

A06-0324

**STATE OF MINNESOTA  
IN COURT OF APPEALS**

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Adar Ywswf, Relator,

vs.

Teleplan Wireless Services, Inc., Respondent–Employer, and  
Department of Employment and Economic Development,  
Respondent.

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**RELATOR’S BRIEF AND APPENDIX**

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## STATEMENT OF LEGAL ISSUES

1. Did the ULJ fail in the duty to conduct the hearing as an evidence gathering inquiry, not an adversary proceeding, and fail to assist an unrepresented party?

**The ULJ did not address how these duties were fulfilled.**

*Most Apposite Authority:*

*Miller v. Int'l Express Corp.*, 495 N.W.2d 616, 618 (Minn. App. 1993)

*Ntamere v. DecisionOne Corporation*, 673 N.W.2d 179 (Minn. App. 2003)

Minn. Stat. § 268.105, subd. 1(b) (2005)

Minn. R., Part 3310.2921 (2005)

2. Did the ULJ properly make the credibility findings required by statute when the case hinged on the credibility of the participants?

**The ULJ found the director of human resources for Teleplan to have offered more credible testimony than Ms. Ywswf without setting out the reasons for crediting or discrediting testimony as required by statute.**

*Most Apposite Authority:*

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

3. Did the ULJ fail to consider persuasive, newly discovered evidence in refusing to reconsider the decision?

**The ULJ appeared to concede that it received a copy of Ms. Ywswf's school transcript on reconsideration. However, the ULJ made no reference to the**

**three sworn affidavits from Ms. Ywswf's coworkers, stating that Teleplan never offered first-shift work to the Nokia workers when the Nokia work ended.**

*Most Apposite Authority:*

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

## **STATEMENT OF THE CASE**

Relator Adar Ywswf was laid off from a position with Respondent on October 11, 2005. (T-5) Relator was disqualified from unemployment insurance for quitting without a good reason. (A-8) Relator appealed her initial determination of disqualification from the Department of Employment and Economic Development. (A-11) An unemployment hearing was held on December 8, 2005 before Unemployment Law Judge Hilory A. Seaton. (A-3) In a decision dated December 9, 2005, the ULJ upheld relator's disqualification. *Id.* Relator requested reconsideration of the ULJ's decision. In a decision dated January 17, 2006, the ULJ issued an Order of Affirmation of its decision. (A-1) Relator sought review of the ULJ's January 17, 2006 decision by Writ of Certiorari. (A-24)

## STATEMENT OF FACTS

Relator Adar Ywswf was employed full-time by Respondent Teleplan Wireless from February 21, 2005 to October 11, 2005 on its Nokia line. (T-5, 7) From November 2003 until her permanent hire date in February 2005, Ms. Ywswf performed the identical job as a temporary worker. (T-13) Ms. Ywswf worked as a tester on the second shift with an ending rate of pay of \$11 per hour. (T-6) She was laid off in October 2005 when the Nokia work ended. (T-6-7)

Teleplan claimed in its correspondence with the Department of Employment and Economic Development (DEED) to have orally offered Ms. Ywswf a first-shift permanent position, but claimed that Ms. Ywswf had refused this offer because she was in school. (A-12-13) Ms. Ywswf's communication with DEED disputed that such an offer was ever made. (A-16) After these submissions by the parties, DEED made an initial determination of disqualification. (A-8) Relator requested an evidentiary hearing.

A telephone hearing lasting 24 minutes was conducted by Unemployment Law Judge Hilory Seaton on December 8, 2005. (A-3; T-1) At the hearing, Ms. Ywswf appeared pro se. The employer appeared through its director of human resources, Shirley Curran. (T-2)

Ms. Curran testified that either she or her "HR generalist" personally offered ten Nokia employees first-shift positions on Teleplan's V-3 line. (T-7) She testified that only three of the ten Nokia employees accepted the first-shift work. (T-8) Ms. Curran

testified that she offered the first-shift work to Ms. Ywswf, and that she refused it because she was attending school in the mornings. (T-8) Ms. Curran testified that Ms. Ywswf later called her a “couple of times” because she was not getting unemployment insurance. (T-10) Ms. Curran admitted that in those conversations Ms. Ywswf was upset because she claimed never to have been offered a first-shift position. (T-10)

Ms. Curran and the ULJ had the following exchange concerning Ms. Curran’s contention that Ms. Ywswf turned down a subsequent offer of a first-shift position because she did not know how to do the work:

ULJ:	Okay, and why couldn’t she do the repair.
Ms. Curran:	She told me she couldn’t do the repair.
ULJ:	Just that she didn’t want to do it, I mean you would have trained her to do it.
Ms. Curran:	Oh, yeah.

