

STATE OF MINNESOTA
IN COURT OF APPEALS

Superior Development, Inc.,

Relator,

vs.

RELATOR'S BRIEF ON THE MERITS

No. A11-1888

Daniel Haugen,

Respondent,

Department of Employment and
Economic Development,

Respondent.

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**CERTIFICATE REGARDING
WORD COUNT**

No. A11-1888

Daniel Haugen,

Relator,

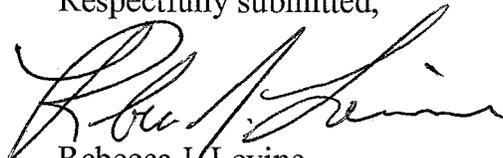
Department of Employment and
Economic Development,

Relator.

Pursuant to Minnesota Rule of Appellate Procedure 132.01, subd. 3,
undersigned counsel for Relator hereby certifies that the number of words in the
attached Relator's Brief on the Merits, excluding the Table of Contents and Table
of Authorities, as counted by the Microsoft Word program (Version 2003), is
11,522.

January 17, 2012

Respectfully submitted,



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Counsel for Relator

STATEMENT OF ISSUES

1. Is the ULJ's conclusion that respondent employee Haugen quit his employment with good reason caused by relator employer, thus making him eligible for UI benefits, supported by substantial evidence in view of the entire record as submitted?
2. Does Minn. Stat. Sec. 481.02, subd. 2 afford appealing employers in UI appeals in this court the right to self-representation without aid of counsel?
3. Do the differing financial and attorney requirements for appealing employees and appealing employers, contained in Minn. Stat. Sec. 268.105, subd. 7, violate equal protection principles?

STATEMENT OF THE CASE

Respondent Daniel Haugen was employed by relator employer, Superior Development, Inc., for two and a half years before he quit on June 29, 2011, after his scheduled hours were reduced. Relator brings this certiorari appeal to challenge the determination by an unemployment-law judge (ULJ) that Haugen is eligible to receive unemployment benefits because he quit his employment with a good reason caused by his employer.

Relator also contends that the prohibition on the ability of corporations to appear *pro se* in this court violates statutory law and concepts of fair play and equal protection. In addition, relator contends that the scheme established under Minn. Stat. Sec. 268.105,

subd. 7, violates equal protection by affording different privileges to appealing employees and employers regarding the requirement to pay fees and costs on appeal of the decision of an ULJ.

FACTUAL STATEMENT

Haugen worked for relator from August 18, 2008, to June 29, 2011. (Appendix at A-10, hereinafter cited as “A-__”) Throughout his over two and a half years of employment, Haugen earned \$15 an hour plus a two percent commission on all rents collected (A-10), as a property manager for relator. Haugen’s job was to manage about 15 single family and duplex rental units owned by relator, as well as an 18 unit apartment building. (A-10)

Haugen was originally hired to work 28 hours a week. Within a month of starting employment with relator, his hours increased to 40 hours a week due to the press of work, which he maintained until relator reduced his hours to 32 hours a week in November 2010. (A-10) However, even after that time, to carry out his job duties, Haugen sometimes exceeded 32 hours of paid work a week, sometimes even working as much as 40 hours a week. (A-10)

In late April 2011, relator reduced Haugen’s hours to 24 hours a week, stating that relator was losing money and could not longer afford to employ Haugen for more than 24 hours a week. (A-10)

Haugen filed a claim for unemployment benefits (which is not a part of this appeal) for his reduced work schedule to the extent it fell below 32 hours in any given week. (A-48) A telephone hearing before an ULJ was conducted on that claim on June

29, 2011. (A-47-48) Immediately after the hearing was concluded, Haugen telephoned relator and said that he was quitting. (A-47) Later that same day, Haugen hand-delivered a written note to relator confirming that he was quitting immediately and asking for his last paycheck. (A-49-50)

Haugen again applied for unemployment benefits, this time after he quit on June 29, 2011, stating the reduction in hours from 32 to 24 as his primary reason for quitting. (A-66) He was determined to be ineligible because he quit employment for personal reasons. Haugen appealed. After a hearing, the ULJ found that he had a good reason to quit caused by his employer. The ULJ concluded, therefore, that Haugen is eligible for unemployment benefits.

Relator requested reconsideration. The ULJ affirmed. This appeal follows.

ARGUMENT

I. A. The UI Statutory Framework of Chapter 268

Subject to certain exceptions, an applicant who quits employment is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 1 (2010). An exception applies when an applicant quit employment for a good reason caused by the employer. *Id.*, subd. 1(1).

(a) A good reason caused by the employer for quitting is a reason that:

- (1) is directly related to the employment and for which the employer is responsible;
- (2) is adverse to the worker; and
- (3) 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.

Id., subd. 3.

If the employee quits due to a good reason caused by the employer, the employee first “must complain to the employer and give the employer a reasonable opportunity to correct the adverse working conditions” before the reason can be considered a valid one.

Id., subd. 3(c).

On appeal, this court must examine whether Haugen’s reason for quitting constitutes a good reason caused by relator. Whether an applicant had a good reason to quit caused by his employer is a legal question, which this court reviews *de novo*. *Peppi v. Phyllis Wheatley Cmty. Ctr.*, 614 N.W.2d 750, 752 (Minn. App. 2000). “In order to constitute good cause, the circumstances which compel the decision to leave employment must be real, not imaginary, substantial not trifling, and reasonable, not whimsical; there must be some compulsion produced by extraneous and necessitous circumstances.”

Ferguson v. Dep’t of Emp’t Servs., 311 Minn. 34, 44 n.5, 247 N.W.2d 895, 900 n.5 (1976). A good reason caused by the employer to quit exists when working conditions combine to create “unreasonable demands of [the] employee that no one person could be expected to meet.” *Zepp v. Arthur Treacher Fish & Chips, Inc.*, 272 N.W.2d 262, 263 (Minn. 1978).

The court views the ULJ’s factual findings in the light most favorable to the decision, giving deference to the credibility determinations made by the ULJ. In doing so,

the court will not disturb the ULJ's factual findings when the evidence substantially sustains them. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

When reviewing the decision of a ULJ, this court 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.

Minn. Stat. § 268.105, subd. 7(d).

I. B. Haugen Did Not Give his Employer an Opportunity to Address the Alleged Adverse Condition and He Does not Qualify for the Statutory Exception

As an initial matter, it is clear that Haugen did not give his employer a reasonable opportunity to correct the asserted hardship caused to him by the reduction in his work schedule to 24 hours a week in April 2011. Haugen concedes that he never told his employer that he was considering quitting before he actually quit on June 29, 2011. (A-65, 69) Rather than ask his employer to address the situation, he simply telephoned relator and said he was quitting and later that same day hand-delivered a written resignation letter, noting how much he was owed as his final paycheck. (A-47-50) For

this reason alone, Haugen cannot qualify for this statutorily created exception. *See* Minn. Stat. Sec. 268.095, subd. 3(c).

In addition, Haugen testified he was upset with the attitude of his superiors toward him and his work and felt they not longer trusted him. (A-69) Generally, a poor relationship with a manager or supervisor does not constitute a good reason to quit. *Portz v. Pipestone Skelgas*, 397 N.W.2d 12, 14 (Minn. App. 1986) (noting that good cause “does not encompass situations where an employee experiences irreconcilable differences with others at work or where the employee is simply frustrated or dissatisfied with his working conditions”). An employee’s frustration or dissatisfaction with his job or working conditions, or his or her hurt feelings, does not constitute a good reason to quit caused by the employer. *Id.* An employee does not have a good reason to quit caused by the employer when there is merely discord between the employee.” *Id. Accord Bongiovanni v. Vanlor Invs.*, 370 N.W.2d 697, 699 (Minn. App. 1985) (concluding that alleged harassment was properly viewed as personality conflict). A good reason caused by the employer is one that is “real, not imaginary, substantial not trifling, and reasonable, not whimsical.” *Haskins v. Choice Auto Rental, Inc.*, 558 N.W.2d 507, 511 (Minn. App. 1997). *See Werner v. Med. Prof’ls LLC*, 782 N.W.2d 840, 843 (Minn. App. 2010) (“To compel is to cause or bring about by force, threats, or overwhelming pressure.”), *review denied* (Minn. Aug. 10, 2010).

