

CASE NO. A12-383

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STATE OF MINNESOTA
IN COURT OF APPEALS

ULANDA WILEY,
Relator,

vs.

DOLPHIN STAFFING, INC.,
Respondent-Employer,

and

MINNESOTA DEPARTMENT OF EMPLOYMENT
AND ECONOMIC DEVELOPMENT,
Respondent.

RELATOR'S BRIEF AND APPENDIX

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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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STATEMENT OF LEGAL ISSUE

Did Relator quit unsuitable employment within 30 days under Minn. Stat. § 268.095, subd. 1(3), when she give the employer notice within 30 days of beginning the job but the notice period extended two weeks beyond 30 days?

The ULJ ruled that the exception to disqualification for a quit within 30 days of beginning unsuitable employment does not apply unless the employment actually ends within 30 days.

Most apposite authorities: Minn. Stat. § 268.095, subd. 1(3); Minn. Stat. § 268.031, subd. 2; Minn. Stat. § 268.035, subds. 23a(g)(4) and (h); *Valenty v. Medical Concepts Development, Inc.*, 503 N.W.2d 131 (Minn. 1993).

STATEMENT OF THE CASE

Relator Ulanda Wiley accepted a temporary job assignment but found she was not able to fulfill the combined attendance expectations of the staffing service agency and the job site because of her circumstances as a single parent of three small children. A staffing service agency representative persuaded her to give two weeks notice on the 30th day of her employment. Relator subsequently requested accommodations to keep her job, but the staffing service chose to accept her notice.

Relator applied for Unemployment Insurance benefits and was denied on the basis that she had quit without a good reason caused by the employer. She appealed, and after an evidentiary hearing, Unemployment Law Judge Elizabeth Kiechle affirmed the disqualification on the grounds that the statutory exception for quitting from unsuitable employment within 30 days only applies if the total duration of the employment was 30 days or less.

Relator requested reconsideration and the ULJ affirmed her prior decision. Relator appeals by writ of certiorari.

STATEMENT OF FACTS

Relator Ulanda Wiley established an Unemployment Insurance benefit account in May 2010. Exh. 30. None of the employers in her base period was a staffing service. *Id.*

On August 9, 2011, Ms. Wiley began working at a temporary job assignment from Respondent Dolphin Staffing, a staffing service. T. 14, Add. 6. During a telephone conversation with Dolphin on September 8, 2011, Ms. Wiley gave two weeks notice. Add. 6. She later attempted to withdraw her notice, but Dolphin chose to accept the quit. Add. 7. Ms. Wiley requested continuing Unemployment Insurance benefits, but a department adjudicator concluded that she had quit without a good reason caused by the employer. Exh. 1. The determination did not address whether the statutory exception for a quit from unsuitable employment within 30 days applied.

Ms. Wiley appealed. Exh. 2. At hearing, the parties testified that the work site was at a company called Medtox Labs, where Ms. Wiley worked as an insurance billing associate. T. 14. She was initially told the assignment would last six weeks; it was not temp-to-hire. T. 38, 46. The job involved a type of medical billing that Ms. Wiley had not previously performed. T. 23-24, Exh. 6. Ms. Wiley is a single parent; during the time of her employment with Dolphin and the placement at Medtox, her children were aged five years, two years, and 11 months. T. 16, 37.

Relator had attendance difficulties at Medtox. On August 31, Ms. Wiley left work

early due to illness. T. 41-42; Exh. 10/6.¹ On September 1, she had an approved partial absence for a required school physical for her oldest child; because of her own illness, she took the full day off. Exhs. 10/6, 14, 28; T. 27, 41-42. On September 6, the school informed her that she would also need to meet with the child's teacher before the child could start class; the only available appointment was the morning of September 7. T. 27; Exhs. 10/8, 15, 26. Later on September 7, she received a call from her day care provider that her 11-month-old was sick; she left early to take the child to the emergency room. T. 28; Exhs. 10/8, 16.

