

*This opinion will be unpublished and  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  
A11-1341**

Victoria Steinhaus,  
Relator,

vs.

Department of Employment and Economic Development,  
Respondent.

**Filed May 21, 2012  
Affirmed  
Larkin, Judge**

Department of Employment and Economic Development  
File No. 27367231-3

Brad C. Eggen, The Law Office of Brad C. Eggen, Minneapolis, Minnesota (for relator)

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

Considered and decided by Larkin, Presiding Judge; Peterson, Judge; and Collins,  
Judge.\*

---

\* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

**LARKIN**, Judge

Relator challenges an unemployment-law judge's (ULJ) determination that she was not available for suitable employment or actively seeking suitable employment from April 15, 2009, through April 12, 2011, and was not eligible for unemployment benefits for that period. Relator argues that the actively-seeking-employment issue was not properly before the ULJ, that the ULJ abused his discretion by denying her request for an additional hearing, and that the ULJ's conclusions are not sustained by the record. We affirm.

### FACTS

In December 2007, relator Victoria Steinhaus tore ligaments in her right knee, requiring reconstructive surgery. She also has degenerative disc disease in her lower back. As a result of her physical ailments, relator is subject to work restrictions: she is unable to bend or lift more than five to ten pounds, must be able to change between standing and sitting positions as needed, and is limited to working two to four hours per day. In April 2009, relator left her job as a quality-assurance laboratory technician due to these restrictions and her resulting inability to perform the work associated with that position.

Relator established an unemployment-benefit account with respondent Department of Employment and Economic Development (DEED) effective April 12, 2009. Relator was found eligible for, and received, unemployment benefits. On February 10, 2011, the

Social Security Administration determined that relator had been disabled<sup>1</sup> and therefore unable to work since April 15, 2009, and the administration approved the payment of disability benefits to relator retroactive to October 2009. DEED learned of the disability determination and sent relator a request for information, asking whether relator was available for or actively seeking employment during the time period she received disability benefits. Relator informed DEED that she was unable to work due to illness or disability from April 14, 2009, until March 15, 2011. She explained that she had torn tendons in her right knee, torn cartilage in her right hip, and a long history of chronic migraines. Relator's doctor provided DEED with a statement indicating that relator was unable to perform any type of work effective April 15, 2009, and continuing for the rest of her life.

DEED issued several ineligibility determinations based on this information. On March 11, 2011, DEED issued two ineligibility determinations (issue-identification numbers 27288378 and 27366956) regarding the deduction of Social Security income from relator's unemployment benefits. *See* Minn. Stat. § 268.085, subd. 4(c) (2010) (requiring the deduction of "50 percent of the weekly equivalent of the primary Social Security disability benefits the applicant is receiving" from the applicant's unemployment benefits). These ineligibility determinations resulted in overpayments of unemployment benefits in the amounts of \$1,134 and \$4,367 and identified the following pending issue

---

<sup>1</sup> The Social Security Administration defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 416 (i)(1)(A) (2006).

that might affect relator's eligibility for benefits: "Ability-Availability-Actively Seeking."

On March 24, DEED issued a third ineligibility determination (issue-identification number 27367231), stating that "[t]he evidence does not show that [relator] is able to perform any gainful employment that can be expected to be available in the labor market" and that relator "is not eligible for benefits beginning [April 15, 2009] and until [relator] is able to perform some gainful employment and is ready and willing to search for and accept a job." This determination resulted in an overpayment of \$24,949.

Relator appealed all three ineligibility determinations. The ULJ held a consolidated hearing on the appeals on April 12 and determined that relator was ineligible to receive unemployment benefits. The ULJ's decision was limited to issue-identification number 27367231.<sup>2</sup> Although the ULJ reasoned that relator "is available for suitable employment," the ULJ decided that relator "was not actively seeking suitable employment" and therefore was not eligible for unemployment benefits. The ULJ determined that relator had been overpaid unemployment benefits in the amount of \$24,949. Relator submitted a request for reconsideration, seeking either "a determination that she has not been overpaid unemployment benefits, or in the alternative, a

---

<sup>2</sup> The decision that is the subject of this appeal is identified with issue-identification number 27367231. Although relator appealed all three of the ineligibility determinations, relator essentially withdrew her challenge to the first two determinations concerning the deductible-income issue. Relator's final submission to the ULJ stated: "[T]he determination of ineligibility and the overpayment amount of \$24,949.00 alleged in Issue Identification Number 27367231 should not be upheld. As for the overpayment amounts of \$4,367.00 alleged in Issue Identification Number 27366956 and \$1,134.00 alleged in Issue Identification Number 27288378, [relator] would agree that said sums are correct."

supplemental hearing to present evidence regarding her job-search activity.” The ULJ considered the request and issued a decision based on the existing record, implicitly denying relator’s request for a supplemental hearing. The ULJ determined that the previously issued findings of fact were correct, “but that the decision [was] not legally correct and should be modified.” The ULJ’s modified decision states that relator “was not available for suitable employment or actively seeking suitable employment.” This certiorari appeal follows.

