

No. A06-0324

State of Minnesota
In Court of Appeals

ADAR O. YWSWF,

Relator,

vs.

TELEPLAN WIRELESS SERVICES INC,

Respondent,

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

Respondent.

RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX

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I. LEGAL ISSUES

Under the law, an unemployment law judge (ULJ) is required to assist unrepresented parties in presenting evidence, and to ensure that facts are fully developed. Adar Ywswf was offered the opportunity to cross-examine her employer, was told that this meant she could ask her employer questions, and stated that instead, she wanted to explain why she disagreed with her employer's testimony. Did the ULJ adequately explain or protect her right to cross-examine her employer?

Ywswf offered evidence after the hearing to demonstrate that she was not in school at the time she was offered employment, and the ULJ declined to remand the case on that basis, because whether or not she was actually in school was not the basis of the decision, as the ULJ explained. Did the ULJ err in not remanding the case for another hearing?

The law requires a ULJ to state the basis for credibility determinations where they are critical to a decision. The ULJ stated in this case that the employer's testimony was more credible than that of Ywswf, citing that it was unclear how the employer could have known certain facts if Ywswf had not shared them with the employer as she claimed she didn't. Was this explanation inadequate under the statute, such that the case must be remanded for a new decision to be written?

II. STATEMENT OF THE CASE

This case involves whether Relator Adar Ywsfw is entitled to unemployment benefits. Ywsfw established a benefit account with the Minnesota Department of Employment and Economic Development. A department adjudicator initially determined that Ywsfw quit her employment for other than a good reason caused by her employer, and that she was therefore disqualified from receiving benefits. (D-1)¹ Ywsfw appealed. A de novo hearing was held, and the unemployment law judge (ULJ) affirmed the initial determination. (Appendix to Department's Brief, A3-A7)

Ywsfw filed a request for reconsideration to the unemployment law judge, who affirmed the initial determination. (Appendix, A1-A2)

This matter is before the Minnesota Court of Appeals on a writ of certiorari obtained by Ywsfw under Minn. Stat. § 268.105, subd. 7(a) (2004 and Supp. 2005) and Minn. R. Civ. App. P. 115.

III. STATEMENT OF FACTS

Adar Ywsfw worked for Teleplan Wireless as a permanent employee from February 21, 2005 until October 11, 2005. (T.5) She worked as a tester, and she worked on the second shift. (T.6)

Ywsfw had been working a second-shift position working with Nokia phones with which the employer gradually received less and less work. (T.7) Ten

¹ Transcript references will be indicated as "T." Exhibits in the record will be "D" for the department, with the exhibit number following.

people working on second shift were likely to be affected by the loss of work, and the employer had at the same time new phones to work on from Motorola on the first shift. (T.7) Thus, the HR generalist and the supervisor met with the ten people from the second shift, including Ywswf, and offered them the opportunity to work on the first shift. (T.7) Shirley Curran, of human resources, met with Ywswf personally. (T.8)

When Curran met with Ywswf, she offered her a position on the first shift from 6:00 AM to 2:30 PM. (T.8) Ywswf told Curran that she could not accept the position, because it would conflict with her school schedule. (T.8) Ywswf was then told that the second shift was ending, and that if she would not accept the first-shift position, her employment would end that night. (T.8)

After Ywswf learned that she would not collect unemployment because she had turned down the first-shift position, she called Curran several times to complain, claiming that she had never been offered the first-shift position. (T.10) She also told Curran that she was no longer going to school. (T.10) This was approximately a month after Ywswf left, and the only position that Curran had was a first-shift position repairing phones, and Ywswf turned it down on the basis that she couldn't do it. (T.10)

At the hearing, after Curran testified, the ULJ asked Ywswf whether she had any questions for Curran. (T.11) Ywswf said, "Yes, I strongly disagree." (T.11) The ULJ said, "Okay, but do you have a question, or do you just want to

state your position?" (T.11) Ywsfw responded, "I strongly disagree what she said." (T.11) The ULJ then asked Ywsfw to explain her position, which she did.

