

CASE NO. A12-383

STATE OF MINNESOTA
IN COURT OF APPEALS

ULANDA WILEY,
Relator,

vs.

DOLPHIN STAFFING, INC.,
Respondent-Employer,

and

MINNESOTA DEPARTMENT OF EMPLOYMENT
AND ECONOMIC DEVELOPMENT,
Respondent.

RELATOR'S REPLY BRIEF

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ARGUMENT

I. Ms. Wiley's September 8 notice constituted a quit within 30 days of beginning her employment.

Respondent urges this Court to conclude that an applicant's "notice of quitting" is distinct from an actual quit for purposes of the exception to disqualification from Unemployment Insurance at Minn. Stat. § 268.095, subd. 1(3). "Quit" is subject to a four-part definition for Unemployment Insurance purposes:

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, is considered to have quit the employment.
- (c) An employee who seeks to withdraw a previously submitted notice of quitting is considered to have quit the employment if the employer does not agree that the notice may be withdrawn.
- (d) An applicant who, within five calendar days after completion of a suitable job assignment from a staffing service (1) fails without good cause to affirmatively request an additional suitable job assignment, (2) refuses without good cause an additional suitable job assignment offered, or (3) accepts employment with the client of the staffing service, is considered to have quit employment with the staffing service. * * *

Minn. Stat. § 268.095, subd. 2. Respondent argues that since subdivision 2(a) states that a quit occurs when the decision to end employment was an employee's "at the time the employment ended," the end of the employment constitutes the quit even if the applicant gave notice two weeks earlier. Resp Br. at 7-8.

Respondent ignores the fact that the ULJ found Ms. Wiley to have quit pursuant to subdivision 2(c) of the statute, not 2(a). *See* Rel. Add. 7. This provision addresses the specific situation in which an employee gives notice and later attempts to revoke it, but the employer chooses to accept the resignation. The ultimate decision to end the employment, “at the time the employment ended,” was the employer’s; however, it is the applicant’s earlier decision to resign that makes the separation a quit rather than a discharge. As the ULJ wrote, “Wiley made the decision to put in her two-week notice on September 8, 2011. Consequently, under Minnesota law, the separation was a quit.” Rel. Add. 7. As discussed in Relator’s principal Brief at 12, to hold that Ms. Wiley’s notice constituted a quit for purposes of subdivision 2(c) of the statute but not for purposes of subdivision 1(3) of the same statute violates both common sense and the legislature’s specific direction that Unemployment statutes are to be liberally construed in favor of a grant of benefits. *See* Minn. Stat. § 268.031, subd. 2.

Relator does not, however, concede that giving notice within 30 days is insufficient to trigger the statute if the quit is established under subdivision 2(a) rather than 2(c). Other than the degree of inconvenience to the employer, there is no operative difference between a situation in which an applicant resigns immediately and one where she gives a two-week notice and ends the job as scheduled when employment is still available. In either case, the decision to end the employment was the applicant’s as of the time the employment ended, and the separation is therefore a quit.

This Court applied the 30-day exception in the context of a quit under subdivision 2(a) in its unpublished decision in *Medek v. St. Peter Church and School*, No. A06-2108, 2007 WL 3347476 (Minn. App. Nov. 13, 2007) (reproduced at Rel. App. 8-9).

Respondent attempts to factually distinguish *Medek* by claiming that the applicant in that case attempted to end his employment immediately rather than giving notice. Resp. Br. at 8-9. But the *Medek* decision does not say this. The only information the decision gives about the sequence of events is:

[I]t is undisputed that, from early on in the employment, relator knew that he was unqualified for this job. Relator testified and the ULJ found that at the beginning of May 2006 relator requested to be replaced. Relator also indicated that within three weeks of starting, he talked to his supervisors about quitting. It was only at St. Peter's request that relator continued to work until a replacement could be found. Both relator and St. Peter agreed that finding relator's replacement took longer than expected, and St. Peter was "extremely grateful" that relator agreed to stay on.