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

When reviewing a ULJ’s eligibility determination, we may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator 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) (2010).

Before addressing relator’s assignments of error, we first clarify the scope of the record on appeal. Relator’s brief contains a supplemental appendix, which she describes as “containing [her] job applications which are part of the public record of [her] job search.” Relator asks this court to consider these documents on appeal, “as the evidence [she] was never given the opportunity to present, all of which verify [her] efforts at seeking employment.” There is no indication that relator submitted these documents to

the ULJ at the initial hearing or in support of her request for reconsideration. *See id.*, subd. 2(c) (2010) (“In deciding a request for reconsideration, the unemployment law judge must not, except for purposes of determining whether to order an additional evidentiary hearing, consider any evidence that was not submitted at the evidentiary hearing conducted under subdivision 1.”).

By its very nature, review by certiorari is solely based on the record before the agency or body. *Amdahl v. Cnty. of Fillmore*, 258 N.W.2d 869, 874 (Minn. 1977). In an unemployment-benefits appeal, evidence which was not received below may not be reviewed as part of the record on appeal. *Appelhof v. Comm’r of Jobs & Training*, 450 N.W.2d 589, 591 (Minn. App. 1990); *see also* Minn. R. Civ. App. P. 110.01 (“The papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases.”). Because relator did not submit the documents contained in her supplemental appendix in the proceedings before the ULJ, the documents are not part of the record, and we do not consider them.

## I.

Relator contends that “the decision to deny unemployment compensation benefits exceeded the scope of [relator’s] appeal and was beyond the jurisdiction of the [ULJ].” *See* Minn. Stat. § 268.105, subd. 7(d)(2), (3) (stating that this court may reverse or modify the ULJ’s decision if the findings, inferences, conclusion, or decision are “in excess of the statutory authority or jurisdiction of the department” or “made upon unlawful procedure”). Relator argues that

[she] appealed a determination (Issue Identification #27367231) which found that evidence did not show [she] was able to perform any gainful employment that could be expected to be available in the employment market. [Her] ability to perform gainful employment during the period of alleged overemployment was the sole issue present in the [d]etermination of [i]neligibility, and the . . . [ineligibility determination] contains no reference to the insufficiency of [her] job search activities. Therefore, the only issue that could have been appealed, and was appealed . . . was the issue concerning [her] ability to perform gainful employment. No motion was made either before the hearing or at the hearing to consolidate the issue of sufficiency of [her] job search activities. Therefore, that issue was not properly before [the ULJ].

In sum, relator argues that the only issue to be considered on appeal to the ULJ was whether she was able to work, not whether she was seeking employment. The record belies relator's argument.

An applicant is not eligible for unemployment benefits unless she is available for suitable employment and is actively seeking suitable employment. Minn. Stat. § 268.085, subd. 1 (2010). An applicant who is receiving Social Security disability benefits is considered unavailable for suitable employment unless, among other circumstances not present here, "the applicant provides a statement from an appropriate health care professional who is aware of the applicant's Social Security disability claim and the basis for that claim, certifying that the applicant is available for suitable employment." *Id.*, subd. 4(c) (2010).

DEED's determination of ineligibility regarding issue-identification number 27367231 states that

[u]nder Minnesota Statute section 268.085, an applicant who is receiving or has applied for primary Social Security disability income is eligible for unemployment benefits only if: 1) the applicant provides a statement from a doctor who is aware of the basis for the disability claim, stating that the applicant is able to perform some gainful employment, *and the applicant is seeking that employment . . . .* The evidence does not show that [relator] is able to perform any gainful employment that can be expected to be available in the labor market . . . [Relator] is not eligible for benefits . . . until [relator] is able to perform some gainful employment *and is ready and willing to search for and accept a job.* [Relator] should contact the department if the applicant is released as able to perform some gainful employment, and *is ready and willing to seek and accept a job.*

(Emphasis added.)

