STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1149

Derek Keltgen,
Relator,

vs.

NCS Pearson, Inc.,
Respondent,

Department of Employment and
Economic Development,
Respondent.

Filed March 19, 2012
Affirmed
Cleary, Judge

Department of Employment and
Economic Development
File No. 24649264-6

Derek Keltgen, Roseville, Minnesota (pro se relator)

NCS Pearson, Inc., c/o TALX UCM Services, Inc., St. Louis, Missouri (respondent employer)

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

Considered and decided by Stoneburner, Presiding Judge; Klaphake, Judge; and Cleary, Judge.

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

CLEARY, Judge

On this second certiorari appeal from unemployment-law judge (ULJ) decisions determining that he was ineligible to receive unemployment benefits after quitting employment with respondent NCS Pearson, Inc. (NCS Pearson), relator Derek Keltgen argues that the employment was temporary and part-time and that he was eligible to receive benefits despite quitting under the exception in Minn. Stat. § 268.095, subd. 1(5) (2008). Because we hold that the employment was full-time, we affirm.

FACTS

Relator previously worked for Wackenhut Corporation (Wackenhut), and was laid off in February 2009. Upon becoming unemployed, relator applied for and began receiving unemployment benefits.

NCS Pearson scores standardized tests for school districts and hires people to work as scorers on the tests. To be a scorer for a particular project, a person must first qualify to score and then maintain an acceptable accuracy rate. A scorer may lose his or her position if the scorer's accuracy rate falls below the acceptable standard. Scorers generally work from 8:00 a.m. to 4:30 p.m. on weekdays when they are working on a project.

On April 27, 2009, relator began working for NCS Pearson as a scorer. Relator worked on three different projects for NCS Pearson. The first project began on April 27 and concluded on May 8. The second project began on May 13 and concluded on May 29. The third project began on June 10 and was scheduled to conclude on June 19.

However, relator quit the job on June 16 because it interfered with evening classes he had begun taking through a community college.

Relator received unemployment benefits for several months after quitting his employment with NCS Pearson. However, the Minnesota Department of Employment and Economic Development (DEED) eventually determined that relator was ineligible to receive benefits as of June 14, 2009, and sent a determination of ineligibility notice to relator on March 8, 2010. The notice claimed that relator owed $12,436 for overpaid benefits.

Relator appealed DEED's determination, and a telephone evidentiary hearing was held by the ULJ on April 20, 2010. On April 22, 2010, the ULJ issued a decision finding that relator had quit employment with NCS Pearson to focus on his schooling and was ineligible to receive unemployment benefits. The ULJ held that relator had not quit for a good reason caused by the employer, because the employment was unsuitable, to enter reemployment assistance training, or due to receiving notification that he was going to be laid off. Relator requested reconsideration, and on June 3, 2010, the ULJ affirmed on reconsideration.

Relator filed a petition for writ of certiorari with this court, requesting that the ULJ's June 3 order on reconsideration be reviewed. On March 2, 2011, this court issued an order opinion affirming the ULJ's finding that relator quit employment with NCS Pearson because it interfered with his studies, not because the employment was unsuitable, to enter reemployment assistance training, or due to receiving notification that he was going to be laid off. *Keltgen v. NCS Pearson, Inc.*, No. A10-1097 (Minn. App.

Mar. 2, 2011) (order op.). However, this court reversed the decision that relator was ineligible to receive unemployment benefits and remanded "solely for a determination as to whether Keltgen has successfully rebutted the presumption that his employment at NCS Pearson was full time and therefore meets the statutory exception of Minn. Stat. § 268.095, subd. 1(5)." *Id.* This court stated, "Because it is undisputed that Keltgen worked more than 32 hours per week for NCS Pearson, his employment is presumptively full time, despite its temporary nature." *Id.*

On March 15, 2011, the ULJ issued a decision holding that relator's employment with NCS Pearson was "intermittent full-time employment; not part-time employment," and that he was ineligible to receive unemployment benefits. The ULJ noted that relator worked full days while at NCS Pearson and that the days of work "were not spread out over time, they were worked consecutively, apparently with some time off over weekends." Relator requested reconsideration, and on May 25, 2011, the ULJ affirmed on reconsideration. Relator filed a petition for writ of certiorari with this court, requesting that the ULJ's May 25 order on reconsideration be reviewed.

D E C I S I O N

When reviewing a decision of a ULJ, this court must view the factual findings in the light most favorable to the decision, giving deference to the credibility determinations made by the ULJ and not disturbing the findings when the evidence substantially sustains them. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). However, "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).

