

OFFICE OF APPELLATE COURTS

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Reply Brief filed by Relator

Court of Appeals  
Trial Court Case #30848565

September 23, 2013

Henry H Rubin, Relator  
Vs.  
Winona State University, Respondent  
Department of Employment & Economic Development, Respondent Department

This reply brief is submitted in response to the Respondent-Department's Brief.

It is important to establish from the start that the respondents (Respondent-Department Brief, p7 and elsewhere) support their central contention that the ULJ's "*finding (that Rubin's appointment as Dean of the College of Education continued throughout the duration of his employment) is plainly supported by the record evidence*" with ONLY the after-the-fact verbal testimony of WSU HR Director Reed. No other evidence is provided by the respondents to support this argument. Reed's testimony - on its own - stands as "*the substantial evidence*" upon which both respondents make their argument.

It is, therefore, important to review these excerpts from the testimony provided by Director Reed\*:

T.26-27

Rubin: "Am I being told that I was in the position of dean after ... May 29."

Reed: "You remained in the position of dean. The working title changed to senior research associate. Your position, everything, your position control number, everything, benefits, remained the same."

Rubin: "So, I remained in the position of dean for paperwork, payroll, benefits, and related purposes, but ..."

Reed: "Correct."

Rubin: "...are you saying that I remained in the position of dean with any of the authorities, responsibilities, expectations, duties of dean after that date?"

Reed: "Your responsibilities were reassigned to the other work. The position itself remained."

T.24-25

ULJ: "... So, when Mr. Rubin was assigned to serve as the senior research associate, did he do any policy making decisions?"

Reed: "... I do not know what his assignments were during that time."

ULJ: "And do you know if he gave, still gave the provost or the president or vice president advice on any policy or administration of the institution?"

\* I feel justified in reporting this testimony because respondent-department introduced excerpted testimony in their Respondent-Brief.

Reed: "I do not know if he gave advice during that reassign time."

T.32

Reed: "... As far as whether or not you (Rubin) provided policy, you gave, what input you gave to the acting dean or to the assistant dean for the College of Education, **I can't speak to that. I don't know.** I can tell you what the dean position responsibilities were based on the position description, and that position remained."

Rubin: "So, you're **saying I continued to have any of the duties, responsibilities outlined in that job description after the reassignment?**"

Reed: "**A reassignment reassigns those duties.**"

T.28

Rubin: "Were any of the duties I was reassigned the same as those that I had as dean?"

Reed: "No, they were reassigned to other work. The position remained."

The foundation of respondents' position as laid out in the only evidence they cite (the testimony of Director Reed) is fully flawed and without merit, as exemplified above:

1. Reed states (here and elsewhere) that she is unaware as to whether or not I engaged in policy-making or advising (which is what qualifies the position of dean as noncovered) after May 28, 2012, while in the position of Senior Research Associate;
2. Reed explicitly states (here and elsewhere) that the duties and responsibilities described in the dean's position description were reassigned from me to others even as she contends that my employment after May 28, 2012, continued to be defined by "dean position responsibilities".

The testimony of respondents' single source of evidence (Reed) negates respondents' arguments in this case: (a) she confirms that she had no knowledge as to whether or not I continued in a policy-making or advising role after May 28, 2012, and (b) she states that neither the content of the position description nor the title of Dean continued to define my employment after the reassignment.

No document or any tangible evidence has been provided by respondents; their case rests wholly on the credibility and substance of Director Reed's testimony.

On the other hand, my position is evidence-based:

- a letter from me requesting reassignment from the position of Dean;
- a letter from the University President Ramaley accepting my request for reassignment from the position of Dean;
- a letter from interim President Gores appointing me to the position of Senior Research Associate and spelling out the new position description (supplanting the position description for the position of Dean), including new position title, report lines, assignments, salary, benefits, and resources for professional development;
- the appointment of a short-term acting Dean followed quickly by the hiring of a long-term interim Dean of the College of Education (the interim being hired from outside the university) to replace me subsequent to May 28, 2012;

- the removal of my name from the University's directory and website and my reassignment with a new position title and specific new and unrelated duties in a new location far from campus;
- and the absence of any contemporaneous evidence whatsoever (in contrast with the after-the-fact testimony provided by Director Reed) that I continued to serve in a policy-making or advisory role, that I continued to be associated with the duties and responsibilities of the position of dean, or that the "position of dean" continued to be attached to me after May 28, 2012, in any way other than, perhaps, in documents maintained by Director Reed.