The site employer, Medtox, asked relator to make up hours that she missed by working early mornings, evenings and weekends. *See* Exhs. 22, 27, 29. Ms. Wiley understood that this was a requirement of the job.² T. 75. Ms. Wiley received assistance through the county for the costs of child care, which was authorized for specific, limited hours. T. 25, Exh. 13. Because of the limits of authorized care hours and the child care provider's limited capacity, Ms. Wiley could only have child care between 8 a.m. and 5:30 p.m. T. 24-25; Exhs. 12, 23, 27. Ms. Wiley could not switch child care providers without giving a two-week notice to the county. T. 25. Relator attempted to make up hours when asked by Medtox, using friends and family members for child care. T. 25-26,

¹ Exhibits with multiple pages are referenced by the exhibit number followed by a slash and the page number, so "Exh. 10/6" means Exhibit 10, page 6.

² Dolphin's principal witness claimed this was not required, but admitted she had no actual knowledge of Medtox's policies. T. 63. Nobody from Medtox testified at hearing.

28-29; Exh. 25.

Dolphin's policy required all absences to have approval one week in advance by a supervisor. T. 39, Exh. 11. Any absence requested less than a week in advance was considered unexcused by Dolphin, regardless of the reason for the absence. T. 39, 47-48; Exh. 11. The policy provided for a warning after the third unexcused absence within a rolling six-month period and termination after the fifth. T. 39, Exh. 11. On September 7, Dolphin told Ms. Wiley that she would need to come in to sign a written warning for her attendance at Medtox. T. 38, 44; Exh. 10/8.

Ms. Wiley had asked Dolphin what the end date of the assignment would be so she could schedule appointments and a trip to visit a relative. T. 26. On September 8, a Dolphin staff member who did not testify at hearing telephoned Ms. Wiley to tell her that the Medtox assignment had been extended to mid-October. T. 19; Exh. 10/9. Ms. Wiley explained that said she did not think she could commit to working another month with no further emergency absences. T. 19, 29; Exh. 10/9. The staff member asked if she could commit to fulfilling a two-week notice and Ms. Wiley said she believed she could do that. T. 19, 30, 31; Exh. 10/9. September 8 was the 30th day from the start of Ms. Wiley's employment on August 9. *See* T. 14.

Dolphin's principal witness at hearing, Amanda Cooper, confirmed that it is Dolphin's practice to attempt to obtain firm notice dates. T. 43-44. Ms. Wiley did not communicate her resignation or notice date to Medtox. T. 31. After the September 8

conversation, Ms. Wiley attempted to reach Ms. Cooper by phone and email. Exhs. 10/9-10, 23. Relator wrote:

[I] wanted to clarify my request for a two-week notice. I am requesting an accommodation for my situation so I can continue my employment. I am a single parent of three children under the age of 5. The only hours I can get child care are 8:00 a.m. to 5:30 p.m. I cannot prevent emergencies, such as when my infant had to go to the ER from daycare on 9/6 [sic]. For this reason I cannot sign a statement saying that I will not miss any more work, because I am not in control of that.

I am requesting that I be allowed to make up for emergency absences in some way other than working after business hours, as I cannot get child care for those hours. Please let me know if I will be allowed to continue working past [9/23].

Exh. 10/9. Ms. Cooper called Ms. Wiley back on September 14 and told her there would be no exceptions to Dolphin's attendance policy. T. 33-34, 60; Exh. 10/10. Ms. Wiley asked to speak with human resources. T. 34, 59; Exh. 10/10. Ms. Wiley testified that she was told by both Ms. Cooper and Dolphin's human resources director that she would not be approved for any further absences, whether or not relator made a request seven days in advance. T. 29, 34.

