STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0611

Nancy C. Levang,
Relator,

vs.

TCG Incorporated,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed April 1, 2008
Affirmed in part, reversed in part, and remanded
Collins, Judge[*]

Department of Employment and Economic Development
File No. 16719 06

Nancy C. Levang, 4430 Cedar Lake Road # 8, Minneapolis, MN 55416 (pro se relator)

TCG Incorporated, 258 Hennepin Avenue, Minneapolis, MN 55401 (respondent employer)

Lee B. Nelson, Katrina I. Gulstad, Department of Employment and Economic Development, 332 Minnesota Street, Suite E200, St. Paul, MN 55101-1351 (for respondent DEED)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Collins, Judge.

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

U N P U B L I S H E D O P I N I O N

COLLINS, Judge

Relator challenges the decision by the ULJ that relator was disqualified from receiving unemployment benefits because she quit without good reason caused by the employer. Relator argues that she did not quit because (a) she was under no obligation to request another position upon completion of her job assignment; and (b) her assignment was not suitable. She also contends that she had good reason to quit because her employer intentionally prevented her from obtaining permanent employment. Because relator did not offer the evidence of good reason to quit until after the original hearing, and because the ULJ did not err in declining to grant an additional hearing, we affirm as to the issue of good reason to quit. But because the ULJ failed to consider whether relator's previous assignment was suitable, we reverse and remand.

FACTS

Relator Nancy Levang worked on various temporary assignments for respondent TCG Incorporated, a staffing agency that does business as Dolphin Staffing (Dolphin). On September 29, 2004, relator signed a form from Dolphin acknowledging that:

> According to Minnesota state statute, section 268.095, subdivision 2, paragraph D, an applicant who, within five calendar days after completion of a suitable job assignment from a staffing service employer, (1) fails without good cause to affirmatively request an additional job assignment, or (2) refuses without good cause an additional suitable job assignment offered, shall be considered to have quit employment. It is your responsibility to contact **Dolphin Staffing** for additional assignments. If you fail to do so, it may affect your unemployment benefits.

Beginning August 30, 2005, relator worked full time at Medtronic on a temporary assignment from Dolphin. The assignment ended on March 3, 2006, and relator did not contact Dolphin to request work within five calendar days.

Relator applied for unemployment benefits with the Minnesota Department of Employment and Economic Development (DEED). A department adjudicator determined that she was qualified to receive benefits. But Dolphin appealed the determination, and after a de novo hearing the unemployment-law judge (ULJ) held that relator was disqualified from receiving benefits because she had quit without good reason by failing to request additional work within five calendar days after the completion of her assignment. Relator moved for reconsideration, but the ULJ affirmed the decision. This certiorari appeal followed.

D E C I S I O N

I.

Relator challenges the determination that she quit her employment. The ULJ's determination must be affirmed unless the decision derives from unlawful procedure, relies on an error of law, is unsupported by substantial evidence, or is arbitrary and capricious. Minn. Stat. § 268.105, subd. 7(d)(3)-(6) (Supp. 2005). An applicant who quits employment is disqualified from receiving unemployment benefits unless a statutory exception applies. Minn. Stat. § 268.095, subd. 1 (Supp. 2005). In the context of a temporary staffing service, a "quit" occurs when **"**[a]n applicant who, within five calendar days after completion of a suitable temporary job assignment . . . (1) fails without good cause to affirmatively request an additional job assignment, or (2) refuses

without good cause an additional suitable job assignment offered . . . ." Minn. Stat. § 268.095, subd. 2(d) (2004). This definition only applies if an applicant signed a statement "written in clear and concise language that informed the applicant of this paragraph and that unemployment benefits may be affected." *Id.*

Relator neither disputes that she signed the written acknowledgement nor challenges the finding that she failed to request another assignment from Dolphin within the statutorily mandated five day period. Rather, she claims that her failure to request additional work did not constitute a quit under applicable case law. She cites *Mbong v. New Horizons Nursing*, 608 N.W.2d 890, 895 (Minn. App. 2000), for the proposition that upon completion of a temporary assignment the employment relationship ends, and an employee's "refusal, avoidance, or unwillingness to accept future assignments does not constitute 'quitting' employment." However, *Mbong* was decided prior to the 2001 amendments to Minn. Stat. § 268.095, subd. 2, which require temporary-service employees who have received prior written notice of the statutory provision to request additional work upon completion of an assignment. 2001 Minn. Laws, ch. 175, § 39, at 585. Therefore, although the rationale of *Mbong* continues to apply in situations when an employee has not received written notice, it is not applicable here. *See Lamah v. Doherty Employment Group, Inc.*, 737 N.W.2d 595, 598-99 (Minn. App. 2007) (applying *Mbong* to a situation involving a temporary employee who did not receive notice of the work-request requirement).

