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STATE OF MINNESOTA
IN COURT OF APPEALS

Shouna Thao,
Relator

vs.

Command Center, Inc.,
Respondent-Employer, and

Department of Employment and
Economic Development,
Respondent

RELATOR'S REPLY BRIEF

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ARGUMENT

Respondent asks this Court to hold that (1) the legislature, sub silentio, repealed a half century of case law on good reason to quit; and (2) the legislature intentionally inserted surplus language into MINN. STAT. § 268.095, subd. 1(c). These novel theories are without a basis in law.

I. A substantial reduction in hours remains a good reason to quit employment.

Respondent argues that "the statute does not create a categorical good reason to quit because of a cut in hours." Resp. Br. at 6. It does not reference any of the case law establishing this principle, arguing instead that "individual consideration" is required under MINN. STAT. § 268.095, subd. 3(b). From there, it appears to ask this Court to hold that a reasonable worker would not quit because of a reduction in hours because she "could still conceivably launch a thorough search for full time work during those days in which she is not working." Resp. Br. at 6. Such an interpretation is not grounded anywhere in the language of the statute, which by its terms is exclusive. MINN. STAT. § 268.095, subd. 3(g). It also asks this Court to disregard more than a half century of Supreme Court precedent interpreting the statute and its predecessors.

Where the Minnesota Supreme Court has construed a law, the Court's construction is presumed to apply to subsequent laws on the same subject matter. MINN. STAT. § 645.17(4). The presumption may be rebutted, but only if the legislature evinces an intent to change the law through "express wording or necessary implication." WIRIG V. KINNEY

SHOE CORP., 461 N.W.2d 374, 377-78 (Minn. 1990). In 1975, the Supreme Court affirmed a grant of benefits for an applicant who had been switched from a fixed salary to a commission, resulting in a 25% reduction in pay, based on the "general rule that a substantial pay reduction gives an employee good cause for quitting." SCOTT V. THE PHOTO CENTER, INC., 306 Minn. 535, 536, 235 N.W.2d 616, 616-17 (1975). For this proposition, the Court cited three of its precedents dating to 1943. *Id.* at 536, 235 N.W.2d at 617. One of those precedents upheld a denial of benefits to a group of employees who quit after the employer, during a union negotiation, proposed a wage reduction of two to four percent. HESSLER V. AMERICAN TELEVISION & RADIO CO., 258 Minn. 541, 104 N.W.2d 876 (1960). The Court in HESSLER concluded that the applicants had quit without a good reason caused by the employer, as the record did not show that "the terms laid down by the employer were so unreasonable that the claimants had no alternative but to leave." *Id.* at 554, 104 N.W.2d at 885.

The Supreme Court clarified the parameters of its "general rule" in SUNSTAR FOODS, INC., V. UHLENDORF, 310 N.W.2d 80 (Minn. 1981). In that case, a group of union employees went on strike after the employer imposed wage reductions of 21 to 26 percent. *Id.* at 82. The employer had a practice of laying off employees on Friday and recalling them on Tuesday, resulting in an effective work week of 28.8 hours. *Id.* The employer claimed it would guarantee 38 hours per week to compensate for the wage reduction, but it previously had broken similar agreements. *Id.* The Court applied the

formulation from HESSLER, "the terms laid down by the employer were so unreasonable that the claimants had no alternative but to leave," to determine whether a lockout had occurred; it then treated this standard as synonymous with the determination of whether an individual employee had a good reason to quit caused by the employer. *Id.* at 84. It surveyed decisions from other jurisdictions and concluded that a pay reduction of 20-25% constituted a good reason to quit, but a reduction of less than 15% did not. *Id.*

The Court made no distinction in SUNSTAR between a reduction in base pay and a reduction in work hours with resulting loss of pay.[1] As in SCOTT, the determining factor was the percentage decrease in compensation, not the manner by which it was achieved. In one case that relied on SUNSTAR, this Court concluded that an applicant had a good reason to quit where the applicant suffered a 19% reduction in pay solely due to a reduction in his workweek from 48 to 40 hours, despite an offsetting increase in his hourly wage. DANIELSON MOBIL, INC., V. JOHNSON, 394 N.W.2d 251 (Minn. App. 1986); *see also* DACHEL V. ORTHO MET, INC., 394 N.W.2d 268, 270 (Minn. App. 1995) (upholding denial of benefits where wage reduction was 10% and employee failed to show that loss of overtime would have contributed to significant change in wages).

