

No. A12-2086

State of Minnesota
In Court of Appeals

ULANDA D. WILEY,

Relator,

vs.

ROBERT HALF INTERNATIONAL, INC.,

Respondent,

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

Respondent.

RESPONDENT-DEPARTMENT'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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LEGAL ISSUE

Under the law, an individual who quits her employment within 30 days because that employment is unsuitable is eligible for benefits. Ulanda Wiley quit her temporary employment with Robert Half International, Inc. (“Robert Half”) after she received the first of four paychecks eight days late and with seven hours of pay missing. Robert Half corrected its errors in a timely fashion. Wiley disclosed to DEED and to Robert Half that she quit her employment in large part because it was causing her to lose eligibility for county services, and she preferred to work in a part-time position because she was in nursing school and had three small children. Did Wiley quit because her employment was unsuitable?

Unemployment Law Judge Andrew Berninghaus found that Wiley quit, did not come under any statutory exception to denial, and was therefore ineligible for unemployment benefits.

STATEMENT OF THE CASE

The question is whether Ulanda Wiley is entitled to unemployment benefits. Wiley established a benefit account with the Minnesota Department of Employment and Economic Development (the “Department”) in 2010, collecting benefits until she returned to work in May 2011 with Robert Half. Following her separation from Robert Half, a DEED clerk determined that Wiley was ineligible for benefits because she quit

her employment and did not fall under any statutory exception to ineligibility.¹ Wiley appealed that determination, and Unemployment Law Judge (“ULJ”) Andrew Berninghaus held a de novo hearing. The ULJ found that Wiley quit, that she did not meet any of the statutory exceptions to ineligibility for quitting, and that she was therefore ineligible for any unemployment benefits.² Wiley filed a request for reconsideration with the ULJ, who affirmed.³ Wiley appealed, and following briefing and oral arguments, this Court issued its decision reversing and remanding the ULJ’s decision on June 18, 2012.⁴ The Court agreed with the ULJ’s finding that Wiley did not quit for a good reason caused by Robert Half, but instructed the ULJ to develop the facts and issue a decision on whether Wiley quit her position because it was unsuitable, which would render her eligible for benefits under Minn. Stat. § 268.035, subd. 23a(g)(4). ULJ Berninghaus held a second hearing, in which both parties participated, with Wiley represented by counsel. ULJ Berninghaus again found that Wiley was ineligible, and specifically found that she had not quit her position because it was unsuitable.⁵ Wiley requested reconsideration, and the ULJ affirmed.⁶

¹ E1-1. Transcript references to the first evidentiary hearing will be indicated “T1. __” and references to the secondary evidentiary hearing will be indicated “T2. __.” Exhibits in the record from the first evidentiary hearing will be “E1- __” with the number following, and exhibits from the second evidentiary hearing will be “E2- __.”

² Appendix to Department’s Brief, A19-A24.

³ Appendix, A14-A18.

⁴ *Wiley v. Robert Half Intern., Inc.*, 2012 WL 2202977 (Minn. App. June 18, 2012).

⁵ Appendix, A6-A13.

⁶ Appendix, A1-A5.

This matter comes before the Minnesota Court of Appeals on a writ of certiorari obtained by Wiley under Minn. Stat. § 268.105, subd. 7(a) (2012) and Minn. R. Civ. App. P. 115.

DEED is charged with the responsibility of administering and supervising the unemployment insurance program.⁷ As the Supreme Court stated in *Lolling v. Midwest Patrol*, unemployment benefits are paid from state funds, the Minnesota Unemployment Insurance Trust Fund, and not from employer funds.⁸ This was later codified.⁹ In 2012, over \$1.28 billion in combined state benefits and federally funded extended benefits were paid from the trust fund to 237,000 unemployed Minnesotans. DEED's interest therefore carries over to the Court of Appeals' interpretation and application of the Minnesota Unemployment Insurance Law. DEED is thus considered the primary responding party to any judicial action involving an unemployment law judge's decision.¹⁰

STATEMENT OF FACTS

Ulanda Wiley worked at Healtheast as a medical billing specialist from 2007 through April of 2010, earning \$15.50 an hour.¹¹ She took a position at Accountemps, a division of Robert Half, from May 3, 2011, until she quit her employment on June 1,

⁷ Minn. Stat. § 116J.401, subd. 1(18) (2012).

