

No. A09-1475

State of Minnesota
In Court of Appeals

KENNETH J. PETRACEK,

Relator,

vs.

UNIVERSITY OF MINNESOTA,

Respondent,

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

Respondent

RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX

KENNETH J. PETRACEK

Relator - Pro se

UNIVERSITY OF MINNESOTA
c/o ADP-UCM/THE FRICK CO
PO BOX 66744
ST. LOUIS, MISSOURI 63166-6744
(612) 626-0576
Respondent- Employer - Pro se

Lee B. Nelson (#77999)
Amy R. Lawler (#0388362)
MINNESOTA DEPARTMENT OF EMPLOYMENT
AND ECONOMIC DEVELOPMENT
1ST NATIONAL BANK BUILDING
332 MINNESOTA STREET, SUITE E200
ST. PAUL, MINNESOTA 55101-1351
(651) 259-7117
Attorneys for Respondent-Department

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).

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Legal Issue

Under the Minnesota law, being in jail does not excuse an individual from accepting an offer of work, nor does it excuse an individual from reporting for work, or calling in to say he is unable to come to work. Kenneth Petracek failed to participate in an evidentiary hearing before an unemployment law judge because he was in jail. Does being in jail, per se, excuse participation in a hearing under Minnesota law?

Unemployment Law Judge Scott Mismash held Petracek's incarceration did not excuse his failing to participate in the hearing, and dismissed his case under Minn. Stat. §268.105, subd. 1(d).

Statement of the Case/Statement of Facts

The Statement of the Case and Statement of Facts have been combined for ease of understanding to the reader.

Kenneth Petracek was discharged from his employment with the University of Minnesota. He filed an application for unemployment benefits and established a benefit account with the Department of Employment and Economic Development (Department). A Department adjudicator issued an initial determination holding Petracek ineligible for unemployment benefits on the basis that he was discharged from his employment for sleeping on the job, and this

amounted to employment misconduct.¹ Petracek appealed and a de novo evidentiary hearing was scheduled before Unemployment Law Judge Scott Mismash (“ULJ”). The evidentiary hearing was scheduled for Wednesday, June 17, 2009, to be conducted by conference telephone. Petracek did not participate in the evidentiary hearing and did not contact the ULJ to request rescheduling, or otherwise communicate with the ULJ.

The ULJ issued an order dismissing Petracek’s appeal on the basis that he failed to participate in the evidentiary hearing.² Petracek requested reconsideration. In his request for reconsideration, Petracek stated that he was in jail on the date of the hearing. Petracek provided no further explanation

The ULJ issued an order that affirmed his original order of dismissal concluding that Petracek failed, under Minnesota law, to show good cause for not participating in the June 17, 2009, hearing.³ This matter now comes before the Minnesota Court of Appeals on a writ of certiorari obtained by Petracek under Minn. Stat. § 268.105, subd. 7 and Minn. R. Civ. App. P. 115.

Standard of Review

When reviewing an unemployment-benefits decision, the Court of Appeals may affirm the decision, remand for further proceeding, reverse, or modify the decision if Petracek’s substantial rights were prejudiced because the decision of

¹ E-1(1). Exhibits in the record will be “E” with the number following.

² Appendix to Department’s Brief, A5-A7.

³ Appendix A1-A4.

the ULJ violated the constitution, was based on an unlawful procedure, was affected by error of law, was unsupported by substantial evidence, or was arbitrary or capricious.⁴

In *Skarhus v. Davannis*, the Minnesota Court of Appeals, applying the same statute and standards applicable to this case, stated that the reviewing court accords deference to the ULJ's decision not to hold an additional hearing and will reverse that decision only for an abuse of discretion.⁵

Argument

The statute provides that if the appealing party fails to participate in the evidentiary hearing, the ULJ has the discretion to dismiss the appeal.⁶ The statute goes on to provide that if on reconsideration the party who failed to participate establishes "good cause" for failing to participate, the ULJ must order a new evidentiary hearing.⁷ The statute defines good cause for that purpose as follows:

"Good cause" for purposes of this paragraph is a reason that would have prevented a reasonable person acting with due diligence from participating at the evidentiary hearing.

In applying the same statute, the Court of Appeals in *Skarhus v. Davannis*, said deference is given to the ULJ's decision not to hold an additional hearing, and it will reverse that decision only for an abuse of discretion.⁸

⁴ Minn. Stat. §268.105, subd. 7(d)(3)-(6) (2008).