Ms. Wiley had a family member pass away and on September 12 learned that the funeral would be September 16. T. 22, 32; Exh. 17. Relator informed both Dolphin and Medtox that she would be out that day. T. 22, Exhs. 10/9, 24. On Tuesday, September 20, she emailed her site supervisor at Medtox asking if she could come in the following weekend to make up the hours missed on September 16. Exh. 22/2. The site supervisor responded, "I thought your last day was Friday? I am confused." Exh. 22/1. Because

Ms. Wiley had not spoken with Medtox about having given notice to Dolphin, she realized that Dolphin must have communicated the September 23 date to Medtox. T. 19-20, 35. Ms. Wiley then emailed Ms. Cooper at Dolphin stating that she assumed her request for accommodations in making up missed hours had been denied and that September 23 was her last day. Exhs. 10/11, 21. Ms. Cooper left Ms. Wiley a voice message confirming this. T. 65, Exh. 10/10. Ms. Wiley's actual last day of work was September 21. T. 16. Ms. Wiley called before her shift on September 22 to report that she would not be able to work her final two days because her two youngest children were sick. Exhs. 10/11, 19; T. 16.

Ms. Wiley argued at the evidentiary hearing that it was not her intent to quit, but that if the separation was considered a quit, she came within three statutory exceptions to disqualification, including the exception for a quit from unsuitable employment within 30 days. T. 78. Unemployment Law Judge Elizabeth Kiechle concluded that the separation was a quit pursuant to Minn. Stat. § 268.095, subd. 2(c), because Ms. Wiley gave notice on September 8 and Dolphin refused to allow her to withdraw the notice. The ULJ ruled that no exception to disqualification applied:

While the applicant put her notice in within 30 calendar days of beginning the employment, she did not quit within 30 calendar days. She continued to work for almost two weeks thereafter. The actual separation occurred in September 23, 2011, the applicant's intended quit date, and not on the date when she gave notice of her intent to quit on September 23, 2011.

Add. 9.

Relator's counsel requested reconsideration, arguing that the relator's giving notice on September 8 had occurred within the required 30 days. App. 3-7. The ULJ summarily affirmed her prior decision. Add. 2-3. This appeal followed.

ARGUMENT

I. Standard of review and governing law.

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).

This case concerns statutory construction, which is a question of law that this Court reviews de novo. *Houston v. International Data Transfer Corp.*, 645 N.W.2d 144, 149 (Minn. 2002). Unemployment Insurance laws are subject to a specific rule of construction:

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.

The statute addresses the consequences of an employee giving notice to quit, as well as the effects of the employer's response to a notice of quitting.

An employee who seeks to withdraw a previously submitted notice of quitting is considered to have quit the employment if the employer does not agree that the notice may be withdrawn.

Minn. Stat. § 268.095, subd. 2(c). A quit from employment generally results in a disqualification from Unemployment Insurance benefits, subject to ten statutory exceptions. *Id.* at subd. 1. One of these exceptions is:

the applicant quit the employment within 30 calendar days of beginning the employment because the employment was unsuitable for the applicant[.]

Id. at subd. 1(3). "A job assignment with a staffing service is considered suitable only if 25 percent or more of the applicant's wage credits are from job assignments with clients of a staffing service * * * ." Minn. Stat. § 268.035, subd. 23a(h); *see also id.* at 23a(g)(4) (providing that employment with a staffing service is unsuitable if less than 25% of the applicant's wage credits are from staffing services).

II. Relator quit when she gave notice on September 8, 2011, within 30 days of beginning her employment with Dolphin.

Ms. Wiley began her employment with Dolphin³ on August 9, 2011. T. 14. At

³ None of relator's base period wage credits are from staffing service agencies. *See* Exh. 30. This means that the temporary job was not "suitable" for relator under the provisions of Minn. Stat. § 268.035, subs. 23a(g)(4) and 23a(h), stating that a job assignment with a staffing service employer is suitable only if at least 25 percent of

Dolphin's request, she gave two weeks notice on September 8, the 30th calendar day of her employment.⁴ Exh. 10/9. She subsequently attempted to withdraw her notice and negotiate an accommodation to the attendance policy, but Dolphin chose not to allow the notice to be withdrawn. Under the plain language of Minn. Stat. § 268.095, subd. 2(c), this sequence of events makes the separation a quit by relator.

A. The plain language of the statute requires that the act of quitting occur within 30 days, not the end of the employment.