⁸ 545 N.W.2d 372, 376 (Minn. 1996); *See National Labor Relations Board v. Gullett Gin Co.*, 340 U.S. 361, 364, (1951); *see also Jackson v. Minneapolis Honeywell Regulator Co.*, 47 N.W.2d 449, 451 (Minn. 1951). Unemployment benefits are paid from state funds, even though taxes paid by employers helped create the fund.

⁹ Minn. Stat. § 268.069, subd. 2.

¹⁰ Minn. Stat. § 268.105, subd. 7(e).

¹¹ T2. 16-17.

2011.¹² This was the first time Wiley had ever taken a position with a temporary staffing service.¹³ Wiley was assigned to work at Handi Medical Supply (“Handi”) as a medical biller, working over 30 hours per week at \$14 per hour.¹⁴ When Wiley began her employment with Robert Half, she set up direct deposit to her checking account.¹⁵ Once her direct deposit was set up, Wiley was paid on a weekly basis.¹⁶

After Wiley became employed by Robert Half, she was informed by Ramsey County that she would need to pay a deductible for her and her children’s medical coverage because of her employment.¹⁷ Wiley paid for a number of bills on a week to week basis, and was behind on multiple bills, including her Xcel Energy bills, her rent, and other debts.¹⁸

Wiley was uncomfortable with her supervisor at Handi, finding that the supervisor was demeaning and failed to acknowledge Wiley’s contributions.¹⁹ Wiley had also heard that her supervisor was not happy with her performance,²⁰ and was frustrated that her supervisor communicated this to Robert Half instead of telling Wiley directly.²¹

¹² T1. 9; T2. 18, 31.

¹³ T. 29.

¹⁴ T1. 9; E1-3.

¹⁵ See T1. 10.

¹⁶ See T1. 18-19.

¹⁷ T1. 15.

¹⁸ T1. 15-17, 19.

¹⁹ T1. 23.

²⁰ T1. 22.

²¹ T2. 21-22.

Wiley received her first direct deposit for the week of May 8, 2011 on May 16, 2011.²² On May 17th, Wiley received payment for her work completed during the week of May 1, 2011 via direct deposit.²³ This deposit was short seven hours of pay for that week.²⁴ Wiley contacted her supervisor to get this error corrected.²⁵ Wiley was properly paid via direct deposit for the week of May 15th on May 23rd, and for the week of May 22nd on May 31.²⁶ Wiley was subsequently paid \$98 for the seven hours of work on June 1, 2011.²⁷

On May 31, 2011, Wiley emailed Brian Baumgartner at Robert Half indicating that she would like a different assignment because she felt uncomfortable with her supervisor.²⁸ She also stated that she believed it would be better for her to quit because she had lost medical benefits by becoming employed.²⁹ She also explained that she would like a part-time position, because she was a single parent of three young children, and was also in nursing school.³⁰ On May 31, 2011, the summer 2011 semester began at Saint Paul College, where Wiley was enrolled in three online courses, including at least one that met during daytime hours.³¹ Cory Kanz, division director at Accountemps,

²² T1. 11-12.

²³ T1. 12.

²⁴ *Id.*

²⁵ T1. 12-13.

²⁶ T1. 19.

²⁷ T1. 15.

²⁸ T1. 24; E1-5; E2-8, pp. 3-4. Both the ULJ's decision and Wiley's testimony at hearing state that this email was sent on May 27, 2011. However, the email is dated May 31, 2011.

²⁹ *Id.*

³⁰ E2-8, pp. 3-4.

³¹ E-8(2).

responded the same morning, asking Wiley to call him so that they could talk about her email.³²

On June 1, 2011, Wiley received the remainder of the overdue pay from her first week of work.³³ The same day, Wiley emailed Cory Kanz at Robert Half saying that she was frustrated because she did not receive her first paycheck on time and she was not being compensated for the medical benefits she lost once she accepted the position.³⁴ In this email, Wiley also admitted that “this situation is probably an isolated incident” with her pay, but stated that she was nonetheless quitting her employment.³⁵

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 Wiley’s substantial rights were prejudiced because the decision of 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.³⁶

There is no presumption of eligibility for unemployment insurance benefits.³⁷ Eligibility is decided under a preponderance of the evidence standard, with no burden of proof assigned.³⁸ The Court of Appeals has explained that whether and why an applicant

³² E2-8, p. 3.