Medek, 2007 WL 3347476 at *2. The decision does not indicate whether, when the applicant "talked to his supervisors about quitting," he asked to quit immediately or gave a fixed notice date; it says only that he agreed to the employer's request that he stay on until replaced. Moreover, this Court's reasoning does not rely on any claim that the applicant attempted to separate from the employment immediately, but rather on the fact that he "intended to quit and so informed his employer within the 30-day statutory period[.]" *Id.* This is exactly what Ms. Wiley did.¹

¹ As noted in Relator's principal Brief, *Medek* is one of two unpublished decisions in which this Court has held that the act of communicating a resignation to an employer

The “at the time the employment ended” language in subdivision 2(a) of the statute, in context, is intended to define whether a separation is a quit, rather than to fix the date that a quit occurs. This language represents a codification of this Court’s precedent in cases where, for example, an employee believes he is going to be discharged and chooses to resign ahead of the official notification of discharge. *See, e.g., Ramirez v. Metro Waste Control Comm’n*, 340 N.W.2d 355 (Minn. App. 1983) (resignation where applicant had not been told he was being discharged is a quit, although employer conceded discharge was likely). It is read in conjunction with specific statutory provisions covering situations where an employee gives notice of quitting and is then fired before the effective date of the quit, or, conversely, is notified of a future discharge and chooses to quit while work is still available. *See* Minn. Stat. § 268.095, subds. 2(b) (resignation in advance of effective date of discharge while work is still available is a quit), 5(b) (termination less than 30 days before effective date of resignation is a discharge until the original effective date of the resignation and a quit thereafter; termination more than 30 days in advance of quit is a discharge). Distinguishing between a quit and a discharge is fundamental to Unemployment Insurance law because the primary purpose of Unemployment Insurance is to respond to “involuntary

within 30 days triggers the exception to disqualification in Minn. Stat. § 268.095, subd. 1(3). *See also Bartleman v. First National Bank Minnesota*, No. A08-0603, 2009 WL 605733 (Minn. App. Mar. 10, 2009) (rejecting applicant’s claim that he formed intent to quit within 30 days where he did not communicate intent to employer until 37th day) (reproduced at Rel. App. 10-12).

unemployment.” *See* Minn. Stat. § 268.03.

Relator, however, does not dispute that the separation in this case was a quit, and the date that a quit occurs is relevant only to the particular exception to disqualification at issue in this case. As discussed in Relator’s principal Brief at 14-16, nothing in the public policy rationale for the exception for a quit from unsuitable employment within 30 days suggests why an applicant who quits without notice on the 30th day of her employment should be privileged over an applicant who gives a two-week notice on the same date and therefore gives her employer a chance to prepare for her departure.

Respondent relies on *Bangtson v. Allina Medical Group*, 766 N.W.2d 328 (Minn. App. 2009). In *Bangtson*, the applicant—a physician who had undergone treatment for diverting patients’ narcotics for his personal use—committed a violent assault on a coworker after receiving notification that his employment would be terminated effective four days later; this caused the employer to discharge him immediately. *Id.* at 330-31. This Court concluded that the assault constituted employment misconduct, rejecting the applicant’s argument that it had occurred after the discharge. *Id.* at 332-33. The decision applies a specific statutory provision stating that a discharge occurs when “the employer will no longer allow the employee to work for the employer in any capacity” and notes that the applicant’s interpretation would invalidate the statutory directive that an applicant who quits in advance of the effective date of a discharge is considered to have quit the employment. *Id.* (citing Minn. Stat. § 268.095, subs. 2(b) and 5(a)). As noted above,

these statutes are part of the legislature's careful attempt to ensure that a separation is in fact involuntary before characterizing it as a discharge. Neither the *Bangtson* decision nor the statutes underpinning it have any relevance to the issues in the present case.

Subdivision 1(3) of Minn. Stat. § 268.095 applies when “the applicant quit the employment within 30 calendar days of beginning the employment * * * .” “Quit” is defined by the four clauses of subdivision 2 of the same statute; the ULJ concluded that subdivision 2(c) established a quit in Ms. Wiley's case. Under this clause, her September 8 notice constituted her quit for Unemployment Insurance purposes. Because the quit occurred within 30 days of the start of her employment on August 9, she meets the criteria of the statute. Nothing in Respondent's arguments, or in the policies underlying the statute (discussed in Relator's Brief at 14-16 and not addressed in Respondent's Brief), merits a contrary result.