As noted, the current three-part general definition of a good reason caused by the employer must be applied to the specific facts of each case. MINN. STAT. § 268.095,

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[1] One of the cases the Court relied on involved a reduction in hours as well as pay. *See* BUNNY'S WAFFLE SHOP V. CALIFORNIA EMPL. COMM'N, 24 Cal.2d 735, 738, 151 P.2d 224, 225 (1944) (reduction in workweek from 6 to 5 days along with 25% pay reduction).

subd. 3(b). That definition is:

> A good reason caused by the employer for quitting is a reason:
>
> (1) that is directly related to the employment and for which the employer is responsible;
> (2) that is adverse to the worker; and
> (3) that would compel an average, reasonable worker to quit and become unemployed rather than remaining in the employment.

Id. at subd. 3(a). The third prong of the definition, "that would compel an average, reasonable worker to quit and become unemployed rather than remaining in the employment," is essentially equivalent to "the terms laid down by the employer were so unreasonable that the claimants had no alternative but to leave." *See* HESSLER, 258 Minn. at 554, 104 N.W.2d at 885.

Thus, the Supreme Court's long-standing interpretation is that a reduction in pay of 20 percent or more is a condition that would cause a reasonable worker to quit, while a reduction of less than 15 percent is not. *See* SUNSTAR, 310 N.W.2d at 84. On the facts of SUNSTAR and SCOTT, the amount of the reduction is determined based on actual hours worked and actual compensation received. This interpretation is fully compatible with the statutory language; there is no "express wording or necessary implication" that HESSLER, SCOTT and SUNSTAR have been overruled. *See* WIRIG, 461 N.W.2d at 377-78.

Under subdivision 3(b) of the statute, this Court must consider all three prongs of subdivision 3(a). There can be no serious dispute that a reduction in hours as a result of lack of work is a circumstance that is directly related to the employment, that the

employer is responsible for it, or that it is adverse to a worker who has an expectation of performing full-time employment. *See* MINN. STAT. § 268.095, subd. 3(a)(1), (2). Under Supreme Court precedent that remains good law, a reduction in compensation of more than 25%, as Ms. Thao experienced through the loss of work hours, meets the final prong of the definition. Respondent fails to mention any of this case law, in effect asking this Court to conclude that the legislature, sub silentio, has overruled more than 50 years of Supreme Court precedent and replaced it with an ad hoc determination by each individual ULJ. No rule of law permits this Court to accept Respondent's request.

As noted, Respondent's primary policy argument is that an employee who is reduced to working only two days a week should not be considered to have good reason to quit because she "could still conceivably launch a thorough search for full time work during those days in which she is not working." Resp. Br. at 6. This novel claim has no support or basis in the statute or case law. In this case, the ULJ found that Ms. Thao's hours were first reduced to 16 to 20, and that she resigned when she learned that her hours were going to be reduced even further in an upcoming week. Rel. Add. 2. Ms. Thao wrote in her request for reconsideration that her remaining job duties would be completed in less than 6 hours per week. Rel. App. 3. Ms. Thao was paid $13 per hour, T. 16, which would work out to $78 per week before taxes. The ULJ asked no questions to develop whether Ms. Thao could have afforded work-related costs such as gas, parking

and child care[2] on so few hours. The ULJ has an affirmative duty to fully develop all relevant facts. MINN. STAT. § 268.105, subd. 1(b); MINN. R. 3310.2921. If this Court were to adopt Respondent's reasoning, a remand would be required to determine whether it would have made economic sense for an average reasonable worker in Ms. Thao's circumstances to remain in the employment.