³³ T1. 15.

³⁴ E1-5.

³⁵ *Id.*

³⁶ Minn. Stat. § 268.105, subd. 7(d) (2012).

³⁷ Minn. Stat. § 268.069, subd. 2.

³⁸ Minn. Stat. § 268.101, subd. 2(e); Minn. Stat. § 268.031, subd. 1.

quit employment are questions of fact for the ULJ to determine.³⁹ Whether employment is suitable for an applicant is also a question of fact.⁴⁰

The Supreme Court recently stated in *Stagg v. Vintage Place*, that it views the ULJ's factual findings "in the light most favorable to the decision"⁴¹ and stated that it will not disturb the ULJ's factual findings when the evidence substantially sustains them.⁴² "Substantial evidence" is that relevant evidence "a reasonable mind might accept as adequate to support a conclusion."⁴³

In *Peppi v. Phyllis Wheatley Community Center*, the Court of Appeals reiterated that it reviews de novo the legal question of whether the applicant falls under one of the exceptions to ineligibility under Minn. Stat. § 268.095, subd. 1.⁴⁴ Statutory interpretation and application is a question of law that the courts review de novo.⁴⁵

ARGUMENT FOR INELIGIBILITY

This Court's decision indicated that on remand "DEED may also present any arguments that weigh against the applicability of the statutory provision [concerning quitting unsuitable work] as it is written." DEED must respectfully do the opposite, and argue in favor of applying the statute precisely as it is written. As written, the statute

³⁹ *Midland Electric Inc. v. Johnson*, 372 N.W.2d 810, 812 (Minn. App. 1985).

⁴⁰ *Zielinski v. Ryan Co.*, 379 N.W.2d 157, 159 (Minn. App. 1985); *Hogenson v. Brian Knox Builders*, 340 N.W.2d 360, 363 (Minn. App. 1983).

⁴¹ 796 N.W.2d 312, 315 (Minn. 2011) (citing *Jenkins v. Am. Express*, 721 N.W.2d 286, 289 (Minn. 2006)).

⁴² *Id.* (citing Minn. Stat. § 268.105, subd. 7(d)).

⁴³ *Moore Assocs., LLC v. Comm'r of Econ. Sec.*, 545 N.W.2d 389, 392 (Minn. App. 1996).

⁴⁴ 614 N.W. 2d 750, 752 (Minn. App. 2000).

⁴⁵ *State v. Thompson*, 754 N.W.2d 352, 355 (Minn. 2008).

allows benefits only to employees who quit their positions because the work was unsuitable. The word “because” exists in the statute, and cannot be ignored. As this Court has stated previously, the reason why an applicant quit employment is question of fact for the ULJ to determine.⁴⁶ Wiley did not quit because the work was unsuitable, but because she was annoyed at the delays in receiving her first week’s paycheck, because she wanted to work part-time because she was in school, and because working for Robert Half limited her eligibility for other county assistance programs. None of these reasons indicate that she quit her employment at Robert Half because it was unsuitable.

Under the statutory provision at issue, an applicant who quits her employment “within 30 calendar days of beginning the employment because the employment was unsuitable for the applicant” may be eligible for benefits based on her separation from that employment.⁴⁷ And for Wiley, who earned less than 45% of her wage credits with a staffing service, a position with a staffing service was considered *per se* unsuitable.⁴⁸ But the statute does not render eligible for benefits any individual who quits an unsuitable position; instead, such applicants are eligible for benefits only if they quit their jobs *because* the position was unsuitable.

Wiley does not qualify for benefits under this exception. When a statute is unambiguous, as is this provision, the Court will apply its plain language to determine its

⁴⁶ *Midland Electric Inc. v. Johnson*, 372 N.W.2d 810, 812 (Minn. App. 1985).

⁴⁷ Minn. Stat. § 268.095, subd. 1(3) (2010).