While Haugen’s alleged workplace perceptions may have been good personal reasons and may actually have motivated in part his quitting employment with relator,

they do not rise to the level of what our legislature has defined as a good reason caused by his employer.

Because Haugen quit his employment and because his reason for quitting does not fit within any of the statutorily created exceptions entitling his to unemployment compensation, his claim must fail.

I. C. The Reduction in Scheduled Weekly Hours was Not a Good Reason to Quit Employment with Relator

Haugen claimed before the ULJ that relator Superior Development gave him good reason to quit by reducing his weekly work schedule of hours from 32 to 24 in April of 2011. He continued to work for two months after his work schedule was reduced to 24 hours, quitting on June 29, 2011. (A-70)

In some cases a pay decrease may influence a reasonable employee's decision whether to remain employed and Haugen faced a reduction in scheduled work hours beginning in April 2011. But the reduction in pay or hours must be the real reason the employee quit, and not one asserted as an after-the-fact make weight rationale.

The record makes clear that Haugen quit primarily because his feelings were hurt and he was offended by what he considered to be unwarranted comments made by the owner of relator during a hearing before an ULJ (not part of this appeal) on June 29, 2011, when Haugen was seeking UI benefits to compensate him for the loss of income attributable to his reduction in scheduled hours from 32 to 24 in April 2011.

Haugen testified at the hearing: "But, when it come down to the 24 hours, that was basically my breaking point. I could not make it on that. I knew I couldn't and I told

them that. And that's really the main reason I quit because, and then everything else got piled on after that. A felt they lost trust in me for all this stuff and value I gave of myself, I felt that the were almost forcing me to quit is sense by making the conditions worse. I thought we had a very good relationship with each other. . . . I felt I had a relationship with him [relator's owner, Mr. Olson], but after that April meeting, maybe it was my perception, but I felt things changed. The conditions of the work changed." (A-69)

Within ten minutes after the conclusion of the hearing before the ULJ on June 29, 2011, Haugen called relator and quit. (A-47)

Haugen alleges that he quit because of a reduction in scheduled work hours, but the record demonstrates that this was not his real reason for quitting. Haugen testified that he did not quit immediately after his scheduled hours were reduced from 32 to 24 because "I thought I'd give it a try and see what happens." (A-70) Haugen worked under the reduced schedule for two months, but quit immediately after the UI hearing on his wage claim because he felt relator no longer had any trust in him. (A-69)

The plain language of the statute demands that the record support the conclusion that Haugen quit "because of" the adverse changes. *See* Minn. Stat. § 268.095, subd. 1(1) (stating that the employee must "quit the employment because of a good reason caused by the employer."). Therefore, Haugen's argument that the ULJ did not err in not applying the average reasonable worker standard is without merit. Because the record does not support the ULJ's factual findings regarding Haugen's reason for quitting, the ULJ's decision must be reversed.

I. D. The Statutes Provide a Remedy for Employees Whose Scheduled Work Falls Below 32 Hours a Week and It is Not Quitting Employment

But even if the ULJ's factual finding that Haugen quit because of a reduction in scheduled work hours is upheld on appeal, Haugen's claim for benefits must still fail.

Haugen argues that the reduction in scheduled work hours (from 32 to 24 a week) gave him good cause to quit. A substantial *wage deduction* may provide an employee with a good reason for quitting if under Minn. Stat. Sec. 268.095, subd. 1 (a) (3) "would compel an average, reasonable worker to quit and become unemployed rather than remaining in the employment."

Prior to August 1, 2004, Minn. Stat. Sec. 268.095, subd. 1 (c) provided that: "A substantial adverse change in the wages, hours, or other terms of employment by the employer shall be considered a good reason caused by the employer for quitting unless the change occurred because of the applicant's employment misconduct." *See Rootes v. Wal-Mart Associates, Inc.*, 669 N.W.2d, 416, 418-19 (Minn. App. 2003).

In 2004, the legislature eliminated this provision and thereby repealed presumption that an employee acts reasonably merely because he quits employment as the result of a "substantial adverse change in . . . wages, [or] hours. . . ." *Id.* The statutory scheme now requires that the "analysis required [to determine the reasonableness of an employee's decision to quit employment] . . . must be applied to the specific facts of each case." Minn. Stat. Sec. 268.095, subd. 1(b). No longer is an employee presumed to act reasonably whenever he or she quits because of a reduction in

wages or hours. Instead, the question is whether the average, reasonable person, when faced with a similar choice, would have chosen to remain employed. *Id.*¹

¹ The 2004 amendment to Minn. Stat. Sec. 268.095, subd. 3, is as follows:

Sec. 63. Minnesota Statutes 2003 Supplement, section 268.095, subdivision 3, is amended to read:

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; ~~and~~

~~(2) that is adverse to the worker; and~~

~~(2) (3) that is significant and 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.

~~(e) (d) A substantial adverse change in the wages, hours, or other terms of reason for quitting employment by the employer shall not be considered a good reason caused by the employer for quitting unless the change if the reason for quitting occurred because of the applicant's employment misconduct.~~

~~(d) (e) Notification of discharge in the future, including a layoff due to lack of work, shall not be considered a good reason caused by the employer for quitting.~~

~~(e) (f) An applicant has a good reason caused by the employer for quitting if it results from sexual harassment of which the employer was aware, or should have been aware, and the employer failed to take timely and appropriate action. Sexual harassment means unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other conduct or communication of a sexual nature when:~~

~~(1) the applicant's submission to the conduct or communication is made a term or condition of the employment;~~

~~(2) the applicant's submission to or rejection of the conduct or communication is the basis for decisions affecting~~

Here, the record reveals that the wage deduction was neither substantial nor unwarranted. Haugen was originally hired on a part-time basis to work 28 hours a week. (A-10, 68) His actual weekly hours worked often exceeded that amount between late 2008 and April 2011 due to the press of business. (A-10) So when relator reduced Haugen's hours to 24 in April 2011 the reduction was only four hours fewer than the originally agreed on amount of 28 weekly work hours between Haugen and relator. This amounts to a 14% reduction in scheduled hours (28 to 24). There was no understanding or agreement at the time Haugen was hired that the job would eventually morph into a full-time 40 hours a week job. The press of business and relator's acquiescence in the increased hours worked by Haugen did not bind relator to a permanent obligation to provide Haugen full-time employment at 40 hours a week. Nor did Haugen accept the

employment; or

(3) the conduct or communication has the purpose or effect of substantially interfering with an applicant's work performance or creating an intimidating, hostile, or offensive working environment.

(f) (g) The definition of a good reason caused by the employer for quitting employment provided by this subdivision shall be exclusive and no other definition shall apply.

[EFFECTIVE DATE.] This section is effective August 1, 2004, and applies to all determinations and decisions issued by the department on or after that date.

Minn. Laws 2004, chap. 183, sec. 63. (emphasis in original)

Decisions under the pre-2004 version of the statute include: *Sunstar Foods, Inc. v. Uhlendorf*, 310 N.W.2d 80, 84-85 (Minn. 1981) (26% decrease); *Scott v. Photo Ctr., Inc.*, 306 Minn. 535, 536, 235 N.W.2d 616, 617 (1975) (25%); *McBride v. LeVasseur*, 341 N.W.2d 299, 300 (Minn. App. 1983) (30%).

job with relator in August 2008 in any reliance on any such promise or understanding. The hours rose and fell weekly with the requirements of the job. The evidence reasonably tends to sustain the implicit finding that the parties did not modify the employment agreement.

Moreover, an “employer . . . [has] the right to require . . . [an employee] to accept reassignment to his old job if those payments and the new job were intended to be ‘temporary’ or experimental. Such reassignment . . . was not a substantial change in the terms of employment such that . . . [the employee] had good cause for quitting his employment.” *Rutten v. Rockie Intern., Inc.*, 349 N.W.2d 335, 336 (Minn. App. 1984).

