of protections, including the right to unemployment insurance. There is no way to know how many employees have been coerced into this course of action. *Nelson v. Levy* was cited in the Legislative Advisory Task Force on Employee Misclassification in noting that the law, under this Court's current interpretation, allows this rampant misclassification of individual employees, while leaving state agencies powerless to address it.²⁷ The Department continues to disagree with the Court's interpretation of 181.723 in *Nelson*, but it will nonetheless apply it. Thus, under this Court's interpretation of the statute in *Nelson*, as of November 9, 2010, Rowan quit her employment and became an independent contractor.

The only question, then, is whether she did so for a good reason caused by her employer, the only statutory exception that might arguably apply. The law explains:

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http://www.doli.state.mn.us/ccld/PDF/Employee_misclassification_report_May2011.pdf, pp. 8-9 (May 13, 2011).

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

- (1) the applicant quit the employment because of a good reason caused by the employer as defined in subdivision 3;²⁸

* * *

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.

* * *

(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.²⁹

Here, Rowan did not quit for a good reason caused by her employer; she chose to form an LLC because her employer suggested that she do so, and she thought that she could earn more money that way. The fact that her employer rather cunningly encouraged her to do so, only a month before it stopped giving her work entirely, does not change the fact that she quit out of a conscious desire to earn more money. She did not complain about any particular condition before quitting, nor has she argued that her employer's working conditions were adverse to her. Rowan quit in order to form an

²⁸ Minn. Stat. § 268.095, subd. 1 (2010).

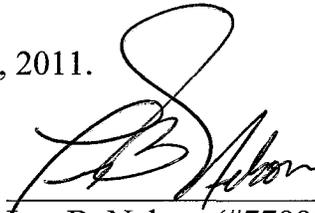
²⁹ Minn. Stat. § 268.095, subd. 3 (2010).

LLC, and while she may not have fully appreciated the ramifications of such a decision, she does not fall under any exception to ineligibility. Under this Court's interpretation of the independent contractor statute, Rowan is ineligible for benefits.

Conclusion

Unemployment Law Judge Peder Nestingen correctly concluded that Rowan quit, and did not fall under any exception to ineligibility. The Department requests that the Court affirm the decision of the Unemployment Law Judge.

Dated this 10th day of October, 2011.



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