II. Ms. Wiley quit because her employment was unsuitable.

As Respondent notes, the statute provides for an exception to disqualification where an applicant quits within 30 days “because” the employment was unsuitable for the applicant. Minn. Stat. § 268.095, subd. 1(3). This provision has been part of the law since 1993.² *See* Laws 1993, ch. 67, § 5. In 2010, the legislature amended the Unemployment statutes to provide that employment with a staffing service agency is not

² Respondent erroneously states that subdivision 1(3) was enacted “[a]bout ten years ago.” Resp. Br. at 7.

suitable employment unless a minimum percentage of the applicant's base period wage credits were from staffing service employers; the minimum percentage was amended to 25 percent effective August 1, 2011. *See* Minn. Stat. § 268.035, subds. 23a(g)(4) and (h); Laws 2010, ch. 347, Art. 2, § 4; Laws 2011, ch. 84, Art. I, § 3. The recent unpublished case involving Ms. Wiley, which was remanded for determination of the suitability issue, appears to be the first in which this Court considered the interplay of these provisions. *See Wiley v. Robert Half Int'l, Inc.*, No. A11-1616, 2012 WL 2202977 (Minn. App. June 18, 2012) (reproduced at Resp. App. at A11-14).

Relator does not dispute that the statute requires a causal link between the decision to quit and the unsuitability of the employment. Like all Unemployment Insurance laws, however, this provision must be remedially construed in light of the humanitarian purpose of the statutes. *See* Minn. Stat. § 268.031, subd. 2. By making temporary employment unsuitable, the legislature has freed applicants in Ms. Wiley's position from any obligation to apply for or accept such employment in order to avoid a temporary disqualification under Minn. Stat. § 268.085, subd. 13c. As discussed in Relator's principal Brief at 14-15, the purpose of the exception to disqualification for a quit from unsuitable employment is to prevent applicants from being penalized for attempting jobs that the law would not have required them to accept. *See Valenty v. Medical Concepts Development, Inc.*, 503 N.W.2d 131, 135 n.6 (Minn. 1993). As this Court stated in Ms. Wiley's recent case:

This “unsuitable employment” exception encourages those who are unemployed to attempt a new job outside their usual field of work or to accept part-time or temporary employment, even though the job from which they were most recently separated was full time.

Wiley, 2012 WL 2209277 at *3, Resp. Br. at A13.

Consistent with this purpose, therefore, the legislature has allowed applicants in Ms. Wiley’s position to quit employment with temporary agencies within 30 days without losing their previous Unemployment benefits, provided that there is an identifiable causal link between the quit and the unsuitability of the employment. The general definition of “suitable employment” is, by its terms, flexible; it considers both factors intrinsic to the employment (such as shifts and total compensation including “overtime practices”) and personal factors such as the applicant’s health, length of unemployment, and distance from the job site. *See* Minn. Stat. § 268.035, subd. 23a. In a case involving an applicant whose base period includes less than 25% of wage credits from temporary employment and who quits a temporary job within 30 days, therefore, this Court should find that she meets the criteria of subdivision 1(3) if she quit because of some articulated factor that reasonably made the employment a poor fit for the applicant’s circumstances, whether connected with the temporary nature of the work or otherwise.

As discussed in Relator’s principal Brief at 17-18, Ms. Wiley has established that causal link. She quit her employment because, as a single parent of three small children, she was unable to meet the combined attendance expectations of the temporary agency and the work site. The obligation to abide by two sets of policies resulted from the fact

that she was employed through a temporary agency, and it was the temporary agency's requirements that she was ultimately unable to fulfill. Her employment was therefore unsuitable both as a matter of law and as a result of her specific situation, and the fact that she was employed by a staffing service employer was part of what made the employment unsuitable for her particular circumstances.

Respondent repeatedly asks this Court to defer to the ULJ's "finding" that Ms. Wiley quit not because the employment was unsuitable, but because "she wanted to avoid further disciplinary action." Resp. Br. 9-10. The difficulty with this argument is that no such finding exists. The ULJ's decision never articulates Ms. Wiley's reasons for quitting; it concludes that the separation was a quit and that the circumstances did not establish a good reason caused by the employer,³ a quit within 30 days from unsuitable employment, or a quit due to loss of child care. *See* Rel. Add. 7, 9; *cf. Dean v. Pelton*, 437 N.W.2d 762, 764 (Minn. App. 1989) (factual findings must be affirmatively stated).

³ Respondent appears to derive its "finding" from the ULJ's discussion of why she concluded that Ms. Wiley had not established a good reason caused by the employer:

The applicant was not subjected to adverse working conditions. The employer had a right to establish and enforce reasonable rules governing absences from work. * * * While Wiley may have been subjected to disciplinary action due to her absences, the average, reasonable worker would not quit and become unemployed rather than remaining in the employment and receiving a warning.