IV. ARGUMENT

A. SUMMARY OF ARGUMENT

Ywsfw received a fair hearing. The issue was straightforward and simple: her employer claimed to have offered her a first-shift position; Ywsfw claimed the offer had never been made. The ULJ appropriately offered Ywsfw the opportunity to question her employer, and appropriately gathered evidence. This case was a simple matter of credibility, and the ULJ conducted a fair hearing and concluded that the employer's testimony was credible.

B. STANDARD OF REVIEW

Effective for unemployment law judge decisions issued on and after June 25, 2005 that are directly reviewed by the Court of Appeals, the legislature restated the standard of review at Minn. Stat. § 268.105, subd. 7(d) (Supp. 2005) as follows:

(d) The Minnesota Court of Appeals may affirm the decision of the unemployment law judge or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are:

- (1) in violation of constitutional provisions;
- (2) in excess of the statutory authority or jurisdiction of the department;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) unsupported by substantial evidence in view of the entire record as submitted; or
- (6) arbitrary or capricious.

C. ARGUMENT FOR DISQUALIFICATION

An applicant who quits employment is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subs. 1 and 3 (2004)² provide in pertinent part:

Subd. 1. **Quit.** An applicant who quit employment shall be disqualified from all unemployment benefits except when:

* * *

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

* * *

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.

Whether an applicant for benefits was discharged or quit is a question of fact. *Hollar v. Richard Manufacturing Co.*, 346 N.W. 2d 692, 694 (Minn. App. 1984).³

² Under Laws 2004, ch. 183, sec. 62, the 2004 amendments to Minn. Stat. § 268.095, subd. 1 applies.

³ See also, *Markert v. National Car Rental*, 349 N.W. 2d 859, 861 (Minn. App. 1984); *Larson v. Pelican Lake Nursing Home*, 353 N.W. 2d 647, 648 (Minn. App. 1984); *Midland Electric Inc. v. Johnson*, 372 N.W. 2d 810, 812 (Minn. App. 1985); *Krantz v. Loxtercamp Transport, Inc.*, 410 N.W. 2d 24, 26 (Minn. App. 1987); *Shanahan v. District Memorial Hospital*, 495 N.W. 2d 894, 896 (Minn. App. 1993); and *Goodwin v. B P S Guard Services, Inc.*, 525 N.W. 2d 28, 29 (Minn. App. 1994).

The statute defines “quit” and “discharge” at Minn. Stat. § 268.095, subds. 2 and 5 (2004). Those subdivisions are 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.

(b) An employee who has been notified that the employee will be discharged in the future, who chooses to end the employment while employment in any capacity is still available, shall be considered to have quit the employment.

* * *

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. * * *.”

Ywswf does not challenge that if her employer’s testimony is credited, she quit her employment under the statute, and she does not request reversal. She asks only for remand based on the procedural issues explained below.

D. PROCEDURAL ISSUES

1. The ULJ did not fail in any general duty to assist Ywswf.

Ywswf first claims that the ULJ “made no effort to assist” her. Her first claim is that her right to cross-examine the employer was not adequately explained to her. This claim is baffling. The ULJ asked her whether she wanted to ask the employer any questions, and when she stated that she disagreed with the employer’s testimony – a very common response for applicants who are offered the opportunity to question their employers – the ULJ again clarified that she had the right to ask the employer questions, which was separate from offering her own testimony. It is not clear what Ywswf believes could or should have been said to

her in order to “explain what this right meant.” There is no indication that Ywswf was incapable of understanding what it means to ask a person a question, nor did she indicate that she did not understand. Telling her that this was her opportunity to ask Curran questions was the plainest and best explanation available. This is what applicants and employers are typically told – that they may ask the other parties questions. The ULJ is not expected to *force* the applicant to ask questions, and it is not surprising that parties often decline to question each other, especially since the ULJ typically begins with thorough questioning of her own.

There is then the strange claim that “the ULJ did not undertake to cross-examine the employer’s witness.” (Rel. Br. 10) It is not even clear what this means, as the ULJ questioned the employer extensively to bring out the facts of the case. There is no requirement that the ULJ assume an adversarial role and, in addition to asking the questions that she believes are necessary to fully develop the evidence, “cross-examine” a witness in some combative sense.