Dissatisfaction with compensation or hours, when the rate of pay or amount of hours is within the employee’s agreement, does not constitute good cause to quit. *See Ryks v. Nieuwsma Livestock Equip.*, 410 N.W.2d 380, 382 (Minn. App. 1987) (no good cause to quit job shown where evidence failed to show that employer breached employment agreement).

Moreover, it is inherently unreasonable and against public policy for an employee subject to a four hour per week reduction in scheduled hours (from 28 hours to 24 hours), or even from 40 hours to 24 hours, to quit employment, when the UI laws provide a remedy for any resulting reduction in pay.

Since 2004, the legislature has provided for UI benefits for employees whose scheduled hours are reduced to below 32 hours a week. Section 268.035 was amended in 2004 to read as follow:

268.035, Subd. 26. **Unemployed.**

An applicant is considered "unemployed" (1) in any week that the applicant performs less than 32 hours of service in employment, covered employment, noncovered employment, self-employment, or volunteer work; and (2) any earnings with respect to that week are less than the applicant's weekly unemployment benefit amount.

Minn. Laws 2004, chap 183, sec. 62. (emphasis in original)

Moreover, section 268.085 provides:

268.085 ELIGIBILITY REQUIREMENTS.

Subdivision 1. Eligibility conditions.

An applicant may be eligible to receive unemployment benefits for any week if:

.....

(3) the applicant was unemployed as defined in section 268.035, subdivision 26;

.....

Subd. 2. Not eligible.

An applicant is ineligible for unemployment benefits for any week:

.....

(6) that the applicant is performing services 32 hours or more, in employment, covered employment, noncovered employment, volunteer work, or self-employment regardless of the amount of any earnings; or

Minn. Stat. Sec. 268.085. (emphasis added)

The fact that UI benefits are available to an employee whose hours are reduced to fewer than 32 hours demonstrates that it is unreasonable for an employee in Haugen's circumstances, whose hours are reduced to 24 hours and who files for UI benefits for the

difference (as Haugen did in the UI hearing held on June 29, 2011) to chose to become unemployed instead of continuing to work the 24 hours scheduled hours and collect UI benefits for the difference resulting from the reduction in scheduled hours.

Because the record shows that the reduction was not substantial and was based on a valid assessment of relator's needs in light of available financial resources, Haugen acted unreasonably in quitting instead of continuing to work 24 hours a week and collect UI benefits for the difference. As a result, respondent Haugen did not have good reason to quit attributable to his employer and is disqualified from receiving unemployment benefits.

The ULJ's conclusion that Haugen quit his employment with good reason caused by relator is unsupported by substantial evidence in view of the entire record as submitted and thus must be reversed and Haugen found to be ineligible for UI benefits. Because the evidence does not supports the ULJ's decision that Haugen quit his job without good reason attributable to his employer, the ULJ's decision must be reversed.

II. The Legislature Has Decreed that Corporations May Appear without Counsel in Proceedings in the Court of Appeals

The legislature has in no uncertain terms provided that corporate employers, like relator, may appear in this court without incurring the expense of retaining counsel.

Relator filed a petition for certiorari herein by mail on October 17, 2011, which was within the time for appeal seeking review of an order issued by the ULJ on

September 15, 2011. Proof of service on both respondents was also filed, along with a check payable to the clerk of court for the required filing fee of \$550.

On October 19, 2011, *sua sponte*, the clerk's office contacted relator and said that the papers had to be refiled because they had not been signed by a licensed attorney. Relator complied the same day and conforming papers, signed by a licensed attorney, were filed by mail on October 19, 2011.

On October 24, 2011, the clerk's office returned the first set of appeal papers to relator, but kept the filing fee check.

After briefing by the parties, on November 23, 2011, the court filed an Order allowing the following of the second attorney signed and initiated petition for certiorari herein to proceed. (A-5)

In Minnesota, the supreme court has held that a corporation must be represented by an attorney in legal proceedings in the district courts and before the supreme court. *Nicollet Restoration, Inc. v. Turnham*, 486 N.W.2d 753, 754, 756 (Minn. 1992). *See also Save Our Creeks v. City of Brooklyn Park*, 699 N.W.2d 307, 309-10 (Minn. 2005) (stating that under Minnesota common law, a corporation must be represented by an attorney in legal proceedings).

In *Nicollet Restoration*, the supreme court rejected the argument that Minn. Stat. Sec. 481.02, subd. 2, authorized a corporation to appear by or through a non-attorney agent. *Nicollet Restoration, Inc. v. Turnham, supra*, 486 N.W.2d at 755. The court stated that under the common law, a corporation still must be represented by a licensed attorney when appearing in district court because "a careful reading of Minn. Stat. § 481.02, subd.

2,” does not permit an officer, employee or agent appearing on behalf of a corporation in district court to be a non-attorney. *Id.* The court further noted that “[e]ven assuming that Minn. Stat. § 481.02, subd. 2, could be construed to permit a corporation to appear by or through a non-attorney agent, such a construction would raise serious constitutional problems.” *Id.*

The court then stated that under Article III, section I, of the Minnesota Constitution, the power to decide who may properly practice law before the courts of this state is vested solely in the judiciary. *Id.* Thus, the court held that “legislative enactments which purport to authorize certain classes to practice law in the courts of this state are not controlling upon the judiciary. As such, we reaffirm our conviction that a corporation must be represented by a licensed attorney when appearing in district court.” *Id.* at 756. The rule applies equally to limited liability corporations, such as relator. *301 Clifton Place L.L.C. v. 301 Clifton Place Condo. Assn.*, 783 N.W.2d 551 (Minn. App. 2010).

Relator contends that Minn. Stat. Sec. 481.02, subd. 2, does, in fact, allow corporations to appear in actions in all Minnesota state courts in which they are named parties. But, putting aside proceedings in the district courts and the supreme court, both of which courts were created by the state constitution, the situation is fundamentally different in the court of appeals, which is a creature solely of legislation.

Article VI, section 1 of the state constitution, reads as follows:

Section 1. **JUDICIAL POWER.** The judicial power of the state is vested in a supreme court, *a court of appeals, if established by the legislature*, a district court and such other

courts, judicial officers and commissioners with jurisdiction inferior to the district court as the legislature may establish. (emphasis added) [Amended, November 2, 1982]²

The clear text of the constitution indicates that a court of appeals may be “established by the legislature.” Minn. Const. Art. VI, sec. 1. The legislature did, in fact, establish a court of appeals in 1982. *See* Minn. Laws 1982, Chap. 501, codified at Minn. Stat. Chap 480A.

As a creature of statute and not a constitutional court, thus subject to the vagaries of legislative enactments, including complete abolition if the legislature so decided, the court of appeals must abide by *all* statutory pronouncements, not just those it agrees with. And, this is clearly how the court of appeals operates. For instance, in Minn. Stat. Sec. 480A.08, the legislature addressed decisions of the court of appeals. Section 480A.08, subdivision 3, states in part as follows:

Unpublished opinions of the Court of Appeals are not precedential. Unpublished opinions must not be cited unless the party citing the unpublished opinion provides a full and correct copy to all other counsel at least 48 hours before its use in any pretrial conference, hearing, or trial. If cited in a brief or memorandum of law, a copy of the unpublished

² Minnesota Constitution Article VI, Section 2, reads in part as follows:

The legislature may establish a court of appeals and provide by law for the number of its judges, who shall not be judges of any other court, and its organization and for the review of its decisions by the supreme court. The court of appeals shall have appellate jurisdiction over all courts, except the supreme court, and other appellate jurisdiction as prescribed by law. (emphasis added)

opinion must be provided to all other counsel at the time the brief or memorandum is served, and other counsel may respond.

The court of appeals clearly follows this statutory dictate of the legislature regarding its own opinions. At the top of every unpublished opinion of this court (A-93) is a prominent heading disclaiming affirming the legislature's command in the following words:

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2010).