⁴⁸ Minn. Stat. § 268.035, subd. 23a(g)(4) (2010).

meaning.⁴⁹ Here, the word “because” must be interpreted plainly. According to the *Oxford English Dictionary*, “because” means “for the reason that; since. . . .”⁵⁰ Accordingly, this provision clearly states that the applicant must have quit *for the reason that* the employment was unsuitable. This Court’s decision in this case last year stated that “[w]e can find no basis for DEED’s argument that the two definitional provisions must be read and applied in tandem rather than separately, as the text suggests.”⁵¹ The Department respectfully posits that the language of the statutory provision governing quits is clear, and that the word “because” cannot be ignored. The word “because” creates the tandem.

The statute does not read that an applicant is eligible where “the applicant quit the employment within 30 calendar days of beginning unsuitable employment.” Instead, it reads that an applicant is eligible where “the applicant quit the employment within 30 calendar days of beginning the employment because the employment was unsuitable for the applicant.” Analogously, this Court has considered hundreds, if not thousands, of cases in which employees claimed that they quit because of a good reason caused by the employer, and in each of those cases has considered the question of why the applicant actually quit. It is not enough, under that “good reason” statutory provision, to quit employment for a reason unrelated to the good reason caused by the employer. To fall under that statutory exception to ineligibility, the applicant must quit because of the good

⁴⁹ Minn. Stat. § 645.16 (2010); *Carlson v. Dep’t of Emp’t & Econ. Dev.*, 747 N.W.2d 367, 371 (Minn. App. 2008).

⁵⁰ OXFORD ENGLISH DICTIONARY ONLINE, available at <http://oxforddictionaries.com/definition/because?q=because>.

⁵¹ 2012 WL 2202977, at *3.

reason caused by the employer. For example, if a worker had her wages cut by 25%, but admitted at hearing that she quit because she wanted to move to a state with warmer weather, she would not have quit because of the wage cut, and therefore would be ineligible for benefits. A worker with serious medical problems who asked the employer for an accommodation, but then quit his employment the day he requested accommodation because he disliked the employer's attitude while considering his requests, would not have quit because of a serious medical condition, but because he disliked his employer's attitude. The word "because" is crucial to the analysis, both in those "good reason caused by the employer" cases and in the case at hand.

In order to accept relator's argument that Wiley met the statutory exception under Minn. Stat. § 268.095, subd. 1(3), the Court must reject the ULJ's finding that Wiley quit because she wanted to restore her other government benefits, because she preferred part-time work because of her school schedule and her three young children, and because she was irritated at the delay in receiving wages from her first week of work. Relator's brief ignores the ULJ's credibility findings. Here, the ULJ had the ability to compare relator's testimony at two different hearings, and found her testimony from the first hearing to be more credible. He specifically explained that at the first hearing "she was persuasive and forthright regarding the reasons that she quit her employment and it was closer in time to when the events of the separation took place."⁵²

The ULJ also noted that Wiley's testimony at the second hearing "was less credible because it appeared to be contrived and self-serving as compared to her

⁵² Appendix, A9.

testimony from the July 15, 2011 hearing and the documents Wiley submitted for the original hearing. Much of Wiley's testimony and documentation are inconsistent and questionable under the circumstances."⁵³ The ULJ even quoted language from the testimony Wiley offered at the first hearing, in which she explained that she believed her family would be better off financially if she quit and returned to receiving the government benefits she had previously collected.⁵⁴ These credibility findings fulfill the requirements of Minn. Stat. § 268.105, subd. 1(c). As this Court explained in *Skarhus v. Davanni's Inc.*, courts "will not disturb the ULJ's factual findings when the evidence substantially sustains them."⁵⁵

Relator's brief focuses on the testimony Wiley offered in which she testified that she was "uncomfortable with the lack of training, with the disconnected lines of communication, and with not being paid on time and in the correct amount. The common thread tying this discomfort together is the unique experience of employment with a temporary staffing service."⁵⁶ At the end of the brief, relator argues that the ULJ's credibility determinations are not supported by the record, because she had "consistently explained that she quit Half International because she was uncomfortable in the position and was not being paid on time and in the correct amount."⁵⁷

But Wiley did not consistently testify to that. As the ULJ's lengthy factual findings and credibility determinations made clear, Wiley's communications to Robert

⁵³ *Id.*

⁵⁴ Appendix, A11.

⁵⁵ 721 N.W.2d 340, 344 (Minn. App.2006).