The other major issue as to the evidence taken at the hearing is Ywswf’s school transcript, which she claimed – and now claims – would now show that she was not actually in school during the semester at issue, although she admits that she was in school for a long period prior to that time and characterized herself at the time of the hearing as “going to school,” but taking a couple of semesters off due to financial problems.

As the ULJ explained in her order responding to the request for reconsideration, the issue here is not whether she actually was or was not in

school. The issue is whether she was offered a first-shift position and turned it down to accommodate her school plans. It would not be at all unusual for an employee on a temporary interruption from school to refuse a first-shift position because she intended to return to school and the first-shift position would interfere. The transcript that Ywsfw submits with her brief shows that she was in school in Fall 2002, Spring 2003, Fall 2003, Spring 2004, Summer 2004, and Fall 2004. She expressed at the hearing that she still considered herself to be in school, just not at the moment.

The fact that Ywsfw was not in school at the moment when the offer was made doesn't mean the offer wasn't actually made. She made it clear at the hearing that she still considered herself to be in school, and was temporarily interrupted from going because of economic problems. (T.13) The transcript doesn't prove anything in particular, other than that Ywsfw was taking a couple of semesters off, just as she said she was. The ULJ did not deny that, nor did she make a finding that Ywsfw was in school at the time that she refused the position. 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.

Ywsfw's brief also makes unsupported and inaccurate comments about the fairness of the hearing in general, most of which evaporate upon reference to the actual transcript. For instance, she claims that she was "cut off," citing page 8 of the transcript, where the ULJ simply asked her to be quiet while Curran was testifying. If the suggestion is that the ULJ must allow everyone to talk

simultaneously in order to afford a fair hearing, that suggestion is impractical, to say the least. It is entirely routine for ULJs to ask parties not to talk over each other's testimony; this is not "cutting off" anyone's efforts to be heard. Similarly, the other cite is to page 16 of the transcript, where Ywswf interrupted Curran while Curran was answering a question, and the ULJ asked her to hold her testimony for a moment and allow Curran to finish. The effort to paint either of these situations as unfair to Ywswf is unconvincing.

Ywswf also claims in her brief that the hearing was unfair because she was "not a native speaker of English." Not being a native speaker of English does not render an individual unable to participate in a hearing on her own behalf. Her counsel may believe that her accent is difficult to understand, but her testimony was apparently understood by the employer and the ULJ, and her testimony was transcribed successfully.

Simply put, Ywswf is not a child. She had completed several semesters of college as of the time she attended the hearing. There is no indication that she was incapable of understanding what it means to "ask questions," or that she could not speak and understand English enough to participate, or that she was incapable of following the same procedure that others follow and needed to be given free rein to interrupt the testimony of others in order to participate. In short, what her brief characterizes as inadequate assistance by the ULJ was simply the result of respecting Ywswf's evident ability to participate in a hearing as anyone else would and follow the usual hearing rules. Absent some indication that an applicant is not

capable of participating or understanding the hearing, the mere fact that she is not a native speaker does not require the ULJ to presume that she cannot participate intelligently given the same guidance and instructions given to others.

2. The ULJ did not fail to make required credibility findings.

Under a fairly new provision, the ULJ in a case where testimony is credited or not, the ULJ “must set out the reason for crediting or discrediting that testimony.” Minn. Stat. § 268.105, subd. 1(c) (Supp. 2005). The statute does not require a “finding of fact,” as Ywswf’s brief suggests, but simply “the reason.” The ULJ’s decision in this case clearly explains the reason for the credibility determination.

The credibility determination in this case ultimately involved the matter of whether a discussion did or did not take place in which Curran offered Ywswf a first-shift position, and Ywswf refused it on the basis that it conflicted with her school schedule. What ultimately swayed the ULJ was the testimony from the employer that she would have had no way of even knowing that Ywswf was in school if the conversation had never happened. The ULJ made this clear in her decision, in which she discussed credibility and stated that she did not find Ywswf’s testimony that the offer was not made to be credible in light of two things. First, the fact that the employer testified that three other employees from Ywswf’s shift had actually taken jobs on the first shift as a result of the offers – testimony that Ywswf certainly could not refute. Second, the ULJ repeated a point she had made in the hearing, which was that it wasn’t clear how Curran would

even have known Ywswf was in school if the discussion about the possible first-shift position had never taken place.

