

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0017**

Jon T. Behrens,
Relator,

vs.

Building Restoration Corp.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed February 26, 2008
Affirmed
Johnson, Judge**

Department of Employment and Economic Development
File No. 13254 06

Jon T. Behrens, 501 Dogwood Street Southwest, Isanti, MN 55040-4446 (pro se relator)

Building Restoration Corp., 1920 Oakcrest Avenue, Suite 1, Roseville, MN 55113-2620
(respondent)

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

Considered and decided by Lansing, Presiding Judge; Ross, Judge; and Johnson,
Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

Jon T. Behrens sought unemployment benefits while he was on a five-week leave of absence from his job because of a broken bone in his heel. The unemployment law judge (ULJ) determined that he was ineligible for benefits because, during the period of time for which he sought benefits, he was not actively attempting to obtain employment that would have accommodated his work restrictions. We affirm.

FACTS

Behrens has worked as a truck driver for Building Restoration Corp. since 2002. On August 5, 2