A remand is not necessary, however. Respondent's argument would apply equally to the employees in SUNSTAR, but the Supreme Court chose to consider the decreased work hours in that case as a contributing factor to the employees' good reason to quit rather than as a job search opportunity. *See* SUNSTAR, 310 N.W.2d at 82 (employer's layoff practices resulted in 28-hour workweeks). Respondent has provided no legal or policy justification for ignoring decades of Supreme Court precedent. Under this precedent, Ms. Thao satisfies the test for a good reason to quit under MINN. STAT. § 268.095, subds. 3(a) and (b).

II. The legislature did not intend the "adverse working conditions" language of MINN. STAT. § 268.095, subd. 3(c), to be without effect.

MINN. STAT. § 268.095, subd. 3(c), states that:

> *If an applicant was subjected to adverse working conditions by the employer,* the applicant must complain to the employer and give the employer a reasonable opportunity to correct the adverse working conditions before that may be considered a good reason caused by the

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[2] Ms. Thao was never asked on the record if she has children, but she wrote in her submissions that she was pregnant at the time of her resignation and has a "family, whom I support." Rel. App. 3, 9. Ms. Thao does have children.

employer for quitting.

[Emphasis added.] Respondent explicitly asks this Court to hold that *any* circumstance that constitutes a good reason to quit triggers the requirement to complain. Resp. Br. at 1, 7, 8, 9 ("[O]nly adverse working conditions could constitute a good reason to quit."). That simply is not what the statute says. Subdivision 3(b) of the statute provides that the three-pronged test of subdivision 3(a) be applied to every case. Subdivision 3(c), by contrast, specifies that it applies *only* when a condition precedent is met: "If an applicant was subjected to adverse working conditions by the employer." The structure of subdivision 3 makes clear that while all cases must be considered under 3(a), only some cases trigger the application of 3(c).

Respondent attempts to conflate the proviso in subdivision 3(c), "[i]f the applicant was subjected to adverse working conditions," with the general requirement in subdivision 3(a)(2) that a good reason to quit be "adverse to the worker."[3] Resp. Br. at 8-9. It explains the policy reasons why the "adverse to the worker" language was added to subdivision 3(a). *Id.* at 8-9. But if every situation that is "adverse to the worker" constitutes an "adverse working condition" that triggers the requirement to complain, then the proviso in 3(c) is not only redundant; it has no reason to exist. This Court presumes that every word and phrase of a statute is intended to have some effect. MINN. STAT. §

[3] Respondent goes so far as to incorrectly state that subdivision 3(a) of the statute includes the phrase "adverse working conditions"; it does not. *See* Resp. Br. at 8.

645.16. Respondent's interpretation violates both established rules of statutory construction and common sense; if the legislature had intended the requirement to complain to apply to every case, it would not have preceded it with an "if" clause.

The courts, similarly, have found a number of circumstances in which good reason to quit exists without any requirement to complain. *See, e.g.,* MILLER V. INTERNATIONAL EXP. CORP., 495 N.W.2d 616, 618 (Minn. App. 1993) (violation of minimum wage law is "per se" good reason to quit); KAHNKE BROS. INC. V. DARNALL, 346 N.W.2d 194, 196 (Minn. App. 1984) (violation of labor law is also "per se" good reason to quit); HAYES V. K-MART CORP., 665 N.W.2d 550, 554 (Minn. App. 2003) (finding good reason to quit where applicant resigned immediately upon breach of employment contract); HOLBROOK V. MINNESOTA MUSEUM OF ART, 405 N.W.2d 537, 539-40 (Minn. App. 1987) (finding good reason to quit where applicant resigned immediately upon demotion to position requiring less skill than applicant possessed). Until the present case, a substantial reduction in wages fell firmly within this category. *See, e.g.,* SUNSTAR, 310 N.W.2d at 84.