This is precisely the sort of testimony that makes a judge determine – not based on an “unarticulated and subjective basis,” but based on the testimony – that one version of events is more credible than another. Does one version make more sense, or does the other? In Ywswf’s version of events, Curran somehow knows that she is in school enough to make that claim when Ywswf applies for benefits, but there is no explanation of how she would actually know this. In Curran’s version of events, the explanation for how she knew is clear: Ywswf told her when they discussed the first-shift job.

Determinations of credibility are often made based on the subtleties of testimony. There are rarely guarantees that one person or the other is telling the truth. When the ULJ identifies a subtlety in the facts – here, the fact that Curran had information that it appeared she got from Ywswf during a discussion Ywswf denied that they ever had – that is the sort of matter on which ULJs rest determinations of credibility. The statute does not require that the reasons meet a particular standard of certainty; it simply requires that the ULJ state what her reason was. Here, she did so.

Ywswf’s brief plainly misrepresents the record when it attacks the ULJs discussion of this issue by claiming that Ywswf testified that she “discussed going to school with Curran” prior to the time she left. This testimony is invented out of whole cloth by Ywswf’s counsel. Ywswf implied that Curran could have known

she was in school, but never testified or even hinted that she had “discussed going to school with Curran,” and this crucial misrepresentation to the Court should be disregarded. Ywswf’s testimony as to how Curran would have known she was in school if the conversation Curran testified to had never happened is as follows, in its entirety: “I was working there, as I said, two years. I started that company, November 1, 2003 until February 21. I was working temporary one year and four months. All that time I was attending school, I’m not denying. I have here my transcript in school, you have my permission to ask.” (T.13) At most, Ywswf suggested that Curran might have been able to know that she was in school, but nowhere is there anything that could even be stretched into a claim that she “discussed going to school with Curran.”

As also explained above, contrary to the assertions in Ywswf’s brief, the transcript showing she was not actually in school at the time, but was taking a couple of semesters off – which was her own testimony – would not demonstrate that Curran was lying about the offer of first-shift work. Curran had no way of knowing whether Ywswf was actually in school, nor did she claim that she knew that. She knew only that she had offered the position, and that it had been refused on the basis that Ywswf was “in school.” Ywswf testified at the hearing that she was “going to school” as well, even though she was temporarily away. “I am going to school but not now – semester, two semesters, last semester I didn’t attend school.” (T.13) She described herself as “going to school” to the ULJ as well, even though she was taking a year off, as many students do at some point.

That she was not actually attending does not resolve the credibility dispute over the discussion, and the fact that the ULJ did not directly address it among her reasons does not require remand of the case.

Ywswf's brief makes the rather surprising assertion that the ULJ should discuss whether someone has an accent or speaks good English when discussing credibility. This is an intriguing idea, but far more likely to inspire lawsuits than improved decision-making. If the implication is that the ULJ has to specifically certify that she did *not* consider the fact that someone had an accent in assessing credibility, there is certainly no such requirement, any more than there is for judges. Parties are not entitled to a presumption that a fact-finder has decided matters of credibility based on who has an accent or doesn't speak perfect English, and ULJs are not required in every case to state something along the lines of, "Credibility was not determined based on the fact that the applicant has an accent." Ywswf may also be suggesting that the ULJ is required to declare that she has adjusted her evaluation of credibility to account for some presumption that any non-native speaker's testimony would automatically have been more credible if presented in the speaker's native language. Ywswf can point to no authority requiring such odd declarations, nor does she explain how much of an accent a person would need to have, or how imperfect her English would have to be, before the ULJ is somehow required to discuss how her English skills impacted the credibility determination.

Finally, Ywswf repeats the assertions discussed above that she was not allowed to “tell her side of the story,” citing only to the points at which she was asked not to interrupt her employer’s answers or talk over her during her testimony. This allegation is without merit.

3. The ULJ did not err in declining to remand the case when Ywswf requested reconsideration.

Ywswf’s final claim is that the ULJ erred in not remanding her case based on the evidence she submitted when she requested reconsideration.