(T-10-11)

The ULJ then asked Ms. Ywswf if she had any questions for Ms. Curran. (T-11) When it appeared that Ms. Ywswf did not understand her right to cross-examine Ms. Curran or how to exercise it, the ULJ moved on and took Ms. Ywswf’s direct testimony. (T-11)

Ms. Ywswf testified, in direct contradiction to Ms. Curran’s testimony, that Ms. Curran had never offered her the first-shift work. (T-11) Rather, she testified that she told Ms. Curran that she was going to apply for unemployment insurance, and Ms. Curran replied, “Yeah, yeah, okay. Don’t worry[;] you have to do it.” (T-11)

The ULJ asked Ms. Ywswf about Ms. Curran’s contention that Ms. Ywswf would

not take first shift work because she was in school. (T-13) Ms. Ywswf responded that she was not attending school during the time period in question, but that she had attended Normandale College in the past. (T-13) She further testified that she had her transcript with her during the hearing. (T-13) The ULJ never asked Ms. Ywswf to produce her transcript nor inquired how it might corroborate her testimony, and the document was not marked as an exhibit nor gathered as evidence.

Ms. Ywswf testified that the only discussion that she had with Ms. Curran on the final day of work was that she was taken into the office and notified that her work was done. (T 14-15) When questioned about whether she would have refused an offer of first-shift work had it been offered, Ms. Ywswf testified:

No, no nobody say that[.] I swear my god[.] I am under oath now, she never say to go first shift[.] Why I refuse if I have job[.] I don't refuse because I don't have income[.] Since that day I sit here, I go here about another job, another job, another job, still not.

(T-15) (punctuation added)

Ms. Ywswf also gave her version of a subsequent exchange about first-shift work. Ms. Ywswf testified that, when she contacted Ms. Curran about work on October 23, 2005, Ms. Curran told her that there was a first-shift position but that Ms. Curran would have to follow up with a first-shift manager named Joe. (T-12) Ms. Ywswf testified that this was “another trick” by the employer and that when Ms. Curran called her back, Ms. Ywswf said that this offer was for repair work and not the tester work she had previously done, and that it was very hard. (T-12) Ms. Curran then told her to file for

unemployment.<sup>1</sup>

On December 9, 2005, the ULJ issued a decision upholding the disqualification. (A-3) In its Order, the ULJ concluded that this was a voluntary separation on the part of Ms. Ywswf because Ms. Ywswf refused to accept an offer of first-shift work because it “conflicted with her school schedule.” *Id.* The ULJ further reasoned that there was no good cause reason for this voluntary quit. *Id.* In a final paragraph, the ULJ offered a credibility finding:

We have considered Ywswf’s contention that she was not offered the opportunity to continue her employment on the first shift and [that she did not]<sup>2</sup> convey to the director of human resources, but do not find her assertions to be credible. The director of human resources credibly testified that all 10 employees, including Ywswf, were offered the opportunity to work on the first shift and that three employees accepted the offer while seven, including Ywswf, declined the opportunity because of personal conflicts. Further, the director credibly testified that she was unaware that Ywswf had been enrolled in school and first learned of her schooling when Ywswf explained that she could not accept the position because it conflicted with her school schedule. And although Ywswf may not currently be attending school as she maintained, we, nevertheless, find that the director of human resources’ testimony that this was the reason offered by Ywswf for her decision to decline continued employment to be credible.

(A-6)

Ms. Ywswf requested reconsideration. (A-7) Along with her request for reconsideration, Ms Ywswf submitted her Normandale College transcript, printed December 1, 2005, which showed that she last attended that school during Fall, 2004.

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<sup>1</sup> The tape of this proceeding clarifies that Ms. Ywswf said “file” and not “fill” as reported in the transcript.

<sup>2</sup> The corrected text comes from the ULJ’s reconsideration decision dated January 17, 2006.