> An applicant who quit employment is ineligible for all unemployment benefits according to subdivision 10 except when:
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> . . . .
>
> (5) the employment was part time and the applicant also had full-time employment in the base period, from which full-time employment the applicant separated because of reasons for which the applicant was held not to be ineligible, and the wage credits from the full-time employment are sufficient to meet the minimum requirements to establish a benefit account under section 268.07 . . . .

Minn. Stat. § 268.095, subd. 1 (2008). The parties do not dispute that relator quit employment with NCS Pearson on June 16, 2009, or that being laid off from employment with Wackenhut otherwise made relator eligible to receive unemployment benefits. The only issue on this appeal is whether relator's employment with NCS Pearson was part-time, which would make him eligible to receive benefits under the aforementioned exception.

This court has stated that, "For the limited purpose of applying the statutory exception of section 268.095, subdivision 1(5), we hold that an employee who performs 32 or more hours of service a week is presumptively employed full time." *Lamah v. Doherty Emp't Grp., Inc.*, 737 N.W.2d 595, 600 (Minn. App. 2007). This presumption is based on the fact that, by definition, an applicant for unemployment benefits is considered unemployed, in part, if the applicant performs less than 32 hours of service in employment in a week. *Id.* at 599–600 (quoting Minn. Stat. § 268.035, subd. 26 (Supp.

2005)). In the order opinion issued on March 2, 2011, this court determined that it was undisputed that Keltgen worked more than 32 hours per week for NCS Pearson, that the presumption that relator was employed full-time by NCS Pearson applies, and that it is relator's burden to rebut this presumption.

Because "different occupations may require significantly different benchmarks to determine what is full time," the presumption may be rebutted by looking at the particular position in question. *Lamah*, 737 N.W.2d at 601.

> [U]nique employment arrangements, such as those that arise from terms in employment contracts, an unusual number of hours for the work day or work week, or sporadic or intermittent work hours, may create circumstances that are more significant than a baseline number of hours to distinguish full-time from part-time employment.

Id. The common definition of the word sporadic is "[o]ccurring at irregular intervals; having no pattern or order in time." *The American Heritage Dictionary of the English Language* 1742 (3d ed. 1992). The word intermittent means "[s]topping and starting at intervals." *Id*. at 942.

For the entire time period relator worked at NCS Pearson (April 27 through June 16, 2009), there were several business days before new projects started that relator did not work. Relator did not work on May 11 and 12 before his second project began on May 13. Relator also did not work June 1–5 and June 8 and 9 before his third project began on June 10. DEED admits that relator was unemployed on these days. *See also Mbong v. New Horizons Nursing*, 608 N.W.2d 890, 895 (Minn. App. 2000) ("With temporary agencies, an employment relationship arises only when each temporary

assignment is offered and accepted. Once each assignment is completed, the employment relationship ends because there is neither a guarantee of future assignments nor any employer obligation to provide them.").

However, while each project was ongoing, relator worked consecutive business days and standard hours that are generally considered full work days (8:00 a.m. to 4:30 p.m.). Relator's work hours during each project were not unusual, sporadic, or intermittent, and relator's employment with NCS Pearson was full-time according to the principles articulated in *Lamah*.

Relator maintains that a scorer's job at NCS Pearson could never be considered full-time because the projects are independent from one another, are for short durations, and are subject to NCS Pearson obtaining contracts to score particular tests. Additionally, he claims that employment with NCS Pearson cannot be guaranteed because a worker must qualify for a project to even be able to score and can be discharged from a project if his or her scoring falls below a certain accuracy rate. Relator states that he meant for his employment at NCS Pearson to be temporary while he went to school and searched for a different job, and never meant for it to be a permanent position.

However, relator is mistaken in assuming that "temporary" is synonymous with "part-time" and that "permanent" is synonymous with "full-time." This is not the case, as a person can certainly be permanently employed in a part-time position or temporarily employed in a full-time position. Minn. Stat. § 268.095, subd. 1, does not make a distinction between permanent and temporary employment for purposes of applying the clause 5 exception, only between full-time and part-time employment. *See also* Minn.

Stat. § 268.095, subd. 11(a) (2008) (stating that this section applies to all covered employment "temporary or of limited duration, permanent or of indefinite duration.").

Relator has not rebutted the presumption that his employment at NCS Pearson was full-time. Because the position was full-time, the Minn. Stat. § 268.095, subd. 1(5), exception does not apply, and the ULJ correctly determined that relator was ineligible to receive unemployment benefits following quitting employment with NCS Pearson.

Affirmed.