Next, relator argues that the ULJ erred by failing to consider whether her employment with Medtronic was suitable. We agree. The statute provides the bases on

which a temporary employee may be considered to have quit her job, but those bases apply only "after completion of a suitable temporary job assignment." Minn. Stat. § 268.095, subd. 2(d). Suitable employment is defined as

> employment in the applicant's labor market area that is reasonably related to the applicant's qualifications. In determining whether any employment is suitable for an applicant, the degree of risk involved to the health and safety, physical fitness, prior training, experience, length of unemployment, prospects for securing employment in the applicant's customary occupation, and the distance of the employment from the applicant's residence shall be considered.

Minn. Stat. § 268.035, subd. 23a(a) (2004). Whether work is suitable is a question of fact, and the ULJ "is vested with wide discretion" to determine suitability of employment. *Willrich v. Top Temp., Inc.*, 379 N.W.2d 731, 732 (Minn. App. 1986) (suitability of employment is a question of fact); *Mastley v. Comm'r of Econ. Sec.*, 347 N.W.2d 515, 518 (Minn. App. 1984) (the agency decision maker has discretion).

As relator argues, the ULJ did not inquire into the suitability of the Medtronic position, but instead focused solely on whether relator had requested additional work within five days after completing her assignment. By statute, the ULJ "shall ensure that all relevant facts are clearly and fully developed" and must also assist pro se parties with the presentation of evidence. Minn. Stat. § 268.105, subd. 1(b) (Supp. 2005) (requiring development of the record); Minn. R. 3310.2921 (2005) (requiring assistance of pro se parties). Absent factual findings in the record, it is not our role to make a determination on a contested issue. *In re Welfare of M.D.O.*, 462 N.W.2d 370, 374-75 (Minn. 1990) (stating that the role of appellate courts is to correct errors, not find facts). Therefore, we

must remand this matter for further development of the record and formal findings addressing the suitability of relator's employment at Medtronic.

II.

Finally, relator argues that even if her actions constitute a quit, she had good reason for declining to request further employment opportunities from Dolphin within five days after completing her Medtronic assignment. In general, an applicant who quits employment without a good reason caused by the employer is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 1(1). With respect to temporary employees, good cause to quit "is a reason that is significant and would compel an average, reasonable worker, who would otherwise want an additional temporary job assignment with the staffing service employer, (1) to fail to contact the staffing service employer, or (2) to refuse an offered assignment." *Id.*, subd. 2(a). Whether an employee has a good reason to quit caused by the employer is a question of law, which this court reviews de novo. *Peppi v. Phyllis Wheatley Cmty. Ctr.*, 614 N.W.2d 750, 752 (Minn. App. 2000).

The ULJ originally concluded that relator quit without good reason stating: "[Relator] has not stated any reason for quitting. There is no evidence that [Dolphin] did anything to cause [relator] to quit." On appeal, relator claims that she had good reason for failing to pursue further employment through Dolphin because the employment agency intentionally prevented her from obtaining permanent positions by ignoring her stated preferences and offering only temporary employment. In support of her argument, relator provides evidence that she made requests for permanent employment, but Dolphin

ignored these requests and instead offered her temporary positions that did not fit her skill level and experience. She also cites a notation in her Dolphin employment records that states that "an offer is on its way for [relator from Medtronic], but please tell her NOT to ask about how to get hired [permanently]."

Although there is arguably some support for relator's assertion, she did not present this evidence prior to moving for reconsideration. A "[ULJ] shall not, except for purposes of determining whether to order an additional evidentiary hearing, consider any evidence that was not submitted at the evidentiary hearing." Minn. Stat. § 268.105, subd. 2(c) (Supp. 2005).

> The [ULJ] 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 the 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.

Id. This court generally defers to the ULJ's decision not to hold an additional evidentiary hearing. *Yusuf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 533 (Minn. App. 2007).

Upon reconsideration, the ULJ found that relator's "argument does not have much weight. [Relator] has not shown good cause for failing to submit this evidence at the hearing and introduction of the evidence is unlikely to change the outcome of the decision." In other words, the ULJ did not find relator's purported justification to be

credible because she did not offer this excuse until after receiving the unfavorable decision.

Based on our review of the evidence, it is clear that the ULJ's denial of the request for an additional hearing was not in error. Relator has not offered any excuse for her failure to present this evidence at the original hearing, and it is unlikely that the newly offered evidence would change the outcome. In fact, much of the evidence belies her argument that her failure to request additional employment within five days was precipitated by Dolphin's allegedly unaccommodating placement practices. Dolphin employment records reveal that just prior to accepting the Medtronic position, relator requested "short-term [employment] while she looks for [permanent employment] on her own." The documented request for permanent employment relied upon by relator relates to an earlier employment application to Dolphin in 2000. In addition, the employment records offered by relator indicate that she resumed her employment search with Dolphin within weeks after completing the Medtronic assignment, and thereafter she continued to consider other temporary positions through the agency. Therefore, as the ULJ concluded, there is no merit to relator's argument for an additional hearing. But as discussed above, we reverse and remand for further development of the record and formal findings with respect to the suitability of relator's employment with Medtronic.

Affirmed in part, reversed in part, and remanded.