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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2275**

Janine M. Bailey,
Relator,

vs.

American Crystal Sugar Company Cooperative,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed September 17, 2012
Affirmed
Schellhas, Judge**

Department of Employment and Economic Development
File No. 28402074-3

Janine M. Bailey, Grand Forks, North Dakota (pro se relator)

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Minnesota (for respondent American Crystal Sugar Company Cooperative)

Lee B. Nelson, Amy Lawler, Department of Employment and Economic Development,
St. Paul, Minnesota (for respondent Department of Employment and Economic
Development)

Considered and decided by Wright, Presiding Judge; Schellhas, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

In this challenge to a decision of an unemployment-law judge (ULJ) that relator is ineligible for unemployment benefits, relator argues that the ULJ's finding that she was not available for suitable employment and not actively seeking employment during a period of medical leave constitutes an abuse of discretion. We affirm.

FACTS

Relator Janine Bailey has recently appealed two other cases to this court: *Bailey v. Am. Crystal Sugar Co.*, No. A11-2074, 2012 WL 3553189 (Minn. App. Aug. 20, 2012); and *Bailey v. Am. Crystal Sugar Co.*, A11-2075. We emphasize that this opinion is limited to the facts and issues presented to the ULJ at Bailey's unemployment hearing in this case.

Respondent American Crystal Sugar Company Cooperative suspended Bailey from work beginning June 11, 2011. The reason for the suspension is unclear based on the record before us and is not relevant to this opinion. On July 13, American Crystal gave Bailey a last-chance agreement and informed her that she must accept the agreement by July 15 or be terminated for cause. That same day, Bailey's medical provider wrote Bailey a letter, which Bailey provided to American Crystal on July 14. The letter said:

I am writing this letter directly to you so that you may share it with whom you deem necessary. This letter is to advise a medical leave of absence from today's date through our next scheduled appointment on August 1, 2011. The current leave is required related to the Serious Health Condition outlined in the Certification of Health Care Provider for Employee's Serious Health Condition (Family

and Medical Leave Act) that I completed for you dated 1-12-11.

On July 18, the same medical provider wrote Bailey another letter identical to the July 13 letter, except for the following sentence: “This letter is to advise a medical leave of absence from June 30th through our next scheduled appointment on August 1, 2011.” American Crystal did not receive a copy of the July 18 letter until the September hearing before the ULJ.

On July 19, American Crystal informed Bailey that it had received the July 13 letter from her medical provider and that it approved her leave under the Family and Medical Leave Act. American Crystal also told Bailey that if she wished to return to work after her leave, she must sign the last-chance agreement.

On August 1, 2011, Bailey’s medical provider wrote Bailey another letter:

This letter is an update to the letter written 7.13.11 advising medical leave through today’s date. . . . Per our discussion, you reported improvement of symptoms such that you feel ready to return to work.

Also on August 1, the company locked out all union employees, including Bailey, because of a labor dispute. Bailey applied for unemployment benefits. Respondent Minnesota Department of Employment and Economic Development (DEED) determined that Bailey was eligible for unemployment benefits beginning July 13. American Crystal appealed, arguing that Bailey was unavailable for work from July 13 to August 1 because she was on an involuntary medical leave.

After a hearing before a ULJ, the ULJ determined that Bailey was ineligible for unemployment benefits from June 30, 2011, to August 1, 2011, because she was not

available for or actively seeking employment. Bailey requested reconsideration, which the ULJ denied.

Bailey appeals by writ of certiorari.

D E C I S I O N

This court may affirm or reverse the ULJ's decision because, among other things, the ULJ's factual findings are "unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 268.105, subd. 7(d)(5) (2010). We view "the ULJ's factual findings in the light most favorable to the decision." *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted).

We note preliminarily that Bailey's brief includes the following documents not presented to the ULJ: a letter from Eric Nykanen; an AHS Hospital form; a letter from Earl Collison; and a printout from the unemployment-insurance website. In an unemployment-benefits appeal, "evidence which was not received below may not be reviewed as part of the record on appeal." *Appelhof v. Comm'r of Jobs & Training*, 450 N.W.2d 589, 591 (Minn. App. 1990); *see* Minn. R. Civ. App. P. 110.01 (defining what is part of the record on appeal). Because Bailey did not submit these documents to the ULJ, they are not part of the record, and we decline to consider them.