(A-23) She also submitted three notarized statements from Abdule Abdi, Ardo Awale, and Hassan Hassan, who each stated that they worked at Teleplan on the same shift as Ms. Ywswf and that none of them were offered first-shift work after the Nokia work ended. (A 21-22) And she submitted two WARN notices from the employer concerning the then impending Nokia lay off. (A-18-19) It appears that, other than the transcript, the ULJ did not consider or address any of this potential remand evidence in her Order of Affirmation dated January 17, 2006. (A-1) It is from the ULJ's Order of Affirmation that Ms. Ywswf now appeals.

## **STANDARD OF REVIEW**

This Court reviews the decision of the Unemployment Law Judge under the following statutory framework:

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

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

Minn. Stat. § 268.105, subd. 7(d)(1)–(6), as amended by Laws 2005, ch. 112, art. 2, § 34

[effective as to Unemployment Law Judge decisions issued on and after June 26, 2005].

This language is almost verbatim identical to the Minnesota Administrative Procedure Act's judicial review standard at Minn. Stat. § 14.69(a)–(f). It is appropriate to use the M.A.P.A. standard, because the Department of Employment and Economic Development is an administrative agency that makes quasi-judicial decisions through a hearing process. *Cf., Arvig Telephone Co. v. Northwestern Bell Telephone Co.*, 270 N.W.2d 111, 116 (Minn. 1978) (“Agency determinations which are legislative in character receive an extremely limited review on appeal, while quasi-judicial actions are somewhat more closely scrutinized.”).

Prior to the 2005 amendment to § 268.105, the Supreme Court in *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002), cited *Ress v. Abbott Northwestern Hosp., Inc.*, 448 N.W.2d 519, 523 (Minn. 1989), for this statement of the standard of review of findings of fact in unemployment insurance cases:

We review the commissioner's factual findings in the light most favorable to the commissioner's decision and will not disturb them as long as there is evidence that reasonably tends to sustain those findings.

But the Court's deference to the Commissioner's findings is not unlimited. *Neve v. Austin Daily Herald*, 552 N.W.2d 45, 47 (Minn. App. 1996). A finding of fact may be reversed if it is arbitrary and capricious or not reasonably supported by the record as a whole. *See Abbey v. Contract Programing Specialists, Inc.*, 377 N.W.2d 28, 31 (Minn. App. 1985) (holding that the Commissioner was arbitrary in rejecting a credibility finding

where the case had been remanded for such a finding).

The Commissioner's decision must be supported by reliable, probative, and substantial evidence. Minn. R., Part 3310.2922. That is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Soo Line R.R. Co. v. Minnesota Dep't of Transp.*, 304 N.W.2d 305, 306 (Minn. 1981); *cf. Schmidgall*, 644 N.W.2d at 804 (Commissioner's findings are upheld if there is evidence reasonably tending to sustain them). Substantial evidence means more than a scintilla of evidence, more than "some" evidence, and more than "any" evidence. *Hiawatha Aviation of Rochester, Inc. v. Minnesota Dep't of Health*, 375 N.W.2d 496, 501 (Minn. 1986). A decision cannot be affirmed merely on the basis of evidence which in and of itself justifies it, without taking into account contradictory evidence from which conflicting inferences can be drawn. *Liffrig v. Independent Sch. Dist. No. 442*, 292 N.W.2d 726, 729 (Minn. 1980).

The Court is "free to exercise its independent judgment" on questions of law, *Smith v. Employers' Overload Co.*, 314 N.W.2d 220, 221 (Minn. 1981), which are reviewed on a *de novo* basis, without deference. *Id.* The Commissioner's conclusions of law are not binding if they do not have reasonable support in the findings of fact. *Zepp v. Arthur Treacher Fish & Chips, Inc.*, 272 N.W.2d 262, 263 (Minn. 1978); *Bray v. Dogs & Cats Ltd.*, 679 N.W.2d 182, 184 (Minn.App. 2004).

## ARGUMENT

### **I. The ULJ failed in the duties to assist an unrepresented party and to conduct the hearing as an evidence-gathering inquiry**

The ULJ is required to assist unrepresented parties in the presentation of evidence, and to control the hearing in order to protect the parties' right to a fair hearing, and ensure that relevant facts are clearly and fully developed. Minn. R., Part 3310.2921 (2005).

When a party is pro se, the ULJ must help the party "to recognize and interpret the parties' claims." *Ntamere v. Decisionone Corp.*, 673 N.W.2d 179, 180-181 (Minn. App. 2003) (citing *Miller v. Int'l Express Corp.*, 495 N.W.2d 616, 618 (Minn.App.1993)).