A recent decision of this Court illustrates the absurdity of Respondent's claim that the requirement to complain should apply in every case. In ROWAN V. DREAM IT, INC., ___ N.W.2d ___, 2012 WL 1070019 (Minn. App. 2012), the employer of a seasonally employed painter encouraged her to resign and form her own LLC rather than be laid off. *Id.* at *5. Formation of the LLC resulted in the loss of the applicant's ongoing eligibility

for Unemployment benefits, and the employer did not inform her that it would not be required to offer her work. *Id.* at *4. This Court, relying heavily on public policy considerations, concluded that an average, reasonable employee would be compelled to follow her employer's advice if not properly informed of the consequences. *Id.* at *5. Nowhere in the decision did this Court suggest that the applicant was required by statute to complain to the employer and give it an opportunity to correct its own duplicity before she resigned. Similar public policy considerations apply in cases in which an employer is violating the law, as in MILLER and KAHNKE; a complaint to a dishonest employer simply invites the employer to attempt to cover its tracks and potentially engage in retaliation against the complaining employee.

Respondent cites POLLEY V. GOPHER BEARING CO., 478 N.W.2d 775 (Minn. App. 1991), for the proposition that an employee is required to complain about a reduction in hours before quitting. In POLLEY, an applicant was demoted upon returning from maternity leave in violation of the Parenting Leave Act. *Id.* at 777-78. She also had her hours reduced from 40 to 35, complained about the reduction, was told that she would be guaranteed the 35 hours, and then had her hours further reduced to 32.5. *Id.* at 776. Respondent had concluded that the applicant did not "meaningfully" complain; this Court reversed that finding as unsupported by substantial evidence and held that the applicant was not required to make any more complaints, as the employer was sufficiently placed on notice of her dissatisfaction. *Id.* at 779.

In POLLEY, three independent factors gave the applicant good reason to quit: violation of the law, demotion, and a substantial reduction in hours. This Court determined as an issue of fact that the applicant had met any applicable requirement to complain. The decision in POLLEY does not state that a complaint is required in cases where hours are reduced; Respondent does not cite any decision in which this Court or the Supreme Court has specifically imposed any such requirement, or denied benefits to an employee whose hours were substantially reduced solely because she failed to complain.[4]

Respondent argues that the law required Ms. Thao to inform her employer about how she "felt" about the reduction in hours, and speculates that the employer "may well" have found a way to increase her hours if she had expressed her feelings. Resp. Br. at 9-10. While the employer's witness made a self-serving claim that he might eventually have given Ms. Thao 24 to 30 hours of work per week, he also admitted in response to the next question that she had not been replaced. T. 25. In any event, nothing in the statute or case law suggests that an applicant is required to make her employer aware of her subjective feelings as a prerequisite to having a good reason to quit. *See* MINN. STAT. § 268.095, subd. 3(g) (definition of good reason to quit is exclusive).

Ms. Thao's testimony also indicates that the employer was in fact aware that she

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[4] Respondent cites POLLEY as its sole authority for the proposition that "this Court has time and time again interpreted subd. 3(c)'s requirement as conjunctive to the definition in subd. 3(a)." Resp. Br. at 8. In fact, POLLEY was decided eight years before subd. 3(c) was added to the statute. *See* MINN. LAWS 1999, ch. 107, § 44.

was unhappy with her hours. When asked why she had not directly approached management, Ms. Thao testified:

> [T]hey told me that my contract, my pay is based on the company orders * * * . They said they are working for other company to contract with so that I could get more hours, so I, I know that they are already stress out about that already * * * .

T. 22. Thus, the employer had not only acknowledged the cut in hours, but communicated to Ms. Thao that it was trying to remedy the situation. The ULJ never questioned the employer's witness about this testimony.[5] Ms. Thao also testified that the reductions in hours were communicated to her directly by her supervisor, Mark B , who was the employer's sole witness. T. 17 ("Mark was telling me to * * * [b]ecause the company was back down on the orders for us so I don't have, only a little work. * * * Mark was telling me that for me to report to the office only for Monday and Friday"), 19. The ULJ did not ask any follow-up questions to either witness about whether Ms. Thao had made her dissatisfaction known during these conversations.