As to the merits of Bailey's appeal, unemployment benefits must be paid to an applicant if, among other things, "the applicant has met all of the ongoing eligibility requirements under section 268.085." Minn. Stat. § 268.069, subd. 1(3) (2010). An applicant who is on "a voluntary leave of absence is ineligible for unemployment benefits," while an applicant who is "on an involuntary leave of absence is not ineligible"

for unemployment benefits. Minn. Stat. § 268.085, subd. 13a(a) (2010). “A medical leave of absence is not presumed to be voluntary.” *Id.* Bailey’s medical leave therefore is presumed to be involuntary, and she may receive unemployment benefits if she meets all other eligibility requirements under section 268.085.

Section 268.085 conditions eligibility for unemployment benefits on whether an applicant was available for and actively seeking suitable employment. *Id.*, subd. 1(4)–(5) (2010). An applicant is “[a]vailable for suitable employment” if she “is ready and willing to accept suitable employment.” *Id.*, subd. 15(a) (2010). “An applicant may restrict availability to suitable employment, but there must be no other restrictions, either self-imposed or created by circumstances, temporary or permanent, that prevent accepting suitable employment.” *Id.* “Actively seeking suitable employment” requires “reasonable, diligent efforts an individual in similar circumstances would make if genuinely interested in obtaining suitable employment under the existing conditions in the labor market area.” *Id.*, subd. 16(a) (2010). But “[a]n applicant who is seeking employment only through a union is considered actively seeking suitable employment if the applicant is in an occupation where hiring in that locality is done through the union.” Minn. Stat. § 268.085, subd. 16(e) (2010). Whether an applicant is “actively seeking” and “available for” suitable employment involve questions of fact. *Goodman v. Minn. Dep’t of Emp’t Servs.*, 312 Minn. 551, 553, 255 N.W.2d 222, 223 (1977) (actively seeking); *Semanko v. Dep’t of Emp’t Servs.*, 309 Minn. 425, 428, 244 N.W.2d 663, 665 (1976) (available).

The ULJ found that Bailey was on a medical leave of absence from June 30 to August 1 and that Bailey was not available for suitable employment during that time period “because of medical restrictions that prevented her from accepting suitable employment.” The ULJ also found that Bailey was not actively seeking suitable employment because Bailey “hoped to return to work in her position” at the company and Bailey testified that “she was not looking for work elsewhere.”

Available for Suitable Employment

Bailey does not seem to challenge the ULJ’s finding about the dates of her medical leave. Rather, she argues that the ULJ’s finding that her medical restrictions made her unavailable for suitable employment was incorrect because “the letters make no mention of any restrictions, capabilities, or unavailability criteria”; she was never “disabled from working”; and she “had no restrictions.” But Bailey’s arguments are unpersuasive.

The ULJ had three letters from Bailey’s medical provider. Two of the letters, dated July 13 and July 18, “advise[d] a medical leave of absence” and stated that the “current leave is *required* related to the Serious Health Condition outlined in the Certification of Health Care Provider for Employee’s Serious Health Condition.” (Emphasis added.) In the last letter, dated August 1, the medical provider wrote that Bailey “reported improvement of symptoms such that you feel ready to return to work.” On an Unemployment Insurance Request for Information form, Bailey answered yes to the questions, “Was there a recent period you were unable to work due to the illness or disability?” and “Does your illness/disability restrict you from performing any of the tasks of your usual occupation?” She also filled in information stating that she was

“totally disabled from performing any type of work” from July 13 to August 1. At the hearing, an American Crystal representative testified that American Crystal did not receive any documentation from Bailey’s medical provider indicating that Bailey had restrictions that could be accommodated so that she could work. American Crystal believed that the medical provider’s July 13 letter contemplated that Bailey was completely off work. When the ULJ asked Bailey whether the ULJ should disregard the medical provider’s letters “saying that [Bailey] should be on a medical leave of absence,” Bailey responded, “I don’t know what to make of that.” And Bailey testified that her medical leave was “an involuntary leave, not by choice.”