DEED's determination reflects the relevant eligibility requirements under Minn. Stat. § 268.085. The italicized portions of the determination address the actively-seeking-employment requirement and indicate an implicit determination that relator was not "ready and willing to search for and accept a job." Consistent with the statutory eligibility requirements and DEED's initial determination, the notice of appeal for issue-identification number 27367231 lists the issue to be considered at the hearing as: "The Ability-Availability-Actively Seeking issue." In accordance with this notice, at the beginning of the hearing the ULJ stated: "[t]he issues appear to be whether [relator] is receiving Social Security Disability benefits which affect eligibility and whether she has been available for and actively seeking suitable employment."

We observe that neither relator nor her attorney objected to the ULJ's summary of the issues to be determined at the hearing. Moreover, during the hearing, the ULJ

inquired at length regarding relator's job-seeking activities. The ULJ asked relator whether she had been looking for work since April 2009, what kind of work she had been looking for, whether she had applied for any teaching positions that did not require licensure, how many different teaching positions she had applied for since 2009, how many office positions she had applied for, and what methods she had used to contact potential employers. Neither relator nor her attorney objected to this line of questioning. Instead, relator testified regarding her job-seeking activities and provided specific information regarding the number of applications and contacts that she had made, her application and contact methods, and the names of the potential employers.

In sum, the record does not support relator's argument that her inability to work was the sole basis for DEED's ineligibility determination and therefore the sole issue to be determined at the hearing before the ULJ. Relator's attempt to support her argument by citing Minn. R. 3310.2910 also fails. The rule provides, in part, that a notice of hearing must be mailed to each party that states the issues to be considered at the hearing and that

[u]pon the motion of a party to a hearing or on the unemployment law judge's motion, the unemployment law judge may consolidate for hearing issues involving the same parties and may take testimony and render a decision on issues not listed on the notice of hearing if each party is so notified on the record at the hearing and does not object on the record.

Minn. R. 3310.2910.

Relator argues that "[n]o motion was made . . . to consolidate the issue of sufficiency of [relator's] job search activities" and that the issue was therefore not

properly before the ULJ. But because the notice of appeal regarding issue-identification number 27367231 states that relator had appealed the “[a]bility-[a]vailability-[a]ctively [s]eeking determination,” that a hearing would be conducted, and that the issues to be considered included the “[a]ctively [s]eeking issue,” there was no need to “consolidate” the job-search issue—it was already listed in the issues to be considered at the hearing.

Because (1) DEED’s ineligibility determination referenced relator’s need to seek gainful employment, (2) DEED notified relator in writing that her appeal of the ineligibility determination would address whether she was actively seeking employment, and (3) the ULJ notified relator at the beginning of the hearing that the employment-seeking issue would be considered, the ULJ did not act beyond the scope of his authority in considering whether relator was actively seeking suitable employment.

## II.

Relator also contends that “the unemployment law judge failed to allow an additional evidentiary hearing with evidence of an active job search as required by Minnesota Statute § 268.105, subd. 2(c).”

The unemployment law judge must order an additional evidentiary hearing if an involved party shows that evidence which was not submitted at the evidentiary hearing: (1) would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence; or (2) would show that the evidence that was submitted at the evidentiary hearing was likely false and that the likely false evidence had an effect on the outcome of the decision.

Minn. Stat. § 268.105, subd. 2(c) (2010). “A reviewing court accords deference to a ULJ’s decision not to hold an additional hearing and will reverse that decision only for an

abuse of discretion.” *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006).

Relator asserts that she was entitled to an additional evidentiary hearing under the first part of section 268.105, subdivision 2(c). She argues that she “made a showing that additional evidence would likely change the outcome of the decision and that there was good cause for not having previously submitted that evidence.” We disagree.

Relator once again argues that it was improper for the ULJ to consider whether she was actively seeking suitable employment. She contends that because she was unaware that the ULJ would consider the adequacy of her job-search, she had good cause for failing to submit additional job-search evidence. But as discussed in section I, the record belies relator’s argument: DEED referenced relator’s need to seek gainful employment in its initial ineligibility determination regarding issue-identification number 27367231 and notified relator in writing that her appeal of that determination would address the actively-seeking-employment issue. Moreover, the ULJ notified relator at the beginning of the hearing that the employment-seeking issue would be considered. Because relator did not object, request a continuance, or seek leave to submit additional information on the employment-seeking issue prior to the closure of the record, she fails to show good cause for not previously submitting the additional job-search evidence. The ULJ therefore did not abuse his discretion by refusing to grant an additional evidentiary hearing.