The only question the ULJ asked either witness was whether Ms. Thao affirmatively had approached management to request more hours; both parties agreed she had not. T. 21, 22, 25, 27. Nothing in the "exclusive" language of the statute restricts the time or manner in which a complaint may be made in order to support a good reason to

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[5] Ms. Thao also testified, "I know that Command Center office stress out too from because the company is back down on their orders * * * ." T. 21. The ULJ did not ask any questions about what discussions with management led Ms. Thao to be aware of this.

quit. *See* MINN. STAT. § 268.095, subd. 3(g) (definition is exclusive); *cf. id.* at subd. 2(d) (requiring applicant to "affirmatively" request additional assignment from staffing service employer). As noted, it is the ULJ's affirmative duty to ensure that all relevant facts are fully developed. MINN. STAT. § 268.105, subd. 1(b); MINN. R. 3310.2921. If the statute were to require Ms. Thao to inform her employer about how she "felt," a remand would be necessary to develop what she actually communicated to management and when.

But as Respondent correctly notes, the reason the requirement to complain was added to the statute is because "[t]he legislature sought to [e]nsure that employers were given an opportunity to address problems encountered by employees." NICHOLS V. RELIANT ENGINEERING & MFG., INC., 720 N.W.2d 590, 595 (Minn. App. 2006); Resp. Br. at 7. In some cases, such as where an employee is being harassed by a coworker or workplace equipment is unsafe, management may not have an "opportunity to address" the problem until being made aware of it by an employee. In other situations–such as where an employer violates laws of which it is presumptively aware, or alters the basic contractual terms of employment such as wages and hours–management is automatically aware of the problem, and thus able to address it, because management is the source of the problem. The legislature therefore imposed a requirement to complain only in cases involving "adverse working conditions," rather than in every case. *Compare* MINN. STAT. § 268.095, subd. 3(b) (requiring consideration of the factors in subd. 3(a) "in every case") *with id.* at subd. 3(c) (requiring complaint "[i]f the applicant was subjected to adverse

working conditions").

Finally, Respondent grounds its request that this Court rewrite the statute in a statement of policy that it has invented out of whole cloth:

> The statute requires such conversations because applicants seek money from the public fund. The statute institutes such rigorous requirements because quitting and collecting such benefits should be a last resort reserved for those whose working conditions are truly untenable. Otherwise, the expectation is that individuals will fund their own work searches.

Resp. Br. at 10. Respondent fails to acknowledge that the legislature has promulgated its own statement of policy:

> Economic insecurity because of involuntary unemployment of workers in Minnesota is a subject of general concern that requires appropriate action by the legislature. The public good is promoted by providing workers who are unemployed through no fault of their own a temporary partial wage replacement to assist the unemployed worker to become reemployed.

MINN. STAT. § 268.03. Instead of mandating "rigorous" interpretation of the law to ensure that Unemployment benefits are a "last resort," the legislature has chosen specifically to instruct:

> This chapter is remedial in nature and must be construed in favor of awarding unemployment benefits. Any legal conclusion that results in an applicant being ineligible for unemployment benefits must be fully supported by the facts. In determining eligibility or ineligibility for benefits, any statutory provision that would preclude an applicant from receiving benefits must be narrowly construed.

MINN. STAT. § 268.031, subd. 2.

Through no fault of her own, Ms. Thao's hours were reduced to a point at which

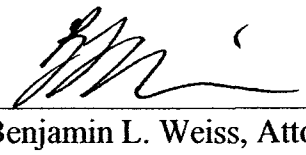
she reasonably concluded that her continued titular employment provided no value either to her or to the employer. Ms. Thao met the exclusive statutory requirements for a good reason to quit caused by the employer, as clarified by long-standing Supreme Court interpretation. Respondent asks this Court to graft an additional requirement into the statute in violation of its language, of long-established Supreme Court precedent, of the rules of statutory construction, and of the legislature's specific directive that Unemployment law be remedially construed in favor of awarding benefits. The ULJ's decision must be reversed.

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: 5/31/12



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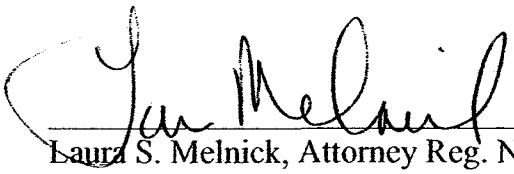

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