The ULJ's decision concludes that the exception to disqualification for a quit from unsuitable employment within 30 days does not apply because the employment lasted longer than 30 calendar days. Add. 9. This interpretation goes beyond the language of the statute. The exception applies if "the *applicant quit* the employment within 30 calendar days of beginning the employment." (Emphasis supplied). By the plain language of the statute, the inquiry is not how long the employment lasted; it is when the "applicant quit." For the exception to apply, the act that constituted a quit for purposes of unemployment insurance law must have occurred within 30 days of beginning the

the applicant's wage credits are from staffing service employment. Relator would not have been disqualified for not seeking or accepting employment with Dolphin under Minn. Stat. § 268.085, subd. 13c (providing for eight-week disqualification from Unemployment benefits for failure to apply for or accept "suitable" employment). See section III, *infra*.

⁴ The actual start date, August 9, is excluded from the calculation pursuant to Minn. Stat. § 645.15, providing that for any time period fixed by law, "exclude the first and include the last day of the prescribed or fixed period or duration of time."

employment.

“Quit” for unemployment insurance purposes is defined by Minn. Stat. § 268.095, subd. 2, which has four clauses. Clause three provides that if an employee gives notice, then attempts to withdraw it but the employer refuses to allow the notice to be withdrawn, the legal consequence is that the applicant “is considered to have quit the employment”. Minn. Stat. § 268.095, subd. 2(c). The ULJ concluded that “Wiley made the decision to put in her two-week notice on September 8, 2011. Consequently, under Minnesota law, the separation is a quit.” Add. 7. Thus, the act that constituted a quit occurred on September 8 when relator gave notice.

Unemployment Insurance law must be remedially construed in favor of granting benefits. Minn. Stat. § 268.031, subd. 2. The ULJ’s decision is a violation of this rule. It is simply inconsistent to conclude that Ms. Wiley’s two-week notice on September 8 constituted her quit for purposes of disqualification under section 268.095, subd. 2(c), but not a quit for the exception under subdivision 1(3) of the same statute. This is particularly the case when the operative term in subdivision 1(3), “quit,” is defined by subdivision 2.

B. This Court should construe the statute in accord with prior unpublished decisions.

Two unpublished decisions addressing this issue both conclude that the exception

is triggered by the date of the employee's notice to quit.⁵ In *Medek v. St. Peter Church and School*, No. A06-2108, 2007 WL 3347476 (Minn. App. Nov. 13, 2007), an applicant took a job and discovered he did not have the computer skills necessary to perform it. *Id.* at *2; App. 9. He spoke with his supervisors about quitting within three weeks of beginning the employment, but at the employer's request, continued to work until a replacement was found, which took "longer than expected." *Id.* This Court concluded that because the applicant "intended to quit and so informed his employer within the 30-day statutory period," he qualified for benefits under Minn. Stat. § 268.095, subd. 1(3). *Id.*

In *Bartleman v. First National Bank Minnesota*, No. A08-0603, 2009 WL 605733 (Minn. App. Mar. 10, 2009), the applicant argued that he intended to quit as of the 30th day of his employment, but admitted he had not informed the employer of his intent until the 37th day. *Id.* at *2; App. 11. The ULJ had found that the applicant "did not give any written or verbal notice of quitting" within 30 days of beginning the employment. *Id.* This Court held that the exception to disqualification did not apply because "there is no evidence that relator's actions expressed an intent to quit" before the 37th day. *Id.*

Both decisions interpret the statute to apply if the act of the employee giving notice to the employer occurs within 30 days of beginning the job. *Medek* is almost exactly on

⁵ Pursuant to Minn. Stat. § 480A.08(3), both decisions are reproduced in Relator's Appendix. This Court has not addressed the issue at bar in a published opinion.

point; like the applicant in that case, Ms. Wiley gave notice within the 30-day period, but worked beyond it until to a date proposed by the employer. The only difference is that Ms. Wiley gave a fixed two-week notice rather than agreeing to stay on indefinitely until replaced. Both decisions are firmly within the language of the statute, and nothing in either decision or in the language of the statute supports applying the law differently to Ms. Wiley.

