

NO. A06-0324

State of Minnesota
In Court of Appeals

Adar Ywswf,

Relator,

v.

Teleplan Wireless Services, Inc.,

Respondent-Employer,

and

Department of Employment and Economic Development,

Respondent.

RESPONDENT-EMPLOYER'S BRIEF

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STATEMENT OF THE CASE

Relator Adar Ywswf quit her employment with Respondent-Employer Teleplan Wireless Services, Inc. on October 11, 2005, when she turned down a first-shift position in lieu of a lay off. On November 15, 2005, the Department of Employment and Economic Development disqualified Relator from receiving unemployment benefits. Relator appealed the disqualification, and a December 8, 2005 hearing was held before Unemployment Law Judge Hilory A. Seaton. On December 9, 2005, the ULJ upheld Relator's disqualification, finding Teleplan's Human Resource Director a more credible reporter than Relator. Relator requested reconsideration of the ULJ's decision, and on January 17, 2006, the ULJ issued an Order of Affirmation.

STATEMENT OF LEGAL ISSUES

I. Did the ULJ properly conduct the hearing?

The ULJ properly conducted the hearing by permitting both parties ample opportunity to present their version of events and ask questions of each other.

Most Apposite Authority: Minn. Stat. § 268.105, subd. 1(b) (2004); Minn. R. 3310.2921.

II. Did the ULJ properly make the credibility findings required by statute?

The ULJ appropriately explained why Teleplan's Director of Human Resources offered more credible testimony than Relator.

Most Apposite Authority: Minn. Stat. § 268.105, subd. 1(c) (2004).

III. Did the ULJ properly consider all the evidence in reconsidering the decision?

The ULJ properly considered all the evidence that was submitted in a timely fashion, and the ULJ appropriately ignored and/or accorded little weight to Relator's untimely documents.

Most Apposite Authority: Minn. Stat. § 268.105, subd. 2(c) (2004); *Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1988).

STATEMENT OF FACTS

Relator worked for Teleplan as a cellular phone tester on a full-time, permanent basis from February 21, 2005 until October 11, 2005. (Tr. at 5-6.) In the fall of 2005, work on the second-shift "Nokia line," in which Relator was working, was slowing down due to a lack of work from Nokia. (*Id.* at 7.) Pursuant to this slowdown, ten Teleplan employees on the Nokia line, including Relator, were to be affected. (*Id.*) Teleplan, however, offered the ten employees, including Relator, first-shift employment, which Relator declined. (A-8.) Accordingly, Relator left her employment with Teleplan on October 11, 2005. (*Id.*) On November 15, 2005, the Department disqualified Relator from receiving unemployment benefits, and Relator requested a hearing. (A-8, A-11.)

At the December 8, 2005 hearing, Teleplan's Human Resources Director Shirley Curran testified that, while Teleplan planned to shut down the second-shift Nokia line on October 11, 2005, every affected employee was to be offered a first-shift position on the "Motorola line:"

When we realized that the, this particular line was going to be going away we realized it was going to affect approximately, well it was going to affect ten people on the second shift. At the same time that that line was going down we received new work from Motorola in that we received work for the Razr phone which we called our V3 line, and that was on the first shift. I had four people on the V3 line, and we were ramping and we needed to get about 16-20 people into that line. As these ten people were affected by the Nokia line we met human resource, my HR generalist and I individually met with the ten people who were going to be affected by the Nokia downsizing, and we met individually with them, and we let them know that there was an opportunity to work on the first shift. A lot of people who were on second shift have reasons why they're on the second shift, they don't want to go to the first shift, but we wanted to give them an opportunity to

come up on the first shift if they wanted to, because we had work there. The engineering department had asked that we try to find experienced workers to work in this line because the phone is so difficult to repair. So we offered the 10 Nokia repair group an opportunity to move to first shift.

(Tr. at 7.)

Ms. Curran testified that Teleplan offered this first-shift work to all ten Nokia line employees, including Relator, and Ms. Curran testified that she personally met with Relator on October 11, 2005 and offered Relator a first-shift Motorola position. (*Id.* at 8.) Seven of the employees, including Relator, turned down the first-shift opportunity because of conflicts in their personal schedules. (*Id.* at 8-9.) Three of the employees accepted the opportunity to begin working on the first shift the following week. (*Id.*)

Ms. Curran testified that Relator “told me at that time that she was going to school in the morning and couldn’t go to first shift. I was kind of surprised, I congratulated her on going to school. I explained to her that we didn’t have anything else on second shift . . .” (*Id.* at 8.) Ms. Curran further explained,

At the time of hire we move people back and forth between shifts. Usually, we’ll ask them if they’d like to move to first shift, we don’t demand it. But we do ask them if they would like to move to first shift. We do have people that move back and forth either at their request or at our request. I have employees that do that too as their school schedules shift we were willing to work with them and shift their work schedules also. So it’s really, it’s not a formal policy but it’s understood that people can move back and forth between shifts.

