STATE OF MINNESOTA
IN COURT OF APPEALS
A09-536

Barbara Dunn,
Relator,

vs.

UCare Minnesota,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed March 16, 2010
Reversed and remanded
Connolly, Judge

Department of Employment and Economic Development
File No. 21432844-3

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UCare Minnesota, Minneapolis, Minnesota (respondent)

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Considered and decided by Hudson, Presiding Judge; Connolly, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

CONNOLLY, Judge

Relator appeals her determination of ineligibility for unemployment benefits because she quit her employment. Relator argues that (1) the position was unsuitable and she quit within the statutory timeframe, and (2) she had good cause to quit because her employer changed the terms and conditions of her employment. Because the unemployment-law judge applied the wrong standard when determining suitability, we reverse and remand.

FACTS

Relator Barbara Dunn has over ten years of experience as a contract manager through her prior positions with 3M Pharmaceuticals and MGI PHARMA, INC. (MGI), and her responsibilities have included drafting, analyzing, and negotiating contracts. It is undisputed that relator has extensive experience in contract management. Relator was laid off when MGI changed ownership in 2008. When she left MGI, relator's annual salary, bonuses, and stock options amounted to a total compensation package of $134,000. Upon her separation from MGI, relator was determined to be eligible for unemployment benefits, but these were delayed on account of the severance package she had received.

Before relator began to receive benefits, she accepted a paralegal position with respondent UCare Minnesota (UCare). The position had an annual salary of $60,000. The description provided by UCare summarized the position's major responsibilities as: "Provide the General Counsel with legal support, particularly in contract drafting, review

and management. Serve as a key legal resource for the Government Programs Department, providing assistance in regulatory research, review of RFP or application documents, and legal support in conjunction with regulatory audits." Relator remained at UCare for 23 days. She attended some training sessions and meetings, but was given little work to do. Relator requested additional work from her supervisor and was given a couple of projects, including looking in the file cabinets where contracts were kept, but not the type of extensive contract work that she had been accustomed to working on in her previous positions. Relator later asked her supervisor if she could look into getting some contract database-management software for UCare, but "was basically making work for [herself]." Relator was also asked to look up agency addresses for the Government Programs Department.

Relator spoke with a representative of respondent Department of Employment and Economic Development (DEED), explaining that she was contemplating quitting her job with UCare and wanted to know if she would still be eligible for benefits based on her prior separation from MGI. Relator was told that she would still be eligible for unemployment benefits if she quit within 30 days of her hiring date and that "[DEED doesn't] penalize people for finding a job and it doesn't work out." Relator then resigned from her position with UCare on May 14, 2008, telling her supervisor that

> [a]s you may remember, several days after I began my job, I brought it to your attention that I believed the job function was different from how it was described to me in prior discussions with you. And also, I find that the position does not require my extensive experience, expertise, and skill set.

Months later, relator obtained employment with the State of Minnesota doing contract-related work, but subsequently resigned from that position as well. When she reapplied for unemployment benefits, relator's separation from the State of Minnesota triggered an inquiry into her eligibility based on her separation from UCare. DEED determined that the position with UCare was suitable employment for relator and, as a result, relator had been overpaid unemployment benefits in the amount of $9,684. Relator appealed this determination.

A hearing was held before an unemployment-law judge (ULJ). At the hearing, relator stated that she quit her employment with UCare because the job she was promised was different than the one she received. Relator stated that her supervisor told her in the interview that, while her position would involve other duties, the majority of the work would be related to contract review and management. Relator testified that after a couple of days, she went to her supervisor and told him that "I remember[ed] asking him what the percentage of my duties with contract management was going to be during the interview process and he said about 80%." Relator also testified that her supervisor disputed the work allocation, and that her duties were now "rather nebulous" and she thought "it was going to be half working with Government Programs and then half working with him on contracts."

Relator testified about the lack of work and when asked whether she had complained to her supervisor that she did not have enough work to do, relator responded that she went to him looking for projects; she "may have" expressly told him that she did not have enough to do; and she thought it was "inherent" that she was not receiving any

work by asking for projects. Relator did state that she had discussed not receiving enough contract work and that she later got one contract to review. When asked whether she quit her employment with UCare because she had been told she would be eligible for unemployment benefits, relator responded "yes," but then later clarified that she quit because the job was not suitable for her.

Relator's supervisor at UCare also testified at the hearing. Relator's supervisor testified that the paralegal position was a newly created position designed to assist him with contract support, but that "[w]e frankly weren't sure whether there'd be enough contract support to justify a full position." However, the position was developed in conjunction with the Government Programs Department and would include legal research and regulatory support for that department as well. Relator's supervisor said that he did not recall telling relator that she would be spending about 80% of her time on contracts, but acknowledged that he could have, stating "[i]t was a new position and so exactly how the duties would unfold and, and how much work would be required for the legal, more kind of classic legal work as compared to the Government Programs support, you know, was not entirely clear at that time." Relator's supervisor testified that he made it clear that relator would be working for both departments.