At an unemployment compensation hearing, both parties may examine and cross-examine witnesses and present exhibits. Minn. R., Part 3310.2921 (2005). The hearing is to be conducted by the ULJ as an evidence-gathering inquiry, not an adversary proceeding, without regard to common law burdens of proof. Minn. Stat. § 268.105, subd. 1(b) (2004).

Here, the transcript reveals that the ULJ made no effort to assist Ms. Ywswf. When Ms. Ywswf had a difficult time understanding that she had the right to cross-examine the employer's witness, the ULJ made no effort to explain what this right meant, nor how she could exercise it. The ULJ did not undertake to cross-examine the employer's witness. (T-11) When Ms. Ywswf testified that she had a copy of her school transcript with her to refute the employer's allegation that she had refused an offer of first-shift work because she was in school, the transcript of the hearing shows that the

ULJ made no effort to inquire about this very likely relevant and probative document, did not mark it as an exhibit nor gather it as evidence. The ULJ did not question the employer about whether there was corroborating evidence that an offer of employment was made or ever reduced to writing, nor did the ULJ ask whether and where the alleged first-shift job had ever been posted. The transcript shows that the ULJ never asked about any potential additional witnesses who could have offered relevant direct testimony, such as the other nine Nokia employees terminated at the same time as relator. None of these basic steps of testing and probing the opposing testimony was performed by the ULJ. Instead, the ULJ's conducted a terse hearing, 24 minutes in duration, in which she asked leading questions to the employer (T-10-11) and cut off Ms. Ywswf's less articulate protests. (T-8, 16) This hearing fell below the standards established in statute and case law to assure that the evidentiary hearing gathers relevant evidence and that the claims of an unrepresented party are fully developed. The ULJ's decision must be vacated and this case remanded for a new evidentiary hearing.

**II. The ULJ failed to make statutorily required credibility findings where the case hinged on the credibility of the participants**

When making important credibility determinations, the ULJ is required to set out reasons for crediting or discrediting testimony. Minn. Stat. § 268.105, subd. 1(c) (2005).<sup>3</sup>

Here, the hearing, as it was conducted, hinged solely on the credibility of the two

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<sup>3</sup> This express requirement is from an August 2005 amendment to the unemployment insurance statute. Here, the case rests solely on the credibility of the

parties. Ms. Ywswf did not have any witnesses other than herself; nor did the employer present testimony from anyone other than the human resources director who had claimed to have orally offered first-shift employment to Ms. Ywswf. Moreover, the record at the time of the hearing contained no documentary evidence from either side apart from the brief, hand-written initial responses to DEED's inquiries that were prepared by the parties.

The ULJ appears to have resolved this credibility issue on an unarticulated and subjective basis. In her only finding relating to credibility, the ULJ states that:

We have considered Ywswf's contention that she was not offered the opportunity to continue her employment on the first shift and [that she did not] convey to the director of human resources, but do not find her assertions to be credible. The director of human resources credibly testified that all 10 employees, including Ywswf, were offered the opportunity to work on the first shift and that three employees accepted the offer while seven, including Ywswf, declined the opportunity because of personal conflicts. Further, the director credibly testified that she was unaware that Ywswf had been enrolled in school and first learned of her schooling when Ywswf explained that she could not accept the position because it conflicted with her school schedule. And although Ywswf may not currently be attending school as she maintained, we, nevertheless, find that the director of human resources' testimony that this was the reason offered by Ywswf for her decision to decline continued employment to be credible.

(A-6) But merely reciting the parties' claims does not constitute a finding of fact, *Dean v. Pelton*, 437 N.W.2d 762, 764 (Minn. App. 1989), let alone a required credibility finding that includes "reasons" for crediting or discrediting testimony. Nowhere in this recitation does the ULJ specify any reason why she did not credit Ms. Ywswf's assertion

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participants.

that she was not offered first-shift work. Instead, the ULJ merely recites details from the employer's witness testimony: Ms. Curran gave detail in the number of employees who, she claimed, accepted or declined first-shift offers, and Curran claimed that she only learned of Ms. Ywswf's school attendance when she conveyed to Ms. Ywswf the offer of first-shift employment.

