

A06-0324

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**STATE OF MINNESOTA**  
**IN COURT OF APPEALS**

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**ADAR YWSWF,**  
*Relator,*  
v.

**TELEPLAN WIRELESS SERVICES, INC.,**  
*Respondent Employer and*

**DEPARTMENT OF EMPLOYMENT AND  
ECONOMIC DEVELOPMENT,**  
*Respondent.*

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**RELATOR'S REPLY BRIEF**

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**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES. ....ii**

**I. The ULJ Failed in her Duties to Assist Pro Se Parties  
and to Conduct an Evidence-Gathering Inquiry. ....1**

**II. The Proposed Evidence Submitted with the  
Request for Reconsideration was Sufficient to Require a Remand. .... 3**

**III. Respondents Make Erroneous Claims About the Standard of Review. .... 5**

**TABLE OF AUTHORITIES**

**CASES**

*Tuff v. Knitcraft Corp.*, 526 N.W.2d 50, 51 (Minn. 1995). . . . .6

**STATUTES**

Minn. Stat. § 14.69(a)–(f). . . . .6

Minn. Stat. § 268.105, subd. 2(c)(1), (2) (Supp. 2005). . . . .3

Minn. Stat. § 268.105, subd. 5a (2004). . . . .5

Minn. Stat. § 268.105, subd. 7 (2004). . . . .5

Minn. Stat. § 268.105, subd. 7(d)(1)–(6) (Supp. 2005). . . . .5

**OTHER AUTHORITIES**

Minn.R., Part 1400.8606, subpart 3.F. . . . .2

Minn.R., Part 3310.2921. . . . .2

**I. The ULJ Failed in her Duties to Assist Pro Se Parties and to Conduct an Evidence-Gathering Inquiry**

Department's brief characterizes this case as solely one of credibility: that if the Employer's witness's testimony is credited, relator quit and should be disqualified. But the Department defends the decision of the ULJ with a series of presumptions and prejudgments, not facts in this record. Rather than gather evidence in a non-adversarial manner, the ULJ here declined to test any of the employer's claims that would have fleshed out Ywswf's strong disagreement. This is below the standard for an administrative law judge conducting a hearing with pro se individuals who are known to be immigrants and non-native speakers of English.

Instead of assessing what were the facts for this employee, the Department uses a presumption: "It would not be at all unusual for an employee on temporary interruption from school to refuse a first-shift position because she intended to return to school and the first-shift position would interfere." DEED Br. 8. But this employee had not been in school for the whole year, because of financial problems, *id.*, so why would she turn down first shift work in order not to conflict with school?

Instead of assessing what this employee intended when she left employment, the Department uses a presumption: "Many students who are temporarily away from school and plan to return do not take first-shift work that will keep them from going back." DEED Br. 8. The ULJ made no effort to determine whether relator was one of these "many students", or was instead a worker who had been laid off and never offered first-

shift work.

The Department also justifies the ULJ's failure to explain or assist with cross-examination by another presumption. It wasn't that the ULJ gave inadequate assistance to a pro se individual, rather the ULJ was "respecting Ywswf's evident ability to participate in a hearing as anyone else would and follow the usual hearing rules." DEED Br. 9. This presumption tries to excuse away the ULJ's duty to determine, based on the facts, whether the individual worker in the hearing knows and understands how to present his or her claim. The hearing is not intended to be adversarial, at least between the worker and the employer, and the ULJ should not rely on having adversarially-minded participants to briskly cross-examine the opposing party. Such a presumption, an expectation of the participants in the hearing, is unjustified both factually, and legally, because it contravenes the stated duty to aid the pro se person in developing their claim. "The referee should assist unrepresented parties in the presentation of evidence." Minn.R., Part 3310.2921.

The Department argues for the bare minimum by the ULJ, but the statute clearly articulates a broader, "evidence gathering" function for the evidentiary hearing. The ULJ may not be merely a passive recipient of what the witnesses say of their own accord.<sup>1</sup>

The Department's presents the novel argument that the ULJ need not make a

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<sup>1</sup> ALJs in the Minnesota Office of Administrative Hearings are required, when conducting hearings, to examine witnesses as necessary to make a "complete record". Minn.R., Part 1400.8606, subpart 3.F.

finding of fact on credibility, but instead can give a “reason”. There is no analysis at all for the suggestion that the ULJ makes something other than a findings of fact, or a conclusion of law. Moreover, the Department’s brief does not explain how the Court should review the “reason” given by the ULJ, as a finding which must be supported by substantial evidence, or as a conclusion of law which is reviewed de novo.