⁵ 721 N.W.2d 340, 345 (Minn. App. 2006).

⁶ Minn. Stat. § 268.105, subd. 1(d).

⁷ Minn. Stat. § 268.105, subd. 2(d).

⁸ 721 N.W.2d 340, 345 (Minn. App. 2006).

Petracek did not provide the ULJ with any explanation surrounding his incarceration, only stating that he was in jail. Clearly he takes the position that that is sufficient reason for missing the evidentiary hearing. That is the same position he takes in his informal brief. The question now before the Court is whether being in jail, per se, amounts to a good reason for missing an evidentiary hearing. The Department's position is that it does not.

The Minnesota Supreme Court in *Grushus v. Minnesota Mining and Manufacturing*, stated that being in jail was not "good cause" for failure to accept work.⁹ Grushus, who was on layoff, was recalled to work by 3M. He was unable to accept that because he was in jail. The Court stated that his failure to accept work was due to his own fault and the fact that he may not have intended to disqualify himself is not determinative. The Court held that his illegal act resulting in his arrest and incarceration was the cause of his failure to accept work when offered.

In *Smith v. American Indian Chemical Dependency Diversion Project*, the Court of Appeals stated that public policy prohibits incarceration from excusing a worker from reporting for work.¹⁰ The Court held Smith disqualified from unemployment benefits on the basis that he was discharged for employment misconduct when he failed to report for work as scheduled.

⁹ 257 Minn. 171, 100 N.W.2d 516 (1960).

¹⁰ 343 N.W.2d 43 (Minn. App. 1984).

In *Luu v. Carley Foundry Co.*, the Court of Appeals held that an individual who was arrested and failed to call in to report his inability to report for work committed employment misconduct and was therefore ineligible for unemployment benefits.¹¹ The Court stated that regardless of whether or not he was guilty of the charges against him, Luu still had an obligation to call in and he didn't do so, and that was employment misconduct.

In *Winkler v. Park Refuse Services, Inc.*, the Court of Appeals held misconduct when an applicant was arrested on outstanding criminal warrants and missed work due to being in jail.¹² The Court held that it was not necessary that the incarceration be due to a criminal conviction, only that it be due to the applicant's actions, and in that case disregarding an outstanding warrant.

Here Petracek has failed to provide any explanation surrounding his incarceration.¹³ Petracek has an obligation to provide some explanation to the ULJ, but he failed to do so. In light of that, the ULJ did not abuse his discretion in refusing to grant a new hearing.

But regardless of any explanation surrounding his incarceration, Petracek minimally had an obligation to inform the ULJ of an inability to participate. He could have called and asked for a rescheduling. He didn't do anything. The Court of Appeals found an obligation to call in to report an inability to report for work in

¹¹ 374 N.W.2d 582 (Minn. App. 1985).

¹² 361 N.W.2d 120 (Minn. App. 1985).

¹³ The writer has come to find out that Petracek was charged with felony damage to property.

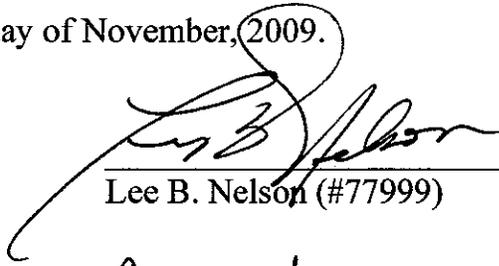
Luu,¹⁴ surely Petracek has that same obligation regarding an evidentiary hearing. By way of an aside, Department records show that Petracek filed a continued request for unemployment benefits for the week ending June 20, 2009, certifying that he was fully available for work throughout the week. This writer has requested that the Department look into application of a false statement penalty under Minn. Stat. §268.182, subd. 2.

Conclusion

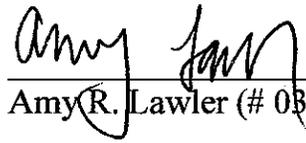
Unemployment Law Judge Scott Mismash did not abuse his discretion in refusing to grant a new hearing. The Department requests the Minnesota Court of Appeals to affirm the decision of the Unemployment Law Judge.

¹⁴ 374 N.W.2d 582 (Minn. App. 1985).

Dated this 9th day of November, 2009.



Lee B. Nelson (#77999)



Amy R. Lawler (# 0888362)

Department of Employment and
Economic Development
1st National Bank Building
332 Minnesota Street, Suite E200
Saint Paul, Minnesota 55101-1351
(651) 259-7117

Attorneys for Respondent Department

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