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Of course, this disclaimer is correct because the legislature has decreed that unpublished opinions of the court should be so treated. The court of appeals is merely carrying out the protocol established by the body that created the court and established guidelines for its operation, including the way in which unpublished opinions of the court of appeals may be used in proceedings before the court.

When it comes to another enactment of the body that created the court of appeals, however, the court has steadfastly refused to follow that enactment. This is the provision of Minn. Stat. Sec. 481.02, subd. 2, which relates to who may appear in the courts of the state.

That statute currently reads in part as follows:

Sec. 481.02 Unauthorized Practice of Law.

.....

Subd. 2. Corporations.

No corporation, organized for pecuniary profit, . . . by or through its officers or employees or any one else, shall maintain, conduct, or defend, except in its own behalf when a party litigant, any action or proceeding in any court in this state. . .

This section of the statutes was first enacted by the legislature in 1931, when the state court system consisted of only district courts and the supreme court. Minn. Laws 1931, Chap. 114, sec. 1(b) (A-91) Going back even earlier in the state's history, prior to 1891, no party, whether an individual or a corporation, could appear in either the district courts or the supreme court without aid of counsel. *See, e.g.*, Minn. Stat. Chap. 88, sec. 8 (Gen. Stats. of 1883), which read as follows: “**Person not an attorney shall not appear in actions.** No person shall appear in any action or proceeding, in the supreme or district court, to maintain or defend the same, unless previously admitted to practice, as herein provided.” (emphasis in original) (A-88)

In 1891, the legislature repealed this section of the statutes and enacted several new provisions relating to the ability of individuals to appear in actions in which they are named parties. Chapter 36 of the Laws of 1891 enacted eight new sections of the statutes, including sections 7 and 8 of Minn. Laws 1891, chap. 36. Section 7 of 1891 chapter 36, related to the ability of *individuals* to appear in actions. It stated in part:

No person shall . . . commence, conduct or defend any action or proceeding in any of the courts of record of the state, *in which he is not a party concerned*, . . . unless he has complied with and been admitted under and pursuant to such rules as the supreme court of this state shall prescribe; . . . Minn. Laws 1891, chap. 36, sec. 7. (emphasis added) (A-90)³

³ Section 8 of the 1891 statutory enactment stated in part:

As a result of this legislative change, individuals could appear *pro se* in any action in a court of record in which they were a named party.

It was not until 1931 that the legislature addressed the ability of *corporations* to appear in Minnesota courts. Chapter 114 of the Laws of 1931 reasserted the ability of individuals to appear *pro se* in actions in which they were a named party (“except in his own behalf as a party thereto in other than a representative capacity” sec. 1 (a)), and addressed for the first time the ability of corporations to appear in actions in which they were named parties.

The legislature added the following language to the laws of the state in 1931, dealing with corporate litigants for the first time:

No corporation, organized for pecuniary profit by or through its officers or employees or anyone else, shall maintain, conduct or defend (*except in its own behalf when a party litigant*) any action or proceeding in any court in this state; . . . Minn. Laws of 1931, Chap. 114, sec. 1 (b). (emphasis added) (A-91)

This language is still part of the laws of the state, currently codified at Minn. Stat. Sec. 481.02, subd. 2, and reads almost identically to the original 1931 version.⁴

Any person who shall appear as an attorney or counselor at law in any action or proceeding in any court of record in this state to maintain or defend the same, *except in his own behalf when a party thereto*, unless he has been admitted to the bar of this state, shall be deemed guilty of a misdemeanor. Minn. Laws 1891, chap. 36, sec. 8. (emphasis added) (A-91)

⁴ The statute currently reads in part as follows:
“No corporation, organized for pecuniary profit, . . . by or through its officers or employees or any one else, shall maintain,

The 1891 law, which first allowed individuals to appear *pro se* in state courts, and the 1931 law, which granted the same right to corporations, using almost identical language, were meant to accomplish the same legislative goal: restricting the practice of law to only qualified persons admitted to the bar of the state, but allowing individuals and corporations to appear *pro se* when then were a named party in the action. The plain reading of the Minn. Stat. 481.02, subs. 1 and 2, allows of no other reading, especially in light of the statutory history of both provisions, as discussed above.

While the supreme court has stated that a corporation must appear in the district courts and before the supreme court only with aid of counsel, it has never held that section 481.02, subd 2, requires that corporations appear in the court of appeals only with aid of counsel. This court is itself clearly allowed to interpret enactments of the legislature when they pertain to proceedings before this court. In fact, the court blushinglly conceded in a footnote in an unpublished opinion not too long ago that while the supreme court had interpreted section 481.02, subd. 2, to require attorney representation in the district courts and supreme court, “we recognize that there could be alternative readings of this statute.” *Walnut Towers v. Schwan*, (Minn. App., Sept. 16, 2008) (unpublished). (A-93, 97 fn. 1)

Whatever the merits of the supreme court’s interpretation of section 481.02, subd. 2, insofar as it relates to the district courts and the supreme court, it is not relevant to the

conduct, or defend, *except in its own behalf when a party litigant, any action or proceeding in any court in this state. . .*”
Minn. Stat. Sec. 481.02, subd. 2. (2010). (emphasis added)

ability of a corporation to appear *pro se* before *this court*, which is a statutory creature of the legislature. As such, this court must abide by and conform its practices to *all* legislative enactments, not just those it finds agreeable to it and choose to disregard the rest. As a legitimate and proper pronouncement of the legislature, section 481.02, subd. 2, of the statutes must be given effect by this court. And, the only fair and scrupulous reading of the plain words of the statutes is that a “corporation by or through its officers or employees or any one else . . . [may] maintain, conduct, or defend, . . . in its own behalf when a party litigant, any action or proceeding in any court in this state. . . .” *Id.*

If the language of subdivision 1 of section 481.02 allows *individuals* to appear *pro se* in proceedings before this court, then the almost identical language in subdivision 2 allows *corporations* likewise to appear *pro se* in proceedings before this court. Only interpretive legerdemain could read identical statutory provisions in contradictory ways.

Underlying the legislative assertion of subdivision 2 of section 481.02 is a manifest intent that corporations, when they are appearing on their own behalf when a party litigant, enjoy the legal capacity to appear before a court for the purpose of asserting or defending their own corporate rights without being represented by professional counsel, and likewise enjoy the capacity to chose to litigate with or without counsel, in the exercise of the discretion conferred by the permissive language of the statute.

The court and opposing counsel may suggest that a reading of subdivision 2 of section 481.02 under which an artificial entity is entitled to appear in court on its own

behalf would force the court to confront difficult issues of policy and administration. Far from *avoiding* policy determinations, however, the court would effectively *engage* in policymaking by refusing to credit the legislative judgments that are explicit in the statutory language. Any reading of the phrase “except in its own behalf when a party litigant” (*See* Minn. Stat. Sec. 481.02, subd 2) that permits this court to override legislative policy judgments is too broad. The legislature has spoken both by establishing the court of appeals and through its legislative prerogative by enacting laws regulating, for instance, the citation of unpublished opinions of the court (Section 481A.08, subd, 3), and the ability of individuals and corporations to appear in the court of appeals without aid of counsel. (Section 481.02, subd. 2) This court must give effect to *all* the words of the very body that created it.

While it might make sense as a matter of policy to exclude corporations and other artificial entities from the benefits of *pro se* representation before this court, the legislature has not done so.⁵

Being a statutory creature, this court must abide by all statutory pronouncements including the one contained in section 481.02, subd. 2, which allows corporations, such as relator, to appear before this court without aid of counsel.

Relator’s initial petition for certiorari, filed on November 17, 2011, wrongfully was not filed by relator and relator was improperly prohibited from proceeding in this

⁵ The denial to corporations of the ability to appear *pro se* in actions in which they are named parties, while allowing the ability to individuals to do so also violates state and federal concepts of equal protection and must be altered for that reason. This point is argued in the next section of the brief in the broader context of other equal protection concerns raised in this appeal.

appeal *pro se* under the provisions of Minn. Stat. Sec. 481.02, subd.2. As a result, relator was forced to incur attorney fees if should not have had to incur in the first instance when if sought to exercise its right of self-representation under the statute.