First, it should be noted that Ywswf’s brief is premised on an incorrect statement of the law prior to the statutory amendments in 2005. Contrary to what the brief states, it has always been the case that the SURJ (and before that, the commissioner’s representative) could consider new evidence during an appeal from a ULJ decision for the purpose of whether remand was appropriate. No change in the law was required to allow new evidence to be considered for that limited purpose; that has always been the law.

The WARN notices the employer provided in anticipation of previous layoffs that did not occur are not relevant. Neither of these notices concerns the layoff that ultimately occurred. The original May 18, 2005 notice references an end date of August 1, 2005, and the August 2, 2005 notice extends that notice for another 14 days, stating that the conditions “may change due to subsequent events beyond our control.” (Rel. Br. App. 18) Ywswf worked for another two months after the last date that was ever referenced. The WARN notice apparently expired

and layoffs were not required at that time. Curran's testimony was that the first-shift position was based on Motorola business that was ramping up in October. Whether other positions were available in May or August says nothing about whether they were available in October.

Next are the statements Ywswf submitted from her co-workers claiming that they lost their second-shift jobs when the work on the Nokia line ended – which is not in dispute – and that “there was no other option.” It is not clear who drafted these statements, but they are in large part identical in wording. The statements are concerning, as they appear in places to attempt to offer “testimony” that the declarant is clearly not able to provide, as in the statement of Abdule Abdi, who says, “I testify that she didn't quit or refuse any opportunity that was offer to her on the last day the work ended.” (Rel. Br. A-20). Abdi cannot “testify” about what was or was not offered to Ywswf in private meetings, and it is troubling that the statement seems to have been prepared simply to contradict the judge's conclusions, whether or not there was any foundation for the statements being made.

Under Minn. Stat. § 268.105, subd. 2 (c) (Supp. 2005), the ULJ is directed to order a new hearing based on new evidence if “an involved party shows that evidence which was not submitted at the evidentiary hearing: (1) would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence; or (2) would show that the evidence that was submitted at the evidentiary hearing was likely false and that the likely false

evidence had an effect on the outcome of the decision.” No good cause for not presenting the co-workers’ statements at the first hearing has been shown or is argued in Ywswf’s brief (which oddly does not even address this standard), so only the second part of the provision is at issue. The ULJ was required to order a new hearing only if the evidence “would show that the evidence that was submitted at the evidentiary hearing was *likely false*” (emphasis added). Unless the ULJ believed that supportive after-the-fact affidavits from co-workers who state that they are also attempting to get unemployment benefits would show that Curran’s testimony was “likely false,” no new hearing was required.

It cannot be said that after-the-fact statements from co-workers with a vested interest in the outcome (as they are claiming benefits as well) would show that Curran’s testimony was “likely false.” An employee will always be able to present something more upon request for reconsideration that could potentially reopen the issue of credibility if that evidence were to be believed, but short of evidence convincing enough to demonstrate that evidence submitted at the hearing was “likely false,” an applicant who failed to provide evidence at an earlier hearing is not entitled to another hearing.

If this court were to conclude that any piece of evidence that supports one person’s version of events rather than another’s is adequate to show that the person whose testimony was originally found credible is now “likely false,” the department would be hard-pressed to ever conclude any case. This is why the standard is intentionally set high – “likely false,” as opposed to “in doubt” or

“possibly false” or “open to further challenge.” It is certainly possible that Curran’s testimony was false; it has not been shown, however, based on the three largely identical statements from co-workers solicited by Ywswf that it was “likely false.”

This case is ultimately simple. It is a credibility matter between the employer and the employee. Curran claimed that she had a conversation with Ywswf that Ywswf claimed never occurred. It is impossible to be certain one way or the other who is telling the truth, but the ULJ is charged with determinations of credibility, and she made that determination appropriately in this case.

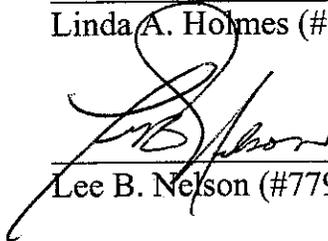
V. CONCLUSION

The unemployment law judge correctly concluded that Ywswf quit her employment and that no statutory exception to disqualification applied. She therefore was disqualified from receiving benefits. The department asks that the Court affirm the agency decision.

Dated this 12th day of May, 2006.



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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) (with amendments effective July 1, 2007).