Rel. Add. 7. The ULJ does not make a factual finding that Ms. Wiley quit in order to avoid discipline, but rather states as a legal conclusion that the discipline to which she was subjected did not establish a good reason caused by the employer to quit.

With respect to subdivision 1(3), the ULJ concludes only that Ms. Wiley did not quit within 30 days; the decision does not reach the issue of suitability. Rel. Add. 9.

The actual reasons for Ms. Wiley's quit are undisputed. Dolphin's record of the September 8 conversation states:

Spoke with Ulanda about the updated timeline at Medtox (i.e. them needing her for 1 more month) and Ulanda said she doesn't feel[] that she can commit to that. She said that she is a single mom and she has family obligations that are going to keep her from being able to work a consistent 8-4:30 p.m. schedule. She said that she has to be able to attend doctor appointments, and school functions and since that has been such an issue in the last few weeks she isn't sure she can give Medtox the time/attention that [they] are asking of her. She said that her daughter just started school and she is getting information last minute from them so that is why she hasn't been able to provide us with proper notice. * * * She said that when she originally accepted the job she was told it was a 4-6 week project so there would have only been 1-2 weeks o[f] scheduling conflicts that she could work through but now that they want her to extend for 1 more month, she just doesn't feel that she can commit to that. Ulanda said that she would be able to commit to the original length of the assignment. I asked her if she could commit to fulfilling a two week notice, putting her last day at 9/23, but also to committing to the 8-4:30 schedule, and she said she could. * * * She said she does want to speak with Amanda about the attendance issues that have been in question and asked us to hold off on telling all of this to Medtox until she's able to talk to Amanda in the morning.

Exh. 10/9. Ms. Wiley had reached the conclusion that she would not be able to fulfill Dolphin's attendance expectations for the length of time requested,⁴ or, put another way,

⁴ The temporary nature of the employment also appears directly related to Ms. Wiley's decision. The employment was not temp-to-hire. T. 38, 46. Ms. Wiley had delayed scheduling required appointments for her children and other matters in order to take the job; she was now being asked to further delay these obligations for an undefined, but finite, period. See T. 26. In a permanent position, both parties would understand that the appointments would need to be scheduled according to the employer's attendance

that Dolphin's inflexible attendance rules, added to Medtox's own expectations, made the employment unsuitable given her circumstances.

Respondent's attempts to argue that the employment was in fact suitable are devoid of factual or legal support. Respondent argues that "this was her second temporary staffing position in 2011." Resp. Br. at 12. But the fact that Ms. Wiley had attempted a previous temporary position after establishment of her Unemployment benefit account does not change the fact that, because none of her base period wages derived from staffing service employers, neither position was suitable under the law. *See* Minn. Stat. § 268.035, subds. 23a(g)(4) *and* (h); Exh. 30. While the assignment was the same general field as Ms. Wiley's last employment, medical billing, it was a type of billing that she had not previously performed. T. 23-24, Exh. 6. And while Respondent argues that the fact that Ms. Wiley sought to withdraw her resignation somehow establishes suitability, it ignores the fact that Ms. Wiley's request was for accommodations to ameliorate the factors that made her employment unsuitable and thus allow her to continue working. *See* Exh. 10/9, Rel. Br. at 6. Respondent can hardly fault Ms. Wiley for requesting accommodations when several other provisions of the quit statute require such requests. *See* Minn. Stat. § 268.095, subds. 1(7) (requiring request for accommodation before quitting for medical reasons), 1(8) (same for loss of child care); *see also id.* at subd. 3(c) (requiring complaint about adverse working conditions to

policy rather than delayed until after the end of the employment.

establish quit for good reason caused by employer).

In summary, Ms. Wiley attempted a temporary position that Unemployment law did not require her to seek or accept. She discovered that the combined attendance requirements of the temporary agency and the job site were incompatible with her family circumstances. She committed the act that constituted a quit for Unemployment Insurance purposes within 30 calendar days of beginning her employment. Under the plain language of Minn. Stat. § 268.095, subd. 1(3), and consistent with its purpose, she continues to qualify for Unemployment benefits.

CONCLUSION

For the foregoing reasons, and those stated in our principal Brief, Relator respectfully requests that this Court reverse the ULJ's decision.

Respectfully submitted,

Dated: 7/23/12



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