As a result, the court should give effect to Minn. Stat. Sec. 481.02, subd. 2, and declare that appealing corporate employers may appear *pro se* in this court.

**III. Minn. Stat. Sec. 268.105, subd. 7 Provides Unequal
Access to Justice and Violates Equal Protection**

A. The Statutory UI Post-DEED Appeal Scheme

**1. The Statute Provides Different Rights on
Appeal to Employees and Employer**

Once a party to an UI appeal has exhausted all appeal rights before the Department of Employment and Economic Development (DEED), the party is left with one alternative for relief, the filing of a petition for certiorari in the court of appeals. *See* Minn. Stat. Sec. 268.105, subd. 7(a). Aggrieved applicants and employers may file such petitions, but the costs put upon each to do so in very different.

An *employee* who desires to file a petition for certiorari to contest an ULJ's decision is not required to pay the customary filing fee in this court of \$550; is not required to post an bond on appeal; is entitled to a written, verbatim copy of the transcript of any hearings before the ULJ at *no* expense to the employee; and either can appear *pro se* in the court of appeals or retain counsel. In essence, the expense to an appealing employee, if the employee chooses to represent himself or herself is zero. Minn. Stat. Sec. 268.105, subd. 7(c).

Appealing employers are entitled to none of these privileges. Employers must pay the filing fee of \$550 or no appeal is possible; they must post a cost bond (relator posted a bond of \$500 (A-82)); they must pay a per page fee for a copy of a transcript of any hearings before the ULJ (relator paid \$144 for a copy of the transcript of the UI hearing (A-83)); and, as discussed in the previous section, if the employer is a corporate body, it must retain counsel at its own expense in order to prosecute an appeal before the court of appeals (relator retained counsel on October 19, 2011). *See* especially the Order of this court in this matter, filed on November 23, 2011, which found that relator could not file a petition for certiorari *pro se* or appear *pro se* in this court, but because it had cured that defect in a timely manner, it could proceed with counsel in this appeal. (A-5) *See also* Minn. Stat. Sec. 286.105, subd. 7(b).

This creates a two-tiered system of appealing parties who have participated before DEED in the same matter on the same issues. Both have substantial interests at stake in appeals before DEED. Applicants who are declared ineligible under chapter 268 of the statutes are denied UI benefits. *See* Minn. Stat. Sec. 268.069, subd. 1. On the other hand, when an applicant is found eligible for UI benefits, the employer incurs, in most instances, an added cost of doing business because the expense of such UI benefits awarded to an applicant is assessed in computing the employer's experience rating, resulting in higher future UI tax payments by the employer. *See* Minn. Stat. Sec. 268.051.

Both of these competing interest are substantial and valid and may be argued in good faith before this court in appeals that must be considered meritorious. Nonetheless,

appealing applicants incur no expenses to seek to vindicate their interests, while appealing employers must “pay-to-play” to do so. This sort of purposeless differentiation of similar interests violates concepts of fair play and equal protection and cannot be allowed to stand for the reasons set forth below.

2. The Evolution of the Statutory Scheme of Minn. Stat. Sec. 268.105, subd. 7

The statutory unemployment compensation system was added to Minnesota law by the legislature in 1936. *See* Minn. Laws 1936, Extra Session, Chap. 2. (A-101). The first version of the law, passed in 1936, allowed judicial appeals by applicants or employers to the district courts and then to the supreme court. Section 8 (f) and (g). (A-102) The statute required both applicants and employers to bear their own expenses on appeal of an adverse UI decision.

The next year, the legislature relieved applicants of bearing costs, fees or expenses of any kind, except, of course, if the applicant chose to retain counsel, in which case the amount of attorneys fees that could be charged an applicant was regulated by the UI commission. *See* Minn. Laws 1937, chap. 306, sec. 5 (j). (A-104-107)⁶

⁶ The relevant portion of the statute read in part:
“[N]o individual claiming benefits shall be charged fees of any kind in any proceeding under this Act by the appeal tribunal, the commission, or its representatives, or by any court or any officers thereof.” Minn. Laws 1937, sec. 5 (j). (A-106)

In 1995, the statutes were amended to make significant changes to the cost issue of judicial appeals. In that year, the legislature amended section 268.105 to read in relevant part as follows:

Subd. 6. [REPRESENTATION; FEES.] In any proceeding under these sections, a party may be represented by any agent. Except for services provided by an attorney-at-law, a claimant for benefits shall not be charged fees of any kind in a proceeding before a reemployment insurance judge, the commissioner or authorized representative, or by any court or any of its officers.

Subd. 7. [COURT OF APPEALS; ATTORNEY FOR COMMISSIONER.] The court of appeals may, by writ of certiorari to the commissioner, review any decision of the commissioner provided a petition for the writ is filed and served upon the commissioner and the adverse party within 30 days of the mailing of the commissioner's decision. Any interested party, except a claimant for benefits, upon the service of the writ shall furnish a cost bond to the commissioner in accordance with rule 107 of the rules of civil appellate procedure. The commissioner shall be deemed to be a party to any judicial action involving any decision and shall be represented by any qualified attorney who is a regular salaried employee of the department of economic security and has been designated by the commissioner for that purpose or, at the commissioner's request, by the attorney general.

See Minn. Laws 1995, chapter 54, section 11. (emphasis in original)

Then in 1999, the legislature again amended section 268.105 to make the following changes:

Sec. 47. Minnesota Statutes 1998, section 268.105, is amended to read:

Subd. 7. [COURT OF APPEALS; ATTORNEY FOR COMMISSIONER JUDICIAL REVIEW.] (a) The Minnesota court of appeals ~~may~~ shall, by writ of certiorari to the commissioner, review ~~any~~ the

decision of the commissioner provided a petition for the writ is filed with the court and a copy is served upon the commissioner and any other involved party within 30 calendar days of the mailing of the commissioner's decision.

(b) Any ~~involved employer,~~ petitioning for a writ of certiorari shall pay to the court the required filing fee and upon the service of the writ shall furnish a cost bond to the commissioner in accordance with the rules of civil appellate procedure. If the employer requests a written transcript of the testimony received at the evidentiary hearing conducted pursuant to subdivision 1, the employer shall pay to the commissioner the cost of preparing the transcript.

(c) Upon review before issuance by the Minnesota court of appeals of a writ of certiorari as a result of a claimant's petition, the commissioner shall, if requested, furnish to the claimant at no cost a written transcript of the testimony received at the evidentiary hearing conducted pursuant to subdivision 1, and, if requested, a copy of all exhibits entered into evidence. No filing fee or cost bond shall be required of a claimant petitioning the Minnesota court of appeals for a writ of certiorari.

(e) ~~(d)~~ The commissioner shall be considered to be a the primary responding party to any judicial action involving any the commissioner's decision and the case title shall be, "In Re the matter of: (named petitioner) and the commissioner of economic security." The commissioner may be represented by any qualified an attorney who is a regular-salaried classified employee of the department and has been designated by the commissioner for that purpose or, at the commissioner's request, by the attorney general.

See Minn. Laws 1999, chap. 107, sec. 47. (emphasis added)

B. The Standard of Review of Equal Protection Claims

The constitutionality of a statute is reviewed *de novo*. *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 421 (Minn. 2005). Statutes are presumed to be constitutional and the court's power to declare a statute unconstitutional is exercised with extreme caution and only when absolutely necessary. *Gluba by Gluba v. Bitzan &*

Ohren Masonry, 735 N.W.2d 713, 721 (Minn.2007) The party challenging the constitutionality of the statute bears the burden of establishing beyond a reasonable doubt that the statute violates a constitutional right. *ILHC of Eagan, LLC v. County of Dakota*, *supra*, 693 N.W.2d at 421; *Westling v. County of Mille Lacs*, 581 N.W.2d 815, 819 (Minn. 1998).