The single argument offered by respondents is summed up in the Orwellian statement "while Rubin's job duties were reassigned and he received a new working title, he remained in the position of dean of the college of education" (Respondent-Department Brief, p4). While respondent never articulated what it means to occupy a position (if neither its title nor position description pertains to you); this position (if it existed at all) only existed in documents maintained by the University's HR unit. It did not exist in relationship to me or my work or my relationships with the University or MNSCU anywhere after May 28, 2012. Respondents cannot change this fact simply by repeating their argument; there should be an expectation of contemporaneous evidence to support their position.

The facts support the following: if the position continued to exist after May 28, 2012, it did so only in documents reportedly maintained by the HR unit; the position description did not describe the position I was in either in terms of title or content. If the position existed, there is no evidence that I was in it.

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**Responses to specific elements of Respondent-Department Brief:**

The respondent states on page 2 that it "conducted an audit that resulted in a determination that Rubin's employment with WSU was noncovered..." It is an error to represent the Department's determination as an "audit" since it makes no reference to – nor provides any evidence of - having investigated the matter (a rudimentary expectation of an "audit") but, rather, appears simply to have affirmed (without investigation) the University's claim that the reason it had not filed "detail reports" with the Department to qualify me for unemployment compensation was because I continued to hold the position of Dean.

The respondent department goes on to note (page 2) that, upon my appeal, the ULJ affirmed his earlier decision. This affirmation by the ULJ cited evidence that I was reassigned to the position of Senior Research Associate but then, based simply on verbal testimony of the University and citing no evidence, affirmed that I continued to serve in the position of Dean (see Relator's Brief, page 5).

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The respondent contends (page 4) that "another individual was assigned responsibility to assist the college of education as a dean, and that person also retained his original title." There are two errors here: (1) there is no functional difference between "assigned the responsibility to assist the college of education as a dean" and "assuming the role of dean" and (2) the acting dean may have "retained his original title" until he was replaced by a full-time and externally hired interim Dean when she assumed the position about a month later.

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Respondent states "Rubin's pay and benefits did not change, and he remained under the administrators plan, meaning his role continued to be unclassified" (page 4). No rule or law is ever cited that links salary with classified vs unclassified/covered vs noncovered work (many classified MNSCU employees receive salaries comparable to or greater than the salary I received). My negotiations with WSU regarding salary never included any reference to my continuation as an unclassified worker, only to my continued employment and to my compensation.

Furthermore, it is not the employee's responsibility to take the initiative to remove himself or herself from the administrator's plan should that be appropriate. Rather, logically that is the responsibility of the employer's HR unit (and, arguably, the vehemence and the weak evidential base of the University's argument may derive from their simple failure to have taken this initiative). Finally, all this being said, my salary and continuation on the administrator's plan do not legally or logically "(mean) his role continue to be unclassified."

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The respondents cite no case law that supports the claim that my service in the position of Senior Research Associate should be noncovered. In point of fact, in every Appellate Court case cited by employer, the relator *clearly* continued to be employed and functioning in his/her *original noncovered position*. This does not describe the facts of my situation.

Respondent states "'Covered employment' is defined as any employment performed in Minnesota unless excluded as 'noncovered employment' under the statute" (page 6). It is the employer's/respondent's duty to prove that my employment was related to policy-making or advising and therefore noncovered. They cannot simply retain me in a noncovered position because I used to provide policy-making or advisory input to the state of Minnesota. Nor can they simply assert (without evidence) that I was noncovered. By the definition they provide (i.e., a position that is not 'noncovered' is 'covered'), respondents' failure to provide evidence that after May 28, 2012, I continued to provide major policymaking or advisory input to the state of Minnesota permits my employment to be factually construed as "covered".

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