Arguably, some evidence suggests that Bailey was available to work. On one Unemployment Insurance Request for Information form, Bailey answered yes to the question, “Are you able to perform any type of work?” And she testified that she “was capable to do [her] job had [she] been allowed.” But upon being pressed by the ULJ about her ability to work and her medical restrictions, Bailey gave indirect answers and did not provide any facts about her ability to work or her medical leave. Viewing the entire record as a whole, we conclude that substantial evidence supports the ULJ’s finding that Bailey was not available to work.

Actively Seeking Suitable Employment

Bailey challenges the ULJ’s finding that Bailey was not actively seeking work. She argues that she had “been seeking, available, keeping in contact with peers, networking.” Bailey’s argument is unpersuasive.

Bailey testified multiple times during the hearing that she was working with her union as it related to her employment with the company, but she did not testify that she was keeping in contact with peers and networking in regard to other employment. And in an Unemployment Insurance Request for Information form, Bailey wrote that her plans for finding employment were “[t]o continue fighting for [her] job back” and in the section that asked her to list her efforts to find employment, she wrote: “I am picketing with others to get my job back!” The unemployment statute requires more. *See Monson v. Minn. Dep’t of Emp’t Servs.*, 262 N.W.2d 171, 172 (Minn. 1978) (holding that relator who “researched a data bank for employment opportunities, . . . regularly consulted professional journals and newspaper employment notices and . . . unsuccessfully applied for two or three . . . positions” was not actively seeking employment); *see also McNeilly v. Dep’t of Emp’t & Econ. Dev.*, 778 N.W.2d 707, 712 (Minn. App. 2010) (concluding that relator was not actively seeking employment when relator “‘asked around for work’ but did not apply for any positions”).

The union exception in the unemployment-insurance statute is inapplicable. The exception considers an applicant to be actively seeking employment if the applicant is seeking employment only through a union and the “hiring in that locality is done through the union.” Minn. Stat. § 268.085, subd. 16(e). Here, a representative of the company stated, “[The union] which Ms. Bailey is a member of only represents American Crystal Sugar Company in East Grand Forks and does not have hiring authority.”

We conclude that substantial evidence supports the ULJ’s finding that Bailey was not actively seeking work.

Other Challenges

Bailey also seems to challenge the ULJ's denial of her request for reconsideration, arguing that the ULJ erred when she said that Bailey "provided no new evidence." But Bailey is mistaken. The ULJ properly denied Bailey's request for reconsideration in part because Bailey had submitted new evidence without showing good cause for why the evidence had not been submitted at the hearing and that the evidence would not change the outcome of the proceeding. *See* Minn. Stat. § 268.105, subd. 2(c) (2010) (noting that ULJ must not, unless for the purposes of determining whether to order an additional evidentiary hearing, consider new evidence in deciding a request for reconsideration).

Bailey also raises other issues that she has had with American Crystal during the course of her employment. Bailey argues that the ULJ ignored the fact that she had been indefinitely suspended since June 11 and that an indefinite suspension is a discharge. But the issue at the hearing was not whether Bailey was indefinitely suspended but rather was whether Bailey was actively seeking and available to work, and the ULJ so informed Bailey and American Crystal at the beginning of the hearing. Generally, this court will not consider matters not argued to or decided by the ULJ. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). We therefore will not address Bailey's arguments.

Bailey also argues that the ULJ's questions made her feel "belittled, intimidated, and degraded which affected [her] greatly throughout the hearing." A ULJ "must exercise control over the hearing procedure in a manner that protects the parties' rights to a fair hearing. The judge must ensure that relevant facts are clearly and fully developed." Minn.

R. 3310.2921 (2011). But upon our careful review of the hearing transcript, we cannot conclude that the ULJ was disrespectful or belittling toward Bailey.

Affirmed.