"Equal protection is an inherent but unenumerated right found and confirmed in Minnesota's state constitution." *Hawes v. 1997 Jeep Wrangler*, 602 N.W.2d 874, 880 (Minn.App.1999). Like the federal constitution's Equal Protection Clause, Minnesota's constitution requires that the law treat people in similar circumstances similarly. *Id.* To determine whether a statutory classification violates such equal protection, the court must consider (1) the classification's character, (2) the individual interests affected by the classification, and (3) the governmental interests asserted in support of it. *LaFreniere-Nietz v. Nietz*, 547 N.W.2d 895, 899 (Minn. App.1996).

When a statutory scheme or classification does not directly and substantially interfere with a fundamental right nor involve a suspect classification, the court reviews it under the rational-basis standard. *See Gluba by Gluba v. Bitzan & Ohren Masonry*, 735 N.W.2d 713, 721 (Minn.2007) (stating standard of review). This standard requires the court to determine "whether the challenged classification has a legitimate purpose and whether it was reasonable for the legislature to believe that use of the challenged classification would promote that purpose." *Id.* Unlike the federal equal-protection analysis, however, when considering an equal-protection claim under the Minnesota Constitution, the court is "unwilling to hypothesize a rational basis to justify a

classification, as the more deferential federal standard requires." *Id.* (quotations omitted).

In Minnesota, courts "have required a reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals." *State v. Russell*, 477 N.W.2d 886, 889 (Minn.1991).

(1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

Gluba, supra., 735 N.W.2d at 721 (quotations omitted).

The Fourteenth Amendment to the U.S. Constitution guarantees that no state will "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Minnesota Constitution likewise guarantees that "[n]o member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." Minn. Const. art. I, § 2. The Minnesota Supreme Court has stated that "[b]oth clauses have been analyzed under the same principles and begin with the mandate that all similarly situated individuals shall be treated alike, but only 'invidious discrimination' is deemed constitutionally offensive." *Gluba by Gluba v. Bitzan & Ohren Masonry, supra*, 735 N.W.2d at 719 (quoting *Kolton v. County of Anoka*, 645 N.W.2d 403, 411 (Minn. 2002) (quoting *Scott v. Minneapolis Police Relief Ass'n*, 615 N.W.2d 66, 74 (Minn. 2000)).

Level of Constitutional Scrutiny

If a constitutional challenge involves neither a suspect classification nor a fundamental right, the court reviews the challenge using a rational basis standard under both the state and federal constitutions. *Id.*

Rational Basis Review

When applying rational basis review under the Equal Protection Clause of the Fourteenth Amendment, the court inquires “whether the challenged classification has a legitimate purpose and whether it was reasonable [for the legislature] to believe that use of the challenged classification would promote that purpose.” *Kolton*, 645 N.W.2d at 411. But when the court applies rational basis review under art. I, § 2 of the Minnesota Constitution, it has sometimes applied a “higher standard.” *See Kahn v. Griffin*, 701 N.W.2d 815, 831 (Minn. 2005); *see also Mitchell v. Steffen*, 504 N.W.2d 198, 210 (Minn. 1993) (Tomljanovich, J., dissenting) (likening Minnesota’s approach to rational basis review to “mid-level” scrutiny). *See also Gluba by Gluba v. Bitzan & Ohren Masonry, supra*, 735 N.W.2d at 721 (*State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991)). “The key distinction between the federal and Minnesota tests is that under the Minnesota test ‘we have been unwilling to hypothesize a rational basis to justify a classification, as the more deferential federal standard requires.’” *Gluba by Gluba v. Bitzan & Ohren Masonry, supra*, 735 N.W.2d at 721 (quoting *State v. Garcia*, 683 N.W.2d 294, 299 (Minn. 2004)). *See also Greene v. Commissioner of Minnesota Department of Human Service*, 755 N.W.2d 713, 724-29 (Minn. 2008).

In assessing the constitutionality of *workers'* compensation statutes, the supreme court has used a formulation of rational basis review that echoes the Minnesota test's terminology and three-prong structure:

To survive [an equal protection] challenge, a [workers' compensation] classification must apply uniformly to all those similarly situated; be necessitated by genuine and substantial distinctions between the two groups; and effectuate the purpose of the law.

Bituminous Cas. Corp. v. Swanson, 341 N.W.2d 285, 287 (Minn. 1983). *See also Alcozer v. N. Country Food Bank*, 635 N.W.2d 695, 705 (Minn. 2001) (applying the same three-prong structure). But the court has not interpreted this formulation as implicating the "higher standard" of rational basis review that the court applied in *Russell Gluba* by *Gluba v. Bitzan & Ohren Masonry, supra*, 735 N.W.2d at 721.

The same test should be applied in this appeal to similar issues under the UI statutes. Since relator does not contend that applicants or employers in UI proceedings are a suspect class, review should be for a rational basis.

**C. Different Fees and Costs for Appealing Employees
and Employers Serves no Rational Purpose**

No legitimate public purpose is served by the legislative classification distinguishing aggrieved applicants from appealing employers in regards to requiring the payment of fees, costs, posting bond, and requiring appealing corporate employers to be represented by counsel when judicial review is sought of an ULJ's decision. Employers are required to pay fees, costs, post bonds and retain counsel in this court. Appealing applicants, employees, have none of these financial burdens.

There are no significant qualitative differences between aggrieved applicants and appealing employers that justify this difference in treatment. Where equal protection mandates that all persons similarly situated should be treated alike, the legislature may rationally impose additional procedural burdens on a particular class of civil litigants where the groups do not substantially stand in the same shoes. The only restriction is that equal protection limits legislative discretion in delineating classifications only to the extent of forbidding arbitrary or irrational classifications, or discrimination that is invidious.

Yet, any argument based on a contention that the relationship of the classification to the statute's goal of reducing costs and deterring frivolous appeals is a sufficient basis for the existing invidious classification is so attenuated as to render the distinction arbitrary or irrational. The current legislative classification burdens identically situated appellants seeking to vindicate substantially similar rights and operating under the same statutory framework. The court is not required to engage in an apples-to-oranges comparison between aggrieved applicants and aggrieved employers under the UI laws. Both are equally capable of filing the same number of frivolous and meritorious appeals. There is no evidence that appeals by applicants and appeals by employers involve varying degrees of discretion, and, as a result, the differences may justify more rigorous procedural rights due to the likelihood of error. In fact, Minn. Stat. Sec. 268.069, subd. 2, states the standard of equality before the UI law of both applicant and employer: "There

is no presumption of entitlement or nonentitlement to unemployment benefits.” Minn. Stat. Sec. 268.069, subd. 3.

Moreover, there are no legitimate governmental interests supporting the legislature's choice to allow a free ride for appealing applicants and the requirement that appealing employers must “pay to play” in the UI post-DEED appellate process. Providing a cost-free judicial forum for aggrieved employee challenges to ULJ decision, while denying the same privilege to aggrieved employers, fundamentally violates ordinary concepts of equal protection and governmental fairness. The corresponding burdens placed on judicial resources by appealing employees and employers are identical for both classes of appellants. In both instances, DEED must appear in support of the party that prevailed before the ULJ. *See* Minn. Stat. Sec. 268.105, subd. 7 (e). It is irrational and arbitrary for the legislature to provide for a judicial process at the court of appeals level to adjudicate efficiently and effectively appeals of ULJ decisions, but to afford different and less burdensome requirements for appealing employees than for appealing employers.

While it is true that where no suspect classification is drawn, the legislature is permitted to distinguish among civil litigants in providing greater or lesser procedural rights and to exercise this prerogative based on its perception of the significance of the interests involved, there must, nonetheless, be an articulable, sufficient rational basis for such different treatment. Once again, the deterrence of frivolous appeals and the conservation of judicial resources are not legitimate legislative purposes under the

circumstances here. The classification drawn between appealing employees and appealing employers is not anchored within the boundaries of the state or federal constitutions.