⁵⁶ Relator's brief, p. 19.

⁵⁷ Relator's brief, pp. 22-23.

Half and DEED, as well as her testimony at hearing, indicated that her primary motivations for quitting were her desire to restore her government benefits, her desire to work part-time because she was in school and had three young children, and her irritation at a delay in receiving her first week's pay, which she acknowledged was likely an isolated incident. At the second hearing, Wiley acknowledged that she was concerned because she had lost her childcare benefits,⁵⁸ she assumed she would become eligible for childcare assistance if she quit, and that when she quit her assignment she was actually being paid on time.⁵⁹

But when the ULJ attempted to further probe Wiley's answers, including why she chose to quit when she was being paid on time, relator's counsel began to repeatedly object.⁶⁰ Moreover, relator's counsel distorted the record, claiming that Wiley did not receive the final pay to which she was due until after she quit. Wiley's testimony at the first hearing is that she received the \$90 she was overdue on June 1, the day she quit.⁶¹ Only after her counsel's objections did Wiley then testify that she felt that she had to quit because she did not know how else to address the fact that her supervisor's errors had prevented her from being timely paid.⁶²

When the ULJ again attempted to probe this inconsistency – why Wiley quit when she was being paid on time – counsel again objected, essentially offering testimony for Wiley, including that “what she's telling you is she'd had problems all along the way

⁵⁸ T2. 23.

⁵⁹ T2. 24.

⁶⁰ T2. 24.

⁶¹ T1. 13; 15.

⁶² T2. 26.

being timely paid.”⁶³ When the ULJ pointed out that this did not answer his question, counsel continued to object, and Wiley offered no explanation for this seeming inconsistency. In short, while Wiley had been extremely forthcoming about her reasons for quitting in her earlier submissions and testimony, her testimony radically changed during the second hearing, and particularly after her counsel began to object and offer testimony on her behalf. The ULJ had to decide which of Wiley’s testimony he believed more, and he ultimately found her to be more credible at the first hearing.

Wiley’s was not a situation where she quit because the temporary nature of the assignment, for example, hindered her efforts to find permanent work. The reasons for which Wiley quit had nothing to do with the temporary nature of the assignment, and everything to do with the types of personal reasons that this Court sees with some frequency. Indeed, this Court’s decision in *Wiley v. Dolphin Staffing*,⁶⁴ noted that Wiley began working at another temporary staffing service, Dolphin Staffing, in August of 2011. Just as Wiley did not quit her position at Robert Half because it was temporary, she was also not deterred from taking a subsequent temporary position. Wiley may well have had good personal reasons for quitting, but they do not show that Wiley quit *because* her position was at a temporary staffing agency. Wiley’s reasons for quitting had nothing to do with the temporary nature of the work that Wiley took. Wiley did not quit because the work was unsuitable for her.

⁶³ T2.27.

⁶⁴ 825 N.W.2d 121 (Minn. App. Nov. 13, 2012).

Relator's brief cites a series of cases decided prior to the legislature's decision in 1997 to add the quitting unsuitable employment exception to ineligibility. In 1997 Minn. Laws ch. 66, § 43, amended Minn. Stat. § 268.09 to add subd. 1a, including subd. 1a(3), explaining that employees who quit their employment were ineligible "unless the claimant quit the employment within 30 calendar days of commencing the employment because the employment was unsuitable for the claimant." Prior to that year, when the statutory definitions of ineligibility became exclusive, Minnesota courts considered ineligibility questions under the common law standards laid out in the cases relator's brief cites. Because these cases were decided under standards that no longer exist in Minnesota law, they offer limited guidance.

Moreover, relator's brief distorts their holdings. For example, relator's brief claims that the relators in *Smith v. Employers' Overload Co.* "quit their employment [with a temporary staffing service] within one week."⁶⁵ But the Supreme Court in that case actually found that the relators, who had no previously temporary staffing experience, had accepted a few one-day assignments, and then did not request any additional assignments.⁶⁶ These workers would also be eligible under today's statute; their temporary position ended, and under Minn. Stat. § 268.095, subd. 2(d), they would have had no obligation to request an additional temporary assignment, since temporary work was *per se* unsuitable for them.

⁶⁵ Relator's brief, pp. 15-16, citing 314 N.W.2d 220, 221 (Minn. 1981).