Ms. Ywswf had no knowledge at the time of the hearing about whether other employees had received offers of first shift employment or not. However, Ms. Ywswf offered testimony to contradict the employer's assertion that Curran only learned of Ms. Ywswf's school attendance in their final meeting. Ms. Ywswf testified that, while she had worked as a permanent employee only since February 2005, she had been employed for over a year before that as a temporary employee and she had discussed going to school with Curran. (T-13) Ms. Ywswf also offered to produce a copy of her transcript to resolve this credibility dispute. (T-13) The ULJ did not address this conflicting explanation nor relator's offer to provide this corroborating evidence.

Both the transcript and, to a greater extent, the tape recording of the proceeding convey that Ms. Ywswf is not a native speaker of English. Her accent is somewhat difficult to understand and her syntax is sometimes non-standard, as in this example:

No, no nobody say that[.] I swear my god[.] I am under oath now, she never say to go first shift[.] Why I refuse if I have job[.] I don't refuse because I don't have income[.] Since that day I sit here, I go here about another job, another job, another job, still not.

(T-15) The ULJ's decision does not include any explanation how she took into account

these language issues in assessing credibility. It also appears that the employer's witness was given more of an opportunity to tell her side of the story. Ms. Ywswf was cut off on a couple of occasions; (T-8, 16) whereas, the employer's witness was allowed ample opportunity to give her entire narrative. (T-7-10; 15-16).

The transcript and record show that the ULJ's decision is deficient because the ultimate credibility finding fails to include reasons for crediting or discrediting testimony. The decision must be reversed.

**III. The ULJ failed to consider persuasive, newly discovered evidence in reconsidering the decision**

The Unemployment Insurance act was recently amended to provide a new process for review of the ULJ's decision. Previously, decisions of the ULJs were reviewed by a Representative of the Commissioner; later this second-level review was performed by a Senior Unemployment Review Judge. In August 2005, a new procedure began whereby a party may request reconsideration from the ULJ who initially heard the appeal. Minn. Stat. § 268.105, subd. 2 (2005). In the past, the SURJ was not allowed to consider new evidence. *See* Minn.Stat. § 268.105, subd. 2(d) (2004) (While conducting a de novo review on appeal, the SURJ may not consider any evidence outside the record established at the evidentiary hearing before the ULJ.) The current language of the statute allows ULJs on reconsideration to consider new evidence for the purpose of determining whether a remand is appropriate. Minn. Stat. § 268.105, subd. 2(d) (2005).

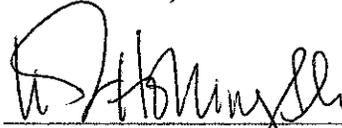
Here, as part of her request for reconsideration, Ms. Ywswf provided the ULJ with a copy of her Normandale College transcript, dated December 1, 2005, which shows that she had not attended school since Fall Semester 2004. (A-23) She also provided three notarized statements from Abdule Abdi, Ardo Awale, and Hassan Hassan, each of whom was a co-worker with Ms. Ywswf on the Nokia line and each of whom asserts that they were laid off, were offered no additional work by Teleplan, and proceeded to claim unemployment benefits. (A-21-22) Finally, Ms. Ywswf provided two lay off notices from Teleplan, dated May 18, 2005 and August 2, 2005. (A-18-19) Neither of these notices contain language that would advise the Nokia employees of any possible future employment. Rather, both notices state that the employees will be “terminated” on a “permanent” basis. *Id.* This evidence is clearly sufficient to warrant a remand on the issue whether this relator should be disqualified, if no offer was really made. Relator’s reconsideration evidence would directly refute the employer’s assertions that (1) all ten Nokia workers were offered first-shift employment and (2) Ms. Ywswf refused first-shift work because she was enrolled in school. The ULJ erred in not seeking and gathering this evidence at the evidentiary hearing. The ULJ erred again in affirming that decision, instead of granting relator’s reconsideration request and holding another hearing to receive relevant evidence.

## CONCLUSION

The ULJ erred as a matter of law in three respects. She failed to properly conduct the hearing to protect Ms. Ywswf as a pro se party, she failed to set out specific reasons for crediting and discrediting testimony, and she failed to consider new evidence provided at reconsideration that should have led to a remand. Because there is probative, material evidence available that demonstrates that Ms. Ywswf was never offered first-shift employment nor did she refuse it, this matter should be remanded to the agency for a new hearing.

Respectfully submitted,

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Dated: 4/19/06

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).