

*This opinion will be unpublished and  
may not be cited except as provided by  
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1373**

John R. Hink,  
Relator,

vs.

Solution Blue, Inc.,  
Respondent,  
Department of Employment and Economic Development,  
Respondent.

**Filed April 30, 2012  
Affirmed  
Rodenberg, Judge**

Department of Employment and Economic Development  
File No. 27627455-3

Patrick J. Kelly, Kevin M. Beck, Trevor S. Oliver, Kelly & Lemmons, P.A., St. Paul,  
Minnesota (for relator)

Solution Blue, St. Paul, Minnesota (respondent employer)

Lee B. Nelson, Minnesota Department of Employment and Economic Development,  
St. Paul, Minnesota (for respondent department)

Considered and decided by Rodenberg, Presiding Judge; Halbrooks, Judge; and  
Ross, Judge.

## UNPUBLISHED OPINION

**RODENBERG**, Judge

Relator challenges the decision by the unemployment law judge (ULJ) that he is ineligible for unemployment benefits because he was neither actively seeking suitable employment nor available for suitable employment. We affirm.

### FACTS

Relator John R. Hink worked full-time for Rehbein Environmental Solutions (RES) as an environmental engineer and brownfield project manager from 1998 until he was laid off on August 7, 2009, as a result of the economic challenges faced by RES.

In the fall of 2009, after being laid off from RES, the relator, his wife, and two other individuals founded a start-up company called Solution Blue Inc. Solution Blue Inc. is a civil-engineering company whose work centers on water conservation and sustainable design. Relator loaned the company a capital investment of \$50,000, and in exchange received two percent of the shares of the company. He allowed the company to use his resume to solicit work. In addition to relator's direct investment, relator's wife obtained a \$50,000 line of credit for the business, secured by a mortgage on the family home.

The company website identified relator and his experience and prior projects, listing him as the company's President/CEO. Relator has been working in the field longer than any of the other engineers listed on the company website.

Relator testified that his actual time commitment to Solution Blue Inc. amounted to approximately one hour per month, which he spent attending shareholder meetings to

receive updates on the company's efforts to identify and recruit clients and to learn when the company would be able to pay back the loan from relator. Relator testified that the only payment he had ever received from Solution Blue Inc. was a \$5.00 check that was issued as part of a test of the company's payroll system.

Around the time that Solution Blue Inc. was founded, relator applied for unemployment benefits, which he began receiving in late November 2009 and collected for 18 months. As a consequence of relator's responses to two custom fact-finding forms mailed to him on April 21, 2011, and April 22, 2011, the respondent-department issued a determination of ineligibility on May 2, 2011, finding that relator had not been eligible for any of the unemployment benefits that he collected. Following a telephone hearing held on May 17, 2011, the ULJ upheld the determination of ineligibility.

Relator contends that during the 18-month period in which he collected unemployment benefits, in addition to his efforts with respect to Solution Blue Inc., he also engaged in a search for employment. Relator did apply for work with multiple companies during this period. The companies were located in Minnesota, as well as in the American southwest, California, Florida, and in other countries.

According to relator, "several of these [companies] are former customers of mine, or former competitors of my former employer, so I knew the principals at the organizations, knew senior management, so I would just go in and meet with them in person."

Relator claims that these contacts were made as part of a work-search effort. He offered a four-page report into evidence at his hearing before the ULJ that documents

these contacts. Relator logged an average of 6.3 events per month, and his reported efforts were relatively consistent on a month-to-month basis, with the exception of a spike in the first month, and a precipitous drop in May 2011.

The document reports employment-seeking contact with a total of 26 companies over the reporting period. On average, excluding the months of November 2009, in which relator contacted nine companies for the first time, and May 2011, for which the data is incomplete, the relator contacted approximately 4.5 companies per month, an average of one of which he was contacting for the first time.

Relator reported sending out eight resumes in November 2009, before he began to collect unemployment benefits, two resumes in December 2009, and six resumes between January 2010 and August 2010. Relator also reported distributing resumes at job fairs, trade shows, and networking events on nine occasions. Relator reported having eight interviews and two second interviews.

The ULJ found that relator had not demonstrated by a preponderance of the evidence that he was available for suitable employment during the period of his receipt of benefits. The ULJ did not find credible relator's statement that he only devoted one hour per month to Solution Blue Inc. The ULJ based this credibility determination on the fact that (1) the Solution Blue Inc. corporate website listed the relator as CEO/President; (2) relator had more work experience than the other Solution Blue Inc. principals; (3) many of the projects listed on the website were projects that the relator had worked on while at his previous employer; (4) relator allowed the company to use his "connections" for the benefit of the corporation; and (5) relator's financial stake in Solution Blue Inc.

The ULJ concluded that all of this prevented relator from being available to accept suitable employment with companies in his field, which would be competitors of Solution Blue Inc.

The ULJ also held that the preponderance of the evidence showed that relator's "attachment to the work force is centered on maintaining and developing Solution Blue, Inc's [sic] clientele and upholding his reputation in the professional arena he has spent years of experience developing. [He] has not made reasonable and diligent efforts [to obtain suitable employment] that an individual in his circumstances would make." The ULJ noted that relator had been unemployed for more than 18 months despite having 18 years of experience in his field. The ULJ also noted that relator had repeatedly contacted the same companies by phone or in person, submitted only a small number of resumes, and received only a few interviews. The ULJ concluded that "[c]ontinuously contacting employers who do not have positions available does not show a genuine interest in obtaining suitable employment."