⁶⁶ *Smith*, 314 N.W.2d at 221.

The Court did not, as relator's brief contends, "reference[] the 1980 amendment as indicative of the legislature's intent to treat employment with a temporary staffing service different [sic] than full-time, permanent employment."⁶⁷ Relator's brief mistakenly states that the 1980 legislature enacted a "safe harbor" provision for workers to try out unsuitable positions without penalty.⁶⁸ 1980 Laws, ch. 508, § 9, only explicitly allowed the payment of benefits to workers whose temporary positions had ended. Thus, workers were not found to have quit their employment simply because the assignment ended. This 1980 law had nothing to do with accepting a temporary assignment and then quitting before it was completed. The nature of this amendment was discussed in *Smith v. Employers' Overload Co.*, 314 N.W.2d 220, 223 (Minn. 1981). The Court, in distinguishing its holding from an earlier decision, also went on to explain that:

It is undisputed that once a worker accepts a job assignment, as was the case in *Danek*, the temporary service is one of the employers for that job until it is completed. However, it stretches our holding in *Danek* beyond what we intended to say that the temporary service agency is an employer to whom the worker must continue to report after the job assignment is completed at the risk of being disqualified from unemployment compensation benefits.⁶⁹

The legislature has adopted the analysis of the *Smith* court only in part; under today's statute, workers must request additional temporary work in order to remain eligible for unemployment benefits, but only if the temporary work is suitable for them. It is also worth noting that this statutory provision underlines the fact that the legislature was careful in its word choices. Minn. Stat. § 268.095, subd. 2(d) automatically exempts

⁶⁷ Relator's brief, p. 15.

⁶⁸ Relator's brief, pp. 15-16.

⁶⁹ *Id.* at 224.

workers from requesting work that is unsuitable; it contains nothing like the “because of” language found in Minn. Stat. § 268.095, subd. 1(3). And indeed, this is where the suitability of temporary work most often comes into play, as workers who turn down temporary assignments are not ineligible under today’s law.

Relator’s brief also cites *Valenty v. Medical Concepts Development Inc.*, even though that case is not particularly on point. There, a worker took a position involving manufacturing, and quit after she injured herself on her first day.⁷⁰ *Valenty* was the first case in which the Court found that a worker could be eligible for benefits if she quit work that was unsuitable for her.⁷¹ First, that holding is now a statutory provision. Second, it has nothing to do with the case at hand. If worker quits a job because it is unsuitable, she is eligible for benefits. A worker in a temporary position does not lose the protections of the broad language of the statute; if she quits because it is unsuitable, she is eligible. Thus, if Wiley, like Valenty, had taken a job that injured her, or was otherwise a terrible mismatch for her in terms of physical ability, hours, wages, or any of the other factors laid out in the statute, she would have been eligible, regardless of the temporary nature of her work. The definition of suitability simply adds one additional potential source of eligibility for temporary staffing service workers: those who quit because it is a position at a temporary staffing service.

In short, the word “because” cannot be ignored. Wiley quit because she wanted to restore her other government benefits, because she wanted to work part-time while

⁷⁰ 491 N.W.2d 679 (Minn. App. 1992).

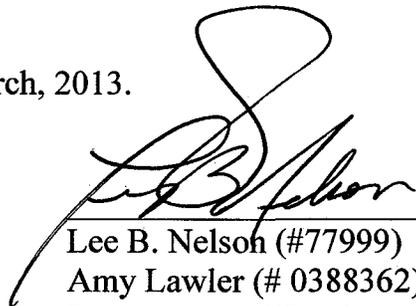
⁷¹ *Id.* at 682-83.

attending school, and because she was annoyed at the difficulties she had in receiving her first week's pay, even though the last error was ultimately remedied on the day she quit. She did not quit because of the temporary nature of the staffing service assignment. She quit for compelling personal reasons that had nothing to do with the unsuitability of the temporary work she had obtained after a year of unemployment.

CONCLUSION

Unemployment Law Judge Andrew Berninghaus correctly concluded that Ulanda Wiley quit her employment and that no statutory exception to ineligibility applied. She is therefore ineligible for benefits. DEED asks that the Court affirm the decision of the Unemployment Law Judge.

Dated this 18th day of March, 2013.



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