## **II. The Proposed Evidence Submitted with the Request for Reconsideration was Sufficient to Require a Remand**

Relator’s request to the ULJ for reconsideration meets both of the standards in Minn. Stat. § 268.105, subd. 2(c)(1), (2) (Supp. 2005), to trigger the mandatory remand for a new hearing. The new evidence is relator’s college transcript, three notarized statements from co-workers, and two notices of impending lay-off. The ULJ wrote that whether Ywswf was in school or not was not at issue; rather “[w]hat is controlling is that Ywswf conveyed to the director of human resources that she could not accept the first shift work, at the time of the offer, because it conflicted with her school schedule.” The school transcript confirms Ywswf’s testimony that, although she still considered herself a student, she had not attended school during her permanent work for the Employer. This evidence corroborates Ywswf’s testimony that she would not have turned down a first shift job because of a school conflict, as alleged by the employer, because she had not been in school since Fall 2004. As relator testified, she believed she had been tricked out of both her job and her unemployment insurance: she could not fathom the employer’s claim that, despite her financial problems, she would turn down the offer: “[W]hy I refuse

if I have job, I don't refuse because I don't have income, since that day I sit here, I go here about another job, another job, another job, still not." (T. at 15).

This showing that she would have no reason to decline first-shift work because of a conflict with her school schedule, combined with testimony consistent with the affidavits of the three co-workers that they were never offered first-shift jobs, would "likely change the outcome of the decision" because this preponderance of evidence would prevail over the employer's uncorroborated testimony. While the transcript was available at the hearing – and should have been marked as an exhibit, even if the ULJ did not admit the document – the proposed witnesses testimony was not presented because relator did not know her employer would not be truthful. Thus, she had no reason to know that she would need to refute that assertion until after her hearing. The three witnesses testimony, if accepted as true, shows that the employer's claim of offering first shift work was likely false, and it clearly affected the outcome of the hearing. Relator acted expeditiously in obtaining the co-workers statements and submitting them with her request for reconsideration.

The Department's assertions that these statements were somehow in an improper form or that they were not disinterested because the people signing the statements were also seeking benefits are not persuasive. The three people who signed and had statements notarized have nothing to gain in this proceeding. These proceedings operate independently of one another by statute and "[n]o findings of fact or decision or order . . .

may be . . . used as evidence in any separate . . . action . . . regardless of whether the action involves the same or related parties or involves the same facts. Minn. Stat. § 268.105, subd. 5a (2004). And even if a single person, perhaps Ms. Ywswf herself, prepared the statements, they were nevertheless signed and notarized by three individuals whom the employer does not dispute were Nokia employees.

There is no merit to the Department's argument that the ULJ had to become convinced of the truth of relator's proposed new evidence, in some preliminary step, before relator's request for reconsideration could be granted. There is nothing in the statute's language to justify that step. Rather, it is only reasonable for the ULJ to determine whether, if the proposed evidence were true, would it show that the employer's claim was likely false. A similar posture is taken when a court is determining whether a complaint is to be dismissed for failing to state a claim on which relief can be granted: the allegations of the complaint are taken as true. Once relator jumps that hurdle, it is at the remanded evidentiary hearing that the new evidence is tested and cross-examined to see if it holds up under scrutiny. The ULJ erred here in not reopening the hearing.

### **III. Respondents Make Erroneous Claims About the Standard of Review**

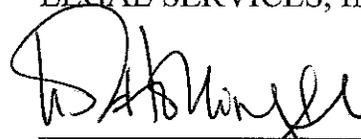
Relator disagrees with both respondents' claims regarding the correct standard of review applied to the ULJ decision by the Court of Appeals. Respondent Commissioner asserts that by its 2005 amendment to Minn. Stat. § 268.105, subd. 7, "the legislature restated the standard of review". DEED Br. at 4. But the change made by Laws 2005, c.

112, art. 2, § 34, inserted into law a standard of review provision that did not exist in the statute before. Compare Minn. Stat. § 268.105, subd. 7 (2004) with subd. 7(d)(1)–(6) (Supp. 2005).

If anything, the Legislature’s amendment, an almost verbatim adoption of the Minnesota Administrative Procedure Act judicial review language from Minn. Stat. § 14.69(a)–(f), signals an intent that judicial review of the Commissioner be conducted in the same manner as review of any other administrative agency decision. To this extent, the respondent Employer’s citation, Resp. Er. Br. at 9, to *Tuff v. Knitcraft Corp.*, 526 N.W.2d 50, 51 (Minn. 1995), appears no longer apposite. The Court in *Tuff* stated that it accorded “particular deference to the commissioner”, rejecting the claimant’s argument that the Commissioner had to explain deviations from the referee’s decision. Now, the appeal process does not include the Commissioner’s review of the ULJ’s decision, and instead of special deference, the ULJ decision is reviewed by the MAPA standard.

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Dated: 5/25/06



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