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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1473**

Stacey Sedio,
Relator,

vs.

PetSmart, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed June 20, 2011
Reversed and remanded
Ross, Judge**

Department of Employment and Economic Development
File No. 25230492-4

Stacey Sedio, Bloomington, Minnesota (pro se relator)

PetSmart, Inc., Columbus, Ohio (respondent employer)

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

Considered and decided by Ross, Presiding Judge; Stauber, Judge; and Muehlberg,
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UNPUBLISHED OPINION

ROSS, Judge

Stacey Sedio challenges an unemployment law judge's (ULJ's) decision dismissing her unemployment-benefits appeal for failure to participate in an evidentiary hearing. The ULJ dialed Sedio's cellular telephone number twice at the time scheduled for her hearing but Sedio never received a call. The ULJ dismissed the appeal and affirmed on reconsideration, concluding that Sedio presented no good cause for her failure to participate in the appeal hearing. Because Sedio did have good cause, we reverse and remand for a hearing.

FACTS

Stacey Sedio ended her full-time overnight employment at PetSmart, Inc. in April 2010. She applied for unemployment benefits but Department of Employment and Economic Development (DEED) found her ineligible.

Sedio requested an administrative appeal and the ULJ scheduled a telephonic evidentiary hearing for June 14, 2010, at 1:00 p.m. Sedio provided her cellular telephone number. The hearing notice stated, "The [ULJ] will call you to participate in this hearing." According to Sedio, on the day and time of the hearing she had her fully charged and in-service telephone beside her for 90 minutes. She claims that she never received a call. The ULJ called twice and both times the call went to Sedio's voicemail. The ULJ did not leave a message.

One week later the ULJ dismissed her appeal because she did not participate in the hearing. Sedio requested reconsideration. The ULJ affirmed her decision, concluding that

Sedio “offered no explanation for her failure to timely contact the Department shortly after 1:00 p.m. to convey that she had not received a call.” Sedio appeals by certiorari.

D E C I S I O N

Sedio challenges the ULJ’s decision dismissing her appeal on grounds of her nonparticipation. When reviewing an unemployment-benefits decision, this court may remand, reverse, or modify a ULJ’s decision if the relator’s substantial rights were prejudiced because the findings, conclusion, or decision are affected by an error of law, unsupported by substantial evidence, or are arbitrary and capricious. Minn. Stat. § 268.105, subd. 7(d) (4)–(6) (2008).

A ULJ has discretion to dismiss an unemployment appeal “if the appealing party fails to participate in the evidentiary hearing.” Minn. Stat. § 208.105, subd. 1(d) (Supp. 2009). This is because “[b]y failing to participate, the appealing party is considered to have failed to exhaust available administrative remedies.” *Id.* But if the appealing party shows that she had good cause for failing to participate in the hearing, the ULJ must issue “an order setting aside the decision and directing that an additional evidentiary hearing be conducted.” *Id.*, subd. 2(d) (Supp. 2009). “Good cause” is a “reason that would have prevented a reasonable person acting with due diligence from participating in the evidentiary hearing.” *Id.* We review a ULJ’s decision not to schedule a new evidentiary hearing for an abuse of discretion. *Skarhus v. Davanni’s*, 721 N.W.2d 340, 345 (Minn. App. 2006).

The ULJ abused her discretion by not granting Sedio a new hearing after Sedio explained why she failed to participate. Sedio asserted that she never received the ULJ’s

scheduled call for the telephonic hearing. The ULJ made no finding rejecting as untrue Sedio's assertion and reasoned only, "If Sedio did not receive the calls, as she alleged, she offered no explanation for her failure to timely contact the Department shortly after 1:00 p.m. to convey that she had not received a call." With no other analysis, the ULJ then summarily concluded, "This matter will, therefore, not be remanded."

The ULJ's reasoning assumes a fact that is only implied in her pithy analysis but that is expressly asserted by DEED in this appeal, which is that Sedio had, and should have been aware of, a duty to contact DEED at the time of the scheduled hearing or soon thereafter if the ULJ failed to reach Sedio by telephone. DEED represents on appeal that it gave "detailed instructions" explaining to Sedio that she "must contact [DEED] . . . if [she has] not received a call within ten minutes of the hearing's scheduled start time." But this crucial representation includes no citation to the record and, after carefully reviewing the record, we see no basis for it. *See* Minn. R. Civ. App. P. 128.02, subds. 1(c), 2 (requiring that each statement of material fact in a brief be accompanied by cite to the record and that "[t]he facts must be stated fairly, with complete candor"). On this record, we reject as unsupported DEED's representation that it informed Sedio of any duty to call DEED if the ULJ failed to contact Sedio by telephone.

DEED rests entirely on its unsupported assertion that it expressly informed Sedio of this duty to telephone DEED, making no claim that Sedio had an implied duty to telephone DEED. Even if we infer such an argument from DEED's contentions, the argument cannot save the ULJ's decision. The actual written information that DEED gave Sedio instructed her of specific hearing-related instances in which she should call

DEED, but none of those instances included the ULJ's failing to successfully initiate the telephonic hearing. The ULJ's decision to leave no message on Sedio's voicemail system informing her of the failed effort to reach her defeats the notion that a reasonable person exercising due diligence would have called DEED.

All that remains in support of DEED's position on appeal is its argument to us questioning the veracity of Sedio's representation that her telephone was on and operating when the ULJ called. DEED asserts that Sedio's representation is "dubious" because, according to DEED, whenever a call to a cellular telephone goes immediately into voicemail without any ringing registered on the caller's end, this "indicat[es] that the cell phone was not turned on." DEED makes this absolute technological declaration without any citation or additional explanation. We reject the declaration for three reasons. First, it clearly asks us to accept a fact that was never argued to or found by the ULJ. We do not find facts on appeal. *Rainforest Cafe, Inc. v. State of Wis. Inv. Bd.*, 677 N.W.2d 443, 452 (Minn. App. 2004). Second, it is unsupported by any citation to technical evidence about the operation of Sedio's telephone, so even if we were able to find facts, DEED gives us no evidentiary basis to do so. And third, relying on what we suppose to be common experience, or at least not an uncommon experience, we assume that various technical reasons other than a telephone being off might (and does) sometimes cause calls to be directed immediately into the recipient's voicemail system.

We hold that Sedio had good cause for not participating in the hearing. She followed the distinctly passive role that the department assigned to her regarding the hearing's commencement. She waited for the ULJ's call that was to commence the

hearing, as instructed, and she then reached the logical conclusion that the ULJ never made the call. The department never expressly nor implicitly placed on Sedio the duty to take any immediate action if the call did not occur. Sedio is entitled to a remand for a hearing.

Sedio also argues the merits of her case, contending among other things that she had good reason to quit caused by her employer. Her arguments are not properly before this court and may be made during her evidentiary hearing.

Reversed and remanded.