## **D E C I S I O N**

Whether a party is entitled to receive unemployment benefits is a question of law subject to de novo review. *See Bukkuri v. Dep't of Emp't & Econ. Dev.*, 729 N.W.2d 20, 21–22 (Minn. App. 2007) (reviewing the application of the unemployment statute de novo). However, whether a party is "actively seeking" and "available for" suitable employment involve questions of fact. *Goodman v. Minn. Dep't of Emp't Servs.*, 312 Minn. 551, 553, 255 N.W.2d 222, 223 (1977). The ULJ makes findings of fact based on the preponderance of the evidence. Minn. Stat. § 268.031, subd. 1 (2010). This court

defers to the credibility determinations made by the ULJ in reaching factual findings. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006).

In order to be eligible to receive unemployment benefits, an applicant must be available for suitable employment. Minn. Stat. § 268.085, subd. 1(4) (2010). An applicant is available for suitable employment if he is “ready and willing to accept suitable employment. The attachment to the workforce must be genuine. An applicant may restrict availability to suitable employment, but there must be no other restrictions, either self-imposed or created by circumstances, temporary or permanent, that prevent accepting suitable employment.” Minn. Stat. § 268.085, subd. 15 (2010).

An applicant may be eligible for unemployment benefits while attempting to start up a business, provided that the employee also continues to be available for suitable employment in the traditional labor market. *Decker*, 540 N.W.2d at 550–51.

In this case, the ULJ found that relator did not continue to be available for suitable employment in the traditional labor market due to his level of involvement with Solution Blue Inc. The ULJ determined that the preponderance of the evidence showed that relator would not be available to accept employment anywhere other than with Solution Blue Inc. and that relator’s “attachment to the workplace is centered on maintaining and developing” the start-up company. The ULJ concluded that relator’s significant financial stake in Solution Blue Inc. and the prominent use of relator’s name and experience in the field by the corporation “prohibits him from being available for suitable employment” with other employers. The ULJ did not find relator’s testimony and claims to the contrary to be credible.

In order to be eligible to receive unemployment benefits, an applicant must also be actively seeking suitable employment. Minn. Stat. § 268.085, subd. 1(5) (2010). “If reasonable prospects of suitable employment in the applicant’s usual and customary occupation do not exist, the applicant must seek other suitable employment to be considered ‘actively seeking suitable employment.’” Minn. Stat. § 268.085, subd. 16(c) (2010).

An applicant who seeks reemployment through entrepreneurial means by attempting to start up a business is considered to be “actively seeking suitable employment” if he also continues to actively seek employment in the traditional labor market. *Decker*, 540 N.W.2d at 550–551.

The ULJ found that relator did not continue to actively seek employment in the traditional labor market while working to start up Solution Blue Inc. Based on the assessment of relator’s credibility, the ULJ found as fact that the efforts reported by relator not to be actual job-search activity, as the very companies being contacted as part of relator’s claimed job search would also have been potential clients of Solution Blue Inc. The ULJ also noted the absence of much specificity in relator’s submissions with respect to his job-search efforts.

The efforts reported by relator relative to his attempts to obtain traditional employment cannot reasonably be described as “active.” Relator only reported an average of only 6.3 job search activities per month during a period when, as the parties concede, market conditions made finding employment very difficult. Relator’s field was, by all accounts, hit particularly hard by the economic circumstances during the period in

question. Relator's efforts were not consistent with the "reasonable, diligent efforts an individual in similar circumstances would make if genuinely interested in obtaining suitable employment under the existing conditions in the labor market area." Minn. Stat. § 268.085, subd. 16(a) (2010). It appears to this court to be particularly significant that the level of relator's purported job-search activity did not increase over time during the 18-month period that he collected unemployment benefits. Neither did the scope of his job search expand. Instead, relator continued to contact the same persons and entities, month after month, many, if not most, of which being the same ones with whom Solution Blue Inc. would have done business. The ULJ found these to be significant indications that relator was not actively seeking employment. The ULJ's factual determination in that regard is supported by the record.

In *Decker*, the applicant's search for employment, in a much better employment market, was characterized by abundant activity, and his receipt of benefits ended after less than three months, when the applicant's start-up business became profitable. 540 N.W.2d at 549–50. Here, relator was contacting an average of only 4.5 potential employers per month, an average of only one "new" potential employer each month, and most of those contacts were with companies with which Solution Blue Inc. would potentially do business if the start-up business became successful. Relator only sent out eight resumes in the nine months after he applied for benefits.

Finally, the evidence, in this case, of the locations, size, and fields of work of the different companies identified in the work-search record, on which the relator relies to argue that he expanded his job search beyond his customary occupation, was not

in evidence at the evidentiary hearing, and was first mentioned in relator's request for reconsideration. Therefore, that evidence is not properly before this court. *See* Minn. Stat. § 268.105, subd. 2(c) (2010) ("In deciding a request for reconsideration, the unemployment law judge must not . . . consider evidence that was not submitted at the evidentiary hearing."). On this record, there is substantial evidence to support the ULJ's determination that relator failed to expand his job search beyond his customary occupation, and the ULJ's determination that relator instead devoted almost all of his time and effort to the success of the start-up company in which he and his wife had invested.

In the long run, relator's entrepreneurial efforts may pay off, but unemployment benefits are not intended to be a short-term subsidy for such efforts. The ULJ properly concluded, on this record, that relator's testimony was not credible and that relator was not available for and actively seeking suitable employment during the period of time in question. Instead, there is substantial evidence supporting the ULJ's determination that relator was focused on his start-up company and had removed himself from the traditional labor market.

**Affirmed.**