Relator's supervisor said that he did not know if relator complained about having enough work to do, but recalled answering relator's questions about the volume of work she could expect to receive. Relator's supervisor testified that "[a]s a relatively small company, we don't have volumes of contracts, you know, that come in every month." Relator's supervisor said that there was some work for relator to do in updating and

reviewing contract templates, but acknowledged that relator did not review "a lot" of contracts and stated that "given she was in the position for two weeks and there's a certain amount of training that, that was involved and also just meeting folks." Relator's supervisor was surprised by relator's resignation, but had sensed "that she wasn't entirely happy in the position just based on her demeanor and, and some of the questions she asked."

The ULJ concluded that relator was ineligible to receive unemployment benefits. The ULJ first determined that relator did not have a good reason to quit caused by her employer because, while relator felt she was being underutilized, "[t]he preponderance of the evidence shows that the employer did not do or fail to do anything that would cause a reasonable, average worker to quit and face the uncertainties of unemployment rather than remaining in the employment." The ULJ then determined that the employment was suitable for relator and *that there was no evidence showing that UCare had breached any promise or made any misrepresentation to relator regarding the paralegal position*. On reconsideration, the ULJ affirmed the previous decision. This certiorari appeal follows.

D E C I S I O N

In a certiorari appeal from the denial of unemployment benefits, we review a ULJ's decision to determine whether the petitioner's substantial rights were prejudiced by findings, inferences, or conclusions that 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) (Supp. 2007). "This court views the ULJ's factual findings in the light most favorable to the decision. . . [and] will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008) (citations omitted), *review denied* (Minn. Oct. 1, 2008).

Generally, an applicant who quits employment is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 1 (Supp. 2007). Exceptions exist, however, when the applicant quit "because of a good reason caused by the employer," and when the applicant quit within 30 calendar days of beginning employment because the employment was unsuitable. *Id.*, subd. 1(1), (3). "Whether a claimant is properly disqualified from the receipt of unemployment benefits is a question of law, which this court reviews de novo." *Hayes v. K-Mart, Corp.*, 665 N.W.2d 550, 552 (Minn. App. 2003), *review denied* (Minn. Sept. 24, 2003). Notably, the unemployment benefit system is remedial in nature and, therefore, "its disqualification provisions are to be narrowly construed." *Hendrickson v. Northfield Cleaners*, 295 N.W.2d 384, 385-86 (Minn. 1980).

Suitability of employment is, in part, a fact question. *See Hogenson v. Brian Knox Builders*, 340 N.W.2d 360, 363 (Minn. App. 1983) (remanding for suitability determination because it involved questions of fact). And although the ULJ has wide discretion in determining whether employment is suitable, the ULJ must follow and apply the relevant statutory criteria. *Mbong v. New Horizons Nursing*, 608 N.W.2d 890, 893 (Minn. App. 2000).

Suitable employment is "employment in the applicant's labor market area that is reasonably related to the applicant's qualifications." Minn. Stat. § 268.035, subd. 23a(a) (Supp. 2007). "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 is considered." *Id.* "[P]rimary consideration is given to the temporary or permanent nature of the applicant's separation from employment and whether the applicant has favorable prospects of finding employment in the applicant's usual or customary occupation at the applicant's past wage level within a reasonable period of time" when determining what is suitable employment. *Id.*, subd. 23a(b). Notably, "[i]f prospects are unfavorable, employment at lower skill or wage levels is suitable if the applicant is reasonably suited for the employment considering the applicant's education, training, work experience, and current physical and mental ability." *Id.*

In addressing suitability, we begin by reviewing relator's challenge to one of the ULJ's findings. The ULJ found that relator "has more than ten years experience as a paralegal and has extensive experience in contract management." While it is undisputed that relator has extensive experience in contract management, there is nothing in the record to support the ULJ's finding that relator has more than ten years of experience as a paralegal. As relator points out, she has over ten years of experience as a contract manager, but has never asserted that she has any experience as a paralegal. We agree that

there is not substantial evidence in the record to support the ULJ's finding that relator had more than ten years of experience as a paralegal.

Next, we review the ULJ's suitability determination. The paralegal position advertised by UCare required a bachelor's degree in paralegal studies or a similar legal-assistant program. UCare also required "[a]t least three years experience as a paralegal or legal assistant, including experience in contract review and drafting as well as legal and regulatory research." The ULJ concluded the paralegal position with UCare was suitable for relator because "[t]here is no evidence in the record showing that the employer breached any promise to [relator] or made any misrepresentation as to the nature and type of work assigned to a paralegal in this organization."