### III.

Relator argues that “[t]he conclusions of the unemployment law judge are not sustained by the record as a whole.” This court may reverse or modify the ULJ’s decision if the findings, inferences, conclusion, or decision are “unsupported by substantial evidence in view of the entire record as submitted.” Minn. Stat. § 268.105, subd. 7(d)(5). Minnesota courts have defined substantial evidence as: “(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety.” *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

Relator asserts that the ULJ’s final order contains factual findings that are contrary to the record. For example, relator asserts that the ULJ erroneously found that the notice of appeal indicates that the issues to be considered at the hearing included the “ability-availability-actively seeking” issue. Relator argues that other documents directly contradict the ULJ’s assessment of the issues under consideration and show that “the sole issue to be considered at the hearing” was the deductible-income issue.

Relator’s argument misrepresents the record. Relator cites to a March 29, 2011 notice of appeal regarding issue-identification number 27288378 and a March 31, 2011 notice of rescheduled hearing regarding issue-identification number 27366956, which both identify the issue to be considered at the hearing as the deductible-income issue. However, the notice of appeal regarding issue-identification number 27367231, which was the third ineligibility determination to be considered at the hearing on the

consolidated appeals, states: “Issues to be Considered at this Hearing: The Ability-Availability-Actively Seeking issue.” Thus, the record substantially supports the ULJ’s finding.

As to the primary grounds for the ULJ’s decision, an applicant is not eligible for unemployment benefits unless she is available for suitable employment and is actively seeking suitable employment. Minn. Stat. § 268.085, subd. 1. Available for suitable employment “means an applicant is ready and willing to accept suitable employment. The attachment to the work force 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.” *Id.*, subd. 15 (2010). Suitable employment is defined as “employment in the applicant’s labor market area that is reasonably related to the applicant’s qualifications.” Minn. Stat. § 268.035, subd. 23a(a) (2010). Actively seeking suitable employment

means those 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. Limiting the search to positions that are not available or are above the applicant’s training, experience, and qualifications is not “actively seeking suitable employment.”

Minn. Stat. § 268.085, subd. 16 (2010).

The ULJ concluded both that relator was not available for suitable employment and that she was not actively seeking suitable employment. As to the latter conclusion, the record establishes that relator has a Bachelor of Science degree in chemical

engineering and was most recently employed as a quality-assurance laboratory technician. Prior to that, relator worked as an assembler. Relator can no longer perform these types of work due to her restrictions. Relator testified that she sought a teaching position and office-related jobs. Relator testified that she unsuccessfully interviewed for one teaching job at a college that did not require a teaching license. She also applied for several teaching jobs that required a license, which she does not have. She applied for approximately six “office-assistant” jobs and passed a merits test to become a census worker, but was physically unable to go door-to-door as the job required.<sup>3</sup>

The ULJ found that relator interviewed for one teaching position, applied for approximately six office-related positions online, and contacted approximately ten potential employers by phone. The ULJ also found that relator had been networking. Although the ULJ found that relator had made efforts to find employment, the ULJ did not find that relator had been actively seeking suitable employment. The ULJ reasoned that relator made few contacts with potential employers during the two-year period in question and that relator was not “making the kind of 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.”

---

<sup>3</sup> Relator argues that the ULJ erroneously found that relator “only identified one job opportunity that she had found that was within her restrictions.” We agree that the record shows that relator applied for more than one position within her restrictions; in fact, the ULJ found that relator applied for approximately seven positions. To the extent that the ULJ’s reference to only “one” job opportunity is erroneous, it is not a basis for reversal. *See* Minn. Stat. § 268.105, subd. 7(d) (limiting reversal to errors that prejudice the substantial rights of a relator).

This court has reviewed relator's detailed testimony regarding the extent of her job-search efforts. Relator submitted approximately seven applications and made ten contacts in a two-year period. This averages out to approximately one employment-seeking attempt per month and does not constitute "actively seeking" employment. See *Monson v. Minn. Dep't of Emp't Servs.*, 262 N.W.2d 171, 172 (Minn. 1978) (holding that regularly reading newspaper and journal advertisements, conducting a single search of a job data bank, and applying for two or three positions in two months does not constitute actively seeking employment); *James v. Comm'r of Econ. Sec.*, 354 N.W.2d 840, 841-42, 844 (Minn. App. 1984) (holding that an individual who makes four job contacts in three weeks, all by telephone, is not actively seeking employment), *review denied* (Minn. Dec. 20, 1984). We therefore conclude that the record substantially supports the ULJ's conclusion that relator was not actively seeking suitable employment. Because this conclusion is a sufficient basis to affirm the ULJ's ineligibility determination, we affirm on this ground without reviewing the ULJ's conclusion that relator was not available for suitable employment.

**Affirmed.**