Relator further contends that the statutory scheme produces irrational results that do not advance the purpose of the UI law, where employees and former employees may press frivolous appeals without fees and costs, while employers may be deterred from filing even meritorious appeals because of the cost. Relator agrees that a statute is not rendered unconstitutional merely because the means stated in the statute are not perfectly consistent with the desired result. But, the inclusion of a no fee or cost stipulation for employees, regardless of ability to pay, does not rationally balance the legislature's competing goals of deterring frivolous appeals while not entirely frustrating all employers, whether capable or incapable of paying the requisite filing and other fees, from bringing a meritorious appeal.

This court's duty is to ensure that the filing fees and other costs are not enacted arbitrarily or in violation of other safeguards provided by the state and federal constitutions. While it is the sole province of the legislature to set the amount of those fees, this court must always inquire into whether the legislature had the constitutional power to enact the statute or specify different treatment or application of provisions of the same law to similarly-situated individuals and entities.

In sum, for all the reasons discussed, relator has established that there is no rational basis for the different statutory requirements for filing fees and other costs required of appealing employees and employers. Therefore, section 268.105, subd. 7 violates equal protection principles and cannot stand.

**D. The Disparity if Treatment of Costs of a Transcript
in UI Appeals Violates Concepts of Equal Protection**

Requiring employers to pay for a verbatim copy of the transcript of the hearing before the ULJ, but not making the same demand of any applicant, regardless of the applicant's ability to pay, Minn. Stat. Sec. 268.107, subd. 7, violates fundamental concepts of fair play and equal protection.

There can never be effective appellate review if the reviewing court is not able to obtain a clear picture of the precise nature of the alleged errors in the court below. The detail in which the proceedings below must be recounted varies, of course, with the nature of the case and the claims on appeal. But, it must be emphasized that in many instances a detailed record of the proceedings below is essential if the reviewing court is to be able to perform its assigned tasks. The appellant bears the burden of providing a record that will amply illustrate all of the alleged errors that he or she wishes to press upon the reviewing court. Often the result on appeal will depend on a precise analysis of the testimony presented at trial. This is especially so when the reviewing court is asked to judge the sufficiency of the evidence.

Therefore, in many UI appeals cases a verbatim transcript of the portions of the UI hearing alleged to contain error will be required if the appellant is to receive a full measure of justice. In many cases, there simply can be no effective substitute for the transcript of all or part of the actual proceedings in the trial court.

Unfortunately, numerous participants in UI proceedings who attempt to attack the proceedings before the ULJ in some detail are unable to afford the transcript that is necessary for their appeal. It is impossible to escape the conclusion that those who are able to purchase transcripts on appeal will, in some cases, receive a more meaningful review of the actions of the ULJ than will those who cannot afford it. The question arises whether this discrimination based on the civil litigant's ability to pay affronts the concept of equal protection in the constitutional sense.

The constitutional mandate that all citizens be accorded the equal protection of the laws has formed the basis of many of relevant U.S. Supreme Court opinions. The seminal case is *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585 (1956). There the Supreme Court stated the broad egalitarian principle encompassed by the equal protection clause: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.* 76 S.Ct. at 591.

In *Griffin*, the Court vacated the denial by the Illinois Supreme Court of a petition for post-conviction relief because the state had not provided the indigent defendants with a free copy of the trial transcript, which was deemed necessary for an effective appeal. Although the state could be said to have treated all parties equally in one respect — it had

a single scale of fees which it charged to all who ordered transcripts — the Court noted that only the rich could afford transcripts on appeal. The Court held that the practical unavailability of transcripts to the poor on appeal that resulted from this uniform fee scale amounted to a denial of equal protection to the indigent. As a result, the Court required the state to act affirmatively to equalize the burdens of the adversary process by furnishing transcripts to those who could not afford to pay for them. *Id.*

This same constitutional requirement that the state act affirmatively to equalize the conditions of the adversary process for the poor also stands behind the landmark decision requiring the courts to provide counsel for indigent defendants at trial. In *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963), the Court "recognize[d] that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* 83 S.Ct. at 796.

This concept of equal protection is equally viable in appellate courts. *Griffin* itself involved procedures on appeal. *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814 (1963), relied heavily on the language and principles of *Griffin* in holding that the states must provide counsel for indigent defendants on appeal. A few years later, the Supreme Court held that appointed counsel must act just as if he were a paid advocate in order to "assure penniless defendants the same rights and opportunities on appeal — as nearly as is practicable — as are enjoyed by those persons who are in a similar situation but who

are able to afford the retention of private counsel." *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 1400 (1967).

Other roadblocks to appellate review for the poor have also been held unconstitutional. Court rules that condition the bringing of a direct appeal, *Burns v. Ohio*, 360 U.S. 252, 79 S.Ct. 1164 (1959), from or a collateral attack, *Smith v. Bennett*, 365 U.S. 708, 81 S.Ct. 895 (1961), on a conviction upon the payment of a filing fee, however small, deny equal protection to the indigent. *Lane v. Brown*, 372 U.S. 477, 83 S.Ct. 768 (1963). Expenses that do not totally preclude review, but that block effective access to the courts for the poor also may deny equal protection. *Gardner v. California*, 393 U.S. 367, 89 S.Ct. 580 (1969). If a state hears all paid appeals, it may not screen the *in forma pauperis* cases, furnishing transcripts only after a trial judge's determination that there are issues worth appealing. *Draper v. Washington*, 372 U.S. 487, 83 S.Ct. 774 (1963).

Nor has the Supreme Court limited its transcript requirement to serious offenses. In one case, the Court announced that a state could not deny a free transcript to a defendant who wanted to appeal a conviction of violating a municipal ordinance. *Williams v. Oklahoma City*, 395 U.S. 458, 89 S.Ct. 1818 (1969). The Court also struck down a New Jersey statute requiring indigents who appealed criminal convictions, lost, and subsequently went to prison, to repay the cost of state-provided transcripts. As the Court said: "[I]t is now fundamental that, once [avenues of appellate review are] established, these avenues must be kept free of unreasoned distinctions that can only

impede open and equal access to the courts." *Rinaldi v. Yeager*, 384 U.S. 305, 86 S.Ct. 1497, 1500 (1966).

The limits of a state's duty affirmatively to equalize a defendant's ability to participate meaningfully in the judicial process have not been conclusively sketched out in the cases. The picture is far from complete, but cases dealing with costs in divorce cases, *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780 (1971), and transcripts on appeal from proceedings involving determination of parental rights, *In re Karren*, 159 N.W.2d 402 (Minn. 1968), coupled with the expansive readings given to *in forma pauperis* statutes, *Coppedge v. U.S.*, 369 U.S. 438, 82 S.Ct. 917 (1962), all suggest that the trend is toward more, not less, affirmative action. Thus, while most of the cases extending equal protection to the judicial process have involved criminal proceedings, the constitutional mandate that there be no invidious discrimination between indigent and rich litigants has been recognized in civil cases as well.

The equal protection clause applies to both civil and criminal cases; the Constitution protects life, liberty and property. It is the importance of the right to the individual, not the technical distinction between civil and criminal, which should be of importance to a court in deciding what procedures are constitutionally required in each case. *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428 (1967). Often a poor litigant will have more at stake in a civil case than in a criminal case. The struggling employee may well find a wage attachment or confiscation of his tools as onerous in securing employment as a criminal conviction. Moreover, the citizen who permanently loses his home, a

government job, a required license, or unemployment benefits may receive a more crippling blow than the criminal who serves a jail sentence.

The U.S. Supreme Court has not considered itself bound by formal distinctions. It has not hesitated to apply these notions of equal protection in some proceedings traditionally considered civil; the right to a free transcript extends to *coram nobis* and *habeas corpus* proceedings. *Lane v. Brown, supra*. Although these types of cases might fairly be characterized as criminal, they do show that the civil-criminal distinction is not the touchstone of equal protection.

The right of all to have free access to the courts is basic to our democratic system. It too cannot be conditioned on the payment of a fee where such a condition precludes the exercise of the right. Just as the poll tax bears no relation to voter qualification, a litigant's ability to pay for a transcript bears no relation to the justice of his position in a suit against him for eviction.