C. The ULJ's decision is inconsistent with the purpose of the law.

If there were any ambiguity in the statutory language, this Court would consider the purpose of the law. Minn. Stat. § 645.16. The 30-day notice rule was enacted following the Minnesota Supreme Court's holding in *Valenty v. Medical Concepts Development, Inc.*, 503 N.W.2d 131 (Minn. 1993). See Laws 1993, ch. 67, § 5. In *Valenty*, a dental assistant quit a manufacturing job after one shift because she could not handle the physical demands of the job. The Supreme Court concluded:

[A] person receiving unemployment compensation benefits should not be penalized for taking an unsuitable job for a short time. A contrary holding would discourage those persons receiving benefits from attempting any job that was not technically "suitable" within the statute. We view such a result as contrary to public policy. * * * We believe it sound public policy to extend a so-called trial period to those attempting unsuitable jobs. To do otherwise would inevitably deter those who might otherwise take such work. * * * A further salutary effect of our ruling is that if a claimant were to take such a job and decide to quit within a reasonable time, the state would be spared from paying benefits for that period.

Id. at 134-35. The Court drew its rationale from a New Jersey Supreme Court decision:

The question is whether a person who takes work he is not required to take

should suffer the loss of unemployment benefits when he is unable to cope with that work. We do not believe he should. A contrary result would inhibit persons who are temporarily unemployed from taking work which, although not commensurate with their former employment, is nevertheless gainful activity which serves the general public interest. * * * We do not believe a person should be penalized for so laudable an effort.

Id. at 135 n.6 (quoting *Wojcik v. Board of Review, Div. of Empl. Sec.*, 58 N.J. 341, 345-46, 277 A.2d 529, 531 (1971)). It noted that the New Jersey court had concluded that five weeks was a reasonable “trial period” for the employee in that case. *Id.* at 135 n.6. The Supreme Court explicitly relied in its decision on the principle that Unemployment statutes are remedially construed. *Id.* at 134-35.

The Court in *Valenty* did not determine as a matter of law what constituted a reasonable trial period. *Id.* at 135 n.4. The Legislature apparently responded by enacting the 30-day language now at section 268.095, subd. 1(3). By codifying the *Valenty* holding, the Legislature endorsed the Court’s humanitarian statement of policy and signaled that the exception to the quit disqualification should be broadly construed.

The ULJ’s reading of the statute is inconsistent with the humanitarian public policy underlying it. A conclusion that the employment must end within 30 days gives an advantage to applicants who quit peremptorily, without notice, over those workers who choose to give their employer advance notice and an opportunity to prepare for the resignation. If an applicant wishes to give her employer a typical two-week notice, the ULJ’s interpretation means a worker has only 16 calendar days from beginning the employment to give such notice. This undercuts the public policy rationale for allowing a

“trial period” and disadvantages employers by encouraging workers to quit with minimal notice or none at all. The ULJ’s holding also means that an applicant who expresses an intent to quit within 30 days could be denied benefits simply because the employer persuades her to continue working past the 30th day, as in *Medek*. Nothing in the statute’s language suggests that the Legislature intended such adverse results. *See* Minn. Stat. § 645.16(6) (directing court to consider consequences of a particular interpretation where a statute is ambiguous).

Ms. Wiley gave notice on September 8, thus committing the act that constituted a quit under Minnesota Unemployment Insurance law within 30 calendar days of beginning her employment at Dolphin. Under the plain language of the statute, and consistent with its policy rationale and this Court’s prior interpretations, she falls within the exception to disqualification at Minn. Stat. § 268.095, subd. 1(3).

II. Ms. Wiley quit because the employment was unsuitable for her within the meaning of the statute.

The ULJ concluded that Ms. Wiley did not quit within 30 days but did not reach the issue of whether the Dolphin assignment was suitable for Ms. Wiley. None of relator’s base period wage credits are from staffing service agencies. Exh. 30. This means that employment at a staffing service employer is not “suitable employment” for her as a matter of law. Under Minn. Stat. § 268.035, subds. 23a(g)(4) and 23a(h), a job

assignment with a staffing service employer is suitable only if at least 25 percent of the applicant's wage credits are from staffing service employment.