We agree with relator that the ULJ applied the wrong legal standard in determining whether the paralegal position was suitable. As relator points out, suitability "is not a function of whether there was a gap between what was promised and what was given due to misrepresentation by the employer." *See Holbrook v. Minn. Museum of Modern Art*, 405 N.W.2d 537, 540 (Minn. App. 1987) (whether employer's offer was reasonable or fair is not relevant to eligibility determination), *review denied* (Minn. July 15, 1987). Instead, Minnesota law requires consideration of whether the terms and conditions of employment match relator's skills, qualifications, prospects, experience, and wage history. Minn. Stat. § 268.035, subds. 23a(a), (b). Here, the ULJ made only two findings related to suitability, addressing relator's experience; only one of which was supported by the record. *See* Minn. Stat. § 268.105, subd. 7(d) (noting this court may reverse if substantial rights have been prejudiced because the findings and conclusion are

not supported by the record). The ULJ failed to address whether the terms and conditions of employment matched relator's skills, qualifications, prospects, and wage history pursuant to Minn. Stat § 268.035, subds. 23a(a), (b).

DEED contends that relator does not argue "that her work was unsafe, that it was too far from her home, or that it was otherwise intolerable." DEED further contends that "there is no indication that relator earned substantially less than the prevailing wage for similar employment" or that relator "had a prospect of earning a salary close to what she had previously enjoyed." We agree with relator's observation that DEED appears to be filling in the factual gaps for the ULJ to show that the paralegal position was suitable. While relator did not argue that her work was unsafe or too far away and while DEED's assertions concerning relator's future prospects for employment may be true, the ULJ made no factual findings concerning these aspects of suitability. These are factual questions. "It is not within the province of [appellate courts] to determine issues of fact on appeal." *Kucera v. Kucera*, 275 Minn. 252, 254-55, 146 N.W.2d 181, 183 (1966).

Moreover, one of the primary considerations is "whether the applicant has favorable prospects of finding employment in the applicant's usual or customary occupation at the applicant's past wage level within a reasonable period of time." Minn. Stat. § 268.035, subd. 23a(b). Here, it is undisputed that relator was unemployed for approximately two months before she was hired at UCare and that the paralegal position paid significantly less than relator's previous contract-manager positions. While DEED implies that relator's future employment prospects were not good, the ULJ made no findings and there is nothing in the record to support this claim.

"Maximum utilization of a worker's skill and experience is a recognized goal of the unemployment compensation system, and courts, as a general rule, have recognized the claimant's right to reject, without loss of benefits, a job which involves far less skill than he possesses." *Hendrickson*, 295 N.W.2d at 386 (quotation omitted); *see also Marty v. Digital Equip. Corp.*, 345 N.W.2d 773, 775 (Minn. 1984) (concluding applicant had right to reject position which was two grades lower than her prior position, her chances for advancement were limited, and the potential maximum salary was less); *Holbrook*, 405 N.W.2d at 539 (holding applicant was not required to accept positions which "were 'primarily' clerical in nature" when she "had advanced to a position requiring only limited clerical work"). Minnesota law did not require relator to continue working as a paralegal with UCare if the position was not suitable for her.

The evidentiary hearing serves as an evidence-gathering inquiry. Minn. Stat. § 268.105, subd. 1(b) (Supp. 2007). The ULJ has a duty to "ensure that all relevant facts are clearly and fully developed." *Id.* The ULJ also has a duty to assist unrepresented parties in the presentation of evidence. *See* Minn. R. 3310.2921 (2007). Focusing solely on whether the terms and conditions of the paralegal position had breached any promise made to relator or whether a misrepresentation had been made, the ULJ failed to ensure the factual record was sufficiently developed to determine whether the position was suitable for relator.

Because the ULJ did not apply the appropriate test in evaluating suitability and because the record contains insufficient facts to determine suitability as a matter of law, we reverse and remand for further factual findings and a new determination on the issue

of suitability. Further, when considering the aspects of suitability set forth in Minn. Stat. § 268.035, subd. 23a, we direct the ULJ to pay particular attention to relator's "prospects for securing employment in [her] customary occupation," *id.*, subd. 23a(a), and the manner in which these prospects could influence suitability under Minn. Stat. § 268.035, subd. 23a(b), to the extent they are unfavorable to relator's finding employment in her customary occupation at her past wage within a reasonable period of time.

Because we conclude that relator's eligibility for unemployment benefits rests on the unsuitability exception set forth in Minn. Stat. § 268.095, subd. 1(3), we decline to address whether relator had a good reason to quit attributable to her employer under Minn. Stat. § 268.095, subd. 1(1).

Reversed and remanded.