Civil cases, of course, are different from criminal cases in that the state is not always the moving party. But this difference does not establish that the underlying principle of *Griffin* is completely inapplicable to civil cases. None of the equal protection cases discussed above has focused on the state's direct involvement in the criminal proceeding. Instead, the Court focused on the deficiencies of procedures whereby rich litigants received more thorough consideration of their appeals than did poor litigants. Court procedures which of themselves invidiously discriminate between rich and poor impair guarantees of equal justice which the Constitution was designed to protect. As *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836 (1948), teaches, the courts themselves may

not be vehicles of discrimination. There, the Court barred judicial enforcement of discriminatory private agreements, in spite of the fact that these agreements were legal between the parties.

In the instant case, Minn. Stat. Sec. 268.105, subd. 7, means that an appealing employer with few if any financial resources will be unable to obtain the transcript even though this is necessary for determination by the court of the merits of a substantial question raised by appellant, whereas both poor and rich employee appellants may obtain such review simply by asking for a free copy of the transcript.⁷

⁷ Not all applicants are poor and without the financial means to pay for costs and fees on appeal an adverse decision of a ULJ. *See, e.g.,*

Ex-head of Philly schools applies for unemployment

By The Associated Press

San Diego Union, Nov. 29, 2011

PHILADELPHIA — The former Philadelphia schools superintendent who received more than \$900,000 in severance pay is looking to collect unemployment.

A district spokesman confirmed Tuesday that Arlene Ackerman had applied for jobless benefits. She's eligible for the state maximum of \$573 a week, based on her former salary of about \$350,000.

Ackerman abruptly left the district last summer. Her leadership saw increased test scores and graduation rates but also clashes with community members, the teachers' union and elected officials.

Her \$905,000 buyout was initially going to be paid using public funds and anonymous private contributions. The donors later backed out after critics blasted the deal's lack of transparency.

Ackerman's attorney tells KYW-AM that his client qualifies for unemployment because she is jobless and wasn't fired for cause.

In *Santa Clara County v. Southern Pacific R.R.*, 118 U.S. 394, 6 S.Ct. 1132

(1886), the U.S. Supreme Court recognized corporations as persons for the purposes of the fourteenth amendment and thus on equal footing, at least in their standing before the courts of this state, with individual civil litigants in judicial and administrative matters. Moreover, this aspect of the corporate right to sue and defend corporate interests has been codified at Minn. Stat. Sec. 322A.20, subd. 3. (“A limited liability company may sue and be sued, and complain, defend, and participate as a party or otherwise in any legal, administrative, or arbitration proceeding, in its limited liability company name.”)

While a government may have some affirmative obligations to aid poor litigants in civil cases, it is unnecessary for the court to determine the extent to which the state and

The Associated Press

<http://www.signonsandiego.com/news/2011/nov/29/ex-head-of-philly-schools-applies-for-unemployment/> Accessed January 10, 2012.

Likewise, not all corporations are profitable, much less as profitable as, say, Cargill, which reported \$2.69 billion in earnings in fiscal year 2011, and thus would be able to pay all fees and costs and attorneys fees required to pursue judicial review of an ULJ’s decision. See “Cargill reports fourth-quarter and fiscal 2011 earnings,” 9 August 2011

at <http://www.cargill.com/news/releases/2011/NA3047889.jsp>

Accessed December 30, 2011.

As indications of the relative ability to pay fees and costs, the categories of applicant and employer used by the legislature in section 268.105, subd. 7, have relatively little accurate predictive value. They are not reliable or proper proxies for ability to pay.

federal constitutions require it to end all distinctions between rich and poor in the courts, or to provide indigent civil litigants with transcripts on appeal. Moreover, despite the compelling arguments that can be marshalled to show that transcripts are constitutionally required for civil appeals presenting substantial issues, such a holding is not required in the court's ruling.

Instead, the court need only decide in this appeal that equal treatment in regard to transcripts on appeal to this court of adverse decisions of ULJ must be established and maintained. The only decision required is one that equalizes the opportunities of rich and poor applicants and employers to obtain appellate review under the UI laws.

As a result, the court should find that both appealing applicants and employers must be afforded transcripts of UI hearings on an equal basis, as established by the future enactments of the legislature under chapter 268, and that the current system, which clearly favors applicants over employers, regardless of any review of ability to pay, violates standards of fair play, substantial justice and equal protection, and cannot stand.

E. Allowing Employees to Appear Pro Se in UI Appeals but not Allowing the Same Privilege to Appealing Employers Violates Equal Protection Principles

As discussed in section ssss above, the court ruled herein on November 23, 2011, that relator could proceed in this appeal only with aid of counsel and would not be allowed to proceed *pro se*. Relator contends in section ss of this brief that it has the statutory right to proceed *pro se*. Relator contends here that as long as an applicant has the right to proceed in this court *pro se*, the same right must be offered corporate employers under fundamental concepts of equal protection.

In *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 120 S.Ct. 684 (2000), the U.S. Supreme Court refused to recognize a constitutional right to self-representation on direct appeal from a criminal conviction. The holding did not, however, preclude a state from recognizing such a right under its own constitution or providing for it by statute. But where, in fact, a state does allow an *individual* self-representation, but denies it to similarly situated *corporate parties* in identical proceedings, equal protection is violated. There are no countervailing considerations that preclude affording the same ability of self-representation to corporate parties in UI appeals to this court that are currently afforded to individuals.

In *Williams v. Oklahoma City, supra*, the U.S. Supreme Court stated as follows:

This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. *Griffin v. Illinois*, 351 U. S. 12; *Douglas v. California*, 372 U. S. 353; *Lane v. Brown*, 372 U. S. 477; *Draper v. Washington*, 372 U. S. 487; *Rinaldi v. Yeager*, 384 U. S. 305, 384 U. S. 310-311 (1966). Although the Oklahoma statutes expressly provide that '[a]n appeal to the Court of Criminal Appeals may be taken by the defendant, *as a matter of right* from any judgment against him . . . ,' Okla.Stat. Ann., Tit. 22, § 1051 (Supp. 1968) (emphasis added), the decision of the Court of Criminal Appeals wholly denies any right of appeal to this impoverished petitioner, but grants that right only to appellants from like convictions able to pay for the preparation

of a 'case-made.' This is an 'unreasoned distinction' which the Fourteenth Amendment forbids the State to make. *See Griffin v. Illinois*, 351 U. S. 12 (1956); *Draper v. Washington*, 372 U. S. 487 (1963); *Eskridge v. Washington State Board*, 357 U. S. 214 (1958).

Williams v. Oklahoma City, supra, 395 U.S. at 459-60.
(emphasis in original)

The “unreasoned distinction” embodied in Minn. Stat. Sec. 268.105, subd. 7, and the holding of this court as set forth in the Order in this matter of November 23, 2011, are forbidden by the fourteenth amendment and cannot stand. If *applicants* may appear *pro se* in appeals to this court of adverse decisions of an ULJ, then appealing *corporate employers* must be afforded the same ability, or neither applicants nor employers should be allowed to engage in self-representation on appeal. The current dichotomy that exists in the UI statutes between the treatment of appealing applicants and appealing employers violates concepts of equal protection and cannot be allowed to stand.

CONCLUSION

The ULJ erred by determining that Haugen is eligible for benefits because he quit for a good reason caused by his employer. Therefore, this court must reverse the ULJ's determination of eligibility and conclude that Haugen is ineligible to receive unemployment benefits.

The court also should give effect to Minn. Stat. Sec. 481.02, subd. 2, and declare that appealing corporate employers may appear *pro se* in this court in UI petitions for certiorari.

The court should also declare that, for all the reasons discussed, relator has established that there is no rational basis for the different statutory requirements for filing fees and other costs required of appealing employees and employers, and the differing abilities of aggrieved employees and employers to appear *pro se*, that section 268.105, subd. 7 violates equal protection principles and cannot stand.

DATED: January 17, 2012

Respectfully submitted,

A handwritten signature in black ink, reading "Rebecca J. Levine". The signature is written in a cursive style and is positioned above a horizontal line.

Rebecca J. Levine

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