Relator had not worked for any staffing service employers during her base period, and therefore did not have to apply for or accept employment from Dolphin Staffing. *Cf. Valenty*, 503 N.W.2d at 135 n.6. Minn. Stat. § 268.085, subd. 13c, imposes an eight-week disqualification from unemployment benefits for an applicant who refuses or fails to apply for "suitable" employment. If the ULJ's reading is not reversed, relator will be in a much worse position than if she had never applied for the Dolphin assignment at Medtox. This is precisely the circumstance that the 30-day rule is designed to prevent.

The statute exempts from disqualification an applicant who quits within 30 days "because" the employment is unsuitable. Minn. Stat. § 268.095, subd. 1(3). Ms. Wiley quit because she was unable to fulfill the combined attendance expectations of the staffing service and the site employer in light of her circumstances as a single parent of three small children. At the site employer, Medtox, she was asked to make up absences during hours that she did not have child care.⁶ *See* Exhs. 22, 27, 29. She also was

⁶ The ULJ found that Medtox did not require Ms. Wiley to make up hours. Add. 9. But the only evidence that making up hours was not a requirement was the testimony of Ms. Cooper, who on cross-examination was asked whether she had any knowledge of whether Medtox was asking Ms. Wiley to make up hours and responded, "I have no knowledge of that." T. 63. The record includes email exchanges between Ms. Wiley and her Medtox supervisor in which she was asked to make up time. Exhs. 22, 27, 29. The ULJ's finding is not supported by substantial evidence in the record as a whole. *See* Minn. Stat. § 268.105, subd. 7(d)(5). But it is not necessary to reverse this finding as the employment with Dolphin, the staffing service, was unsuitable both by statute and

performing types of medical billing for which she did not have experience or training. T. 23-24, Exh. 6; *see* Minn. Stat. § 268.035, subd. 23a(a) (prior training and experience are considerations in suitability). The record is not adequately developed to determine whether the Medtox job, if not just a temporary placement, could have been suitable for Ms. Wiley.

But because Ms. Wiley was employed by the staffing service, she was required to fulfill a second set of attendance expectations beyond those of Medtox. Regardless of whether she could have reached a satisfactory agreement with Medtox on making up the hours she missed, she had no way to prevent the accumulation of more unexcused absences under Dolphin's zero-tolerance policy. In only six weeks of employment, Ms. Wiley had five absences treated as unexcused because there was no advance approval a week ahead of time. These absences include relator's own illness on August 31-September 1, her daughter's school conference on September 7, another child's emergency room visit on the same day, the funeral on September 16, and the illnesses of two of her children on September 22 and 23. While the August 31 and September 16 incidents could have happened to any employee, the other three directly resulted from Ms. Wiley's situation as a single parent. As a staffing service employee, Ms. Wiley had to answer not to one, but two employers. The attendance policies of the staffing service, Dolphin, were not flexible enough to accommodate relator's circumstances and ultimately

because its policies were incompatible with Ms. Wiley's circumstances.

made her “trial period” with Medtox unsuccessful.⁷

Employment with a staffing service was not suitable employment for Ms. Wiley as a matter of law. Relator quit within 30 days because the employment with Dolphin was not suitable for her. She qualifies for the exception to disqualification under Minn. Stat. § 268.095, subd. 1(3).

⁷ By contrast, Ms. Wiley testified that her previous employer had allowed her to preplan appointments and had not objected to occasional absences for the needs of her two older children. T. 32-33.

CONCLUSION

The ULJ erroneously applied the law by concluding that Ms. Wiley had not quit within 30 days as required by Minn. Stat. § 268.095, subd. 1(3). Ms. Wiley fulfilled the statutory requirement by giving notice to quit unsuitable work within 30 days. The employment was unsuitable for her as a matter of law. Because Ms. Wiley meets one of the statutory exceptions from a quit disqualification, she is eligible for unemployment benefits. The decision by Respondent's ULJ must therefore be reversed.

Respectfully submitted,

LAW OFFICES OF SOUTHERN MINNESOTA
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Dated: 6/5/12



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