(*Id.* at 9.)

When pressed by the ULJ regarding whether Relator understood that Teleplan was offering her first-shift work, Ms. Curran insisted, “When [Relator] told me that she was

going to school in the morning and couldn't go to first shift it was pretty clear to me that she understood that I was offering her first shift because she was telling me the reason why she couldn't go to first shift." (*Id.*)

Ms. Curran also testified under examination from the ULJ that, one month later, Relator turned down another job with Teleplan—doing repair work on the phones—even though the job was offered to her with training:

Q. Okay, and why couldn't she do the repair.

A. She told me she couldn't do repair.

Q. Just that she didn't want to do it, I mean would you have trained her to do it.

A. Oh yeah.

Q. Okay, and the repair work would have been the same wage.

A. Oh yeah, we bring people in who don't know repair. She understands the process, if she told me she couldn't do it, or if she didn't want to do it that would be her choice.

(*Id.* at 10-11.)

Relator denied much of Ms. Curran's testimony. (*Id.* at 14-15.) Relator, however, did eventually admit meeting with Ms. Curran on October 11, 2005:

Q. Did you meet with Ms. Curran at some time before your job ended.

A. No.

Q. You had a meeting with her before you left employment, you had a discussion with her.

A. Everybody had

(*Id.* at 14.) Relator also admitted that Ms. Curran discussed the Motorola work:

A. [On] October 11, 2005 I attended as normal my work so administration since there wasn't any bonus, nothing they bring one bucket, two buckets from Motorola side

Q. And why would she talk about the Motorola job if there wasn't work for you for the Motorola job.

. . . .

(*Id.* at 14-15.)

On December 9, 2005, the ULJ determined that Relator had voluntarily quit her employment with Teleplan. (A-3.) On December 13, 2005, Relator requested reconsideration of the ULJ's decision and submitted additional documents that she had not sought to introduce at or before the hearing. (A-7.) On January 17, 2006, the ULJ denied Relator's request and affirmed the December 9, 2005 Order. (A-1.) This appeal followed.

ARGUMENT

I. The Court's Standards Of Review.

This Court reviews a ULJ's decision 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) (2004).

It is a well-established rule . . . that this court on certiorari cannot disturb the determination of the commissioner of the Department of Employment Security on the question of eligibility for unemployment compensation merely because the court does not agree with the determination, and can interfere only where he has exceeded jurisdiction, has proceeded upon an erroneous theory of law, or where his action is arbitrary, oppressive, and unreasonable, or without evidence to support it.

Vicker v. Starkey, 265 Minn. 464, 470, 122 N.W.2d 169, 173 (1963).

“This court has long accorded particular deference to the commissioner rather than to the referee. . . . the applicable standard of review is whether there is reasonable support in the evidence to sustain the decision of the director rather than the decision of the appeal tribunal.” *Tuff v. Knitcraft Corp.*, 526 N.W.2d 50, 51 (Minn. 1995). “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.” *Schmidgall v. Filmtec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

“Whether an employee has been discharged or voluntarily quit is a question of fact.” *Midland Elec., Inc. v. Johnson*, 372 N.W.2d 810, 812 (Minn. App. 1985). “When the parties have presented conflicting evidence on the record, this court must defer to the [factfinder’s] ability to weigh the evidence.” *Whitehead v. Moonlight Nursing Care, Inc.*, 529 N.W.2d 350, 352 (Minn. App. 1995).

II. The Minnesota Unemployment Insurance Law.

Unemployment benefits are not available to an employee who voluntarily quits when there is alternative employment available:

Subdivision 1. **Quit.** An applicant who quit employment shall be disqualified from all unemployment benefits

....

Subd. 2. **Quit defined.** (a) A quit from employment occurs when the decision to end the employment was, at the time the employment ended, the employee's.

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

....

Minn. Stat. § 268.095 (2004).

Strict rules of evidence and procedure do not govern unemployment-benefits hearings:

Subdivision 1. **Evidentiary hearing by an unemployment law judge.** (a) Upon a timely appeal having been filed, the department shall send, by mail or electronic transmission, a notice of appeal to all involved parties that an appeal has been filed, that a de novo due process evidentiary hearing will be scheduled, and that the parties have certain rights and responsibilities regarding the hearing. . . .

(b) The evidentiary hearing shall be conducted by an unemployment law judge without regard to any common law burden of proof as an evidence gathering inquiry and not an adversarial proceeding. The unemployment law judge shall ensure that all relevant facts are clearly and fully developed. The department shall adopt rules on evidentiary hearings. The rules need not conform to common law or statutory rules of evidence and other technical rules of procedure. The

department shall have discretion regarding the method by which the evidentiary hearing is conducted. . . .

(c) After the conclusion of the hearing, upon the evidence obtained, the unemployment law judge shall make findings of fact and decision and send those, by mail or electronic transmission, to all involved parties. When the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the unemployment law judge must set out the reason for crediting or discrediting that testimony. . . .

. . . .

Subd. 2. Request for reconsideration. (a) Any involved applicant . . . may . . . file a request for reconsideration asking the unemployment law judge to reconsider that decision. . . .

. . . .

(c) In deciding a request for reconsideration, the unemployment law judge shall not, except for purposes of determining whether to order an additional evidentiary hearing, consider any evidence that was not submitted at the evidentiary hearing conducted under subdivision 1.

The unemployment law judge must order an additional evidentiary hearing if an involved party shows that evidence which was not submitted at the evidentiary hearing: (1) would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence; or (2) would show that the evidence that was submitted at the evidentiary hearing was likely false and that the likely false evidence had an effect on the outcome of the decision.

. . . .

Minn. Stat. § 268.105 (2004).

Minn. R. 3310.2921 provides a procedure for the presentation of evidence at the hearing:

The order of presentation of evidence shall be determined by the referee. The referee shall inform the parties of their burdens of proof before the taking of testimony.

Each party may present and examine witnesses and offer their own documents or other exhibits. . . . Opposing parties shall have the right to examine witnesses, object to exhibits and testimony, and cross-examine the other party's witnesses. The referee should assist unrepresented parties in the presentation of evidence. The referee shall rule upon evidentiary objections on the record. The referee shall permit rebuttal testimony. Parties shall have the right to make closing statements. Closing statements may include comments based upon the evidence and arguments of law. The referee may limit repetitious testimony and arguments.

The referee shall exercise control over the hearing procedure in a manner that protects the parties' rights to a fair hearing. The referee shall ensure that relevant facts are clearly and fully developed.

Minn. R. 3310.2912 provides that, at least five days before a telephonic evidentiary hearing, any party may submit written documents to the ULJ for consideration during the hearing:

Upon receipt of notice of a telephone conference hearing, and no later than five calendar days before the scheduled time of hearing, parties may submit to the department any documents they wish to offer as exhibits at the hearing. Copies of the documents as well as all documents which are to be introduced as department exhibits shall be mailed to all parties by the appellate office in advance of the hearing. If a party moves to introduce additional documents during the course of the hearing, and the referee rules that the documents should be admitted into evidence, the moving party shall send copies of the documents to the referee and the opposing party. The record shall be left open for sufficient time for the submission of a written objection and for response to the documents. The response may be in writing or the referee may, when appropriate, reconvene the telephone conference hearing to obtain a response or permit cross-examination regarding the late filed exhibits.

Minn. R. 3310.2922, however, provides that only relevant and material evidence that is offered at the hearing may be considered:

Only evidence received into the record of any hearing may be considered by the referee. The parties may stipulate to the existence of any fact or the authenticity of any exhibit.

All competent, relevant, and material evidence, including records and documents in the possession of the parties which are offered into evidence, shall be part of the hearing record. . . . A referee may exclude any evidence which is irrelevant, immaterial, unreliable, or unduly repetitious. A referee shall not be bound by statutory and common law rules of evidence. The rules of evidence may be used as a guide in a determination of the quality and priority of evidence offered. . . . A referee shall only use reliable, probative, and substantial evidence as a basis for decision.

The standard of proof for the determination of facts in an unemployment-benefits hearing is by a preponderance of the evidence. Minn. Stat. § 268.03, subd. 2 (2004) (stating, “Preponderance of the evidence means evidence in substantiation of a fact that, when weighed against the evidence opposing the fact, is more convincing and has a greater probability of truth”).

III. The ULJ Properly Conducted The Evidentiary Hearing.

Relator argues that the ULJ failed to fulfill her “duties to assist an unrepresented party and to conduct the hearing as an evidence-gathering inquiry.” (Relator’s Br. at 10.) But while some latitude may be given to *pro se* litigants, bending of all rules and requirements is not permitted. *Liptak v. State ex rel. City of New Hope*, 340 N.W.2d 366, 367 (Minn. App. 1983). Further, “Rule 3310.2921 . . . does not require a judge to determine which statutory provisions might apply and to make arguments on behalf of

parties.” *Wehner v. Carlson Store Fixture Co.*, No. C6-96-440 (Minn. App. Sep. 10, 1996) (unpublished and attached) (stating that unemployment-benefits claimants are entitled to seek counsel for agency proceedings and that “it is unreasonable to expect judges to inform pro se claimants of all potentially applicable provisions”).

In this case, the Department’s disqualification determination provided Relator the means for challenging the disqualification, and all procedures were fully set forth therein. The parties agreed that they had already received the Department’s documents before the hearing, and all parties stipulated to entry of those documents into evidence at the onset of the hearing. (Tr. at 1-5.) Relator never sought to introduce any additional documents into evidence before or during the hearing, such as her school transcript, the three alleged affidavits, or the WARN notices, and she has not explained why those documents could not have been produced before the hearing. As Relator concedes, this matter turns solely on the credibility of the witnesses (Relator’s Br. at 11-12 n.3), and the ULJ simply found Ms. Curran’s testimony more credible than Relator’s testimony.

Also, the ULJ initially examined Ms. Curran. (*Id.* at 5-11.) The ULJ then asked Relator whether she had any questions for Ms. Curran, to which Relator did not. (*Id.* at 11.) The ULJ then permitted Relator to testify. (*Id.* at 11-15.) The ULJ then re-examined Ms. Curran. (*Id.* at 15.) Finally, the ULJ permitted Relator to make a final statement. (*Id.* at 17.) Relator cannot reasonably contend that she was precluded from fully testifying or presenting all her relevant evidence at the hearing. *See Simon v. On Board Corp. Minn.*, No. C9-03-288 (Minn. App. July 1, 2003) (unpublished and attached) (finding no error even when applicant is cut off from testifying at a hearing

when the testimony was irrelevant to the issues). The record shows the ULJ examined both parties equally.

Contrary to what Relator alleges, the ULJ did challenge Ms. Curran's version of events, including examining Ms. Curran as to her belief that Relator understood that Teleplan was offering her first-shift work. (Tr. at 9.) The ULJ asked Relator whether she had any questions for Ms. Curran—other than simply disagreeing with Ms. Curran's testimony—and Relator did not have any cross-examination questions. (*Id.* at 11.) The ULJ had no duty to explain to Relator the nature of cross-examination, and it was sufficient for the ULJ to simply ask if Relator had any questions for Ms. Curran. Further, it would be unreasonable to impose on the ULJ a duty to contact witnesses, as Relator suggests, when Relator could have sought to subpoena witnesses for the hearing. (Relator's Br. at 11.)

Finally, no evidence suggests that Relator could not understand English. *See* Minn. R. 3310.2911 (stating that, upon request, the department shall provide an interpreter to an applicant). To the contrary, Relator's transcript shows that she has taken many courses in English, including courses on the subject of the English language. (A-23.) To the extent Relator had difficulty with English, she never requested an interpreter, and the ULJ was not required to provide one for Relator when Relator understood and fully participated in the hearing. Because the ULJ properly followed all statutory procedures, this Court should affirm.

IV. The ULJ Made the Statutorily Required Credibility Findings.

Relator argues that the ULJ “failed to make statutorily required credibility findings where the case hinged on the credibility of the participants.” (Relator’s Br. at 11.) Credibility judgments are the province of the commissioner’s representative and not for the reviewing court. *LaSalle Cartage Co. v. Hampton*, 362 N.W.2d 337, 341 (Minn. App. 1985). Where credibility is at issue, “this court must defer to the Commissioner’s ability to weigh the evidence.” *Whitehead*, 529 N.W.2d at 352 (citation omitted).

The ULJ was persuaded by Ms. Curran’s testimony that Relator voluntarily declined alternative first-shift employment, and the ULJ specifically found Relator’s assertions not credible. (A-6.) These credibility findings are supported by the evidence, which showed that Relator initially denied speaking with Ms. Curran on October 11, 2005 but then simultaneously admitted she had. (Tr. at 14.) Also, Relator denied having been offered a position with the first-shift Motorola line but simultaneously admitted that Ms. Curran discussed the Motorola job with her on October 11, 2005. (*Id.* at 14-15.)

Ms. Curran’s testimony was also supported by believable details, such as that (a) Teleplan’s protocol was to move employees between shifts depending on need and/or an employee’s request; (b) Teleplan’s engineers had requested that experienced workers be transferred to the first-shift Motorola line; (c) three Nokia line employees accepted the first-shift transfer while seven did not; and (d) Relator was later offered repair work, which she also turned down. (*Id.* at 7-8, 10.) These details rendered Ms. Curran’s testimony more credible.

Ms. Curran's version of events was further supported by the reasonable notion that Relator might choose to attend or continue school rather than take a first-shift position, particularly when seven of the ten Nokia line employees similarly had personal conflicts with first-shift work. No evidence suggests any ulterior or arbitrary motive behind Ms. Curran's version of events, which were entirely reasonable, and Relator's admission that Ms. Curran discussed the Motorola first-shift position but then did not offer it is unreasonable.

The credibility of Ms. Curran and Relator was within the province of the ULJ, who was present at the hearing to listen to and reflect on the parties' live testimony, affect, tone, and response time. The ULJ followed the statute by describing, in her findings, the specific facts supporting her determination that Ms. Curran was more credible than Relator. (A-5, A-6.) These findings are, by themselves, sufficient credibility determinations. Thus, this Court should affirm the ULJ's decision.

V. The ULJ Properly Refused to Consider New Evidence in Reconsidering the Decision.

Relator argues that the "ULJ failed to consider persuasive, newly discovered evidence in reconsidering the decision." (Relator's Br. at 14.) But evidence that was not made part of the record below may not be considered on appeal. Minn. R. 3310.2922; Minn. R. Civ. App. P. 110.01; *Fabio v. Bellomo*, 489 N.W.2d 241, 246 (Minn. App. 1992), *aff'd*, 504 N.W.2d 758 (Minn. 1993); *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). Documents sought to be introduced before a telephonic hearing must be introduced at least five days before the hearing, or a showing must be made that the

newly discovered evidence would have affected the outcome of the proceeding and was not previously introduced for good cause. Minn. Stat. § 268.105, subd. 2(c) (2004).

None of the items of evidence that Relator sought to introduce after the hearing were newly discovered, and she has articulated no reason at all why they were not introduced before or even at the hearing. Moreover, none of the items of evidence would have made any difference had they been timely.

First, the school transcript would not have bolstered Relator's credibility at the hearing because she still admitted that Ms. Curran discussed the Motorola work, and because Ms. Curran credibly testified that Relator was turning down the first-shift work because she was going to school. (A-23.) Whether or not Relator actually was enrolled in school or planned to return to school, Ms. Curran credibly testified that Relator did not wish to accept the first-shift Motorola position.

Second, the three alleged affidavits, which are virtually identical to one another, are irrelevant, vague, and lack foundation as to whether Relator was offered alternative employment or whether Relator refused any employment. (A-20-A-22.) No evidence shows the alleged affiants actually obtained unemployment benefits, and the affiants were not present at the hearing for live testimony or cross-examination. (*Id.*)

Third, the WARN notices Relator sought to submit after the hearing were issued months before Relator quit working at Teleplan. (A-18.) They stated that the information contained therein could change at any time, and they suggested that a layoff would occur in July 2005—months before the October 2005 slow down of work actually

occurred. (*Id.*) Further, Ms. Curran testified that circumstances changed permitting first-shift work for those who sought to continue working. (Tr. at 7.)

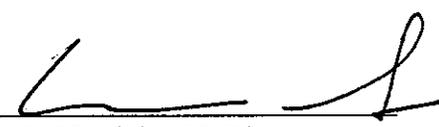
Even on appeal, Relator has not provided any reason why she did not produce these documents before or at the hearing. Nonetheless, the ULJ had an opportunity to review the documents on reconsideration and appropriately found them unpersuasive. Because Relator's late-disclosed documents would not have affected the outcome of the hearing, the Court should affirm.

CONCLUSION

The ULJ corrected applied the law to the facts of this case. The ULJ properly conducted the hearing to protect Relator as a *pro se* party, she set out specific reasons for crediting and discrediting the parties' testimony, and she appropriately reconsidered and affirmed the decision. Because the evidence supports the ULJ's decision that Relator was offered first-shift employment and that she refused it, and because the witnesses' credibility was within the province of the ULJ, the Court should affirm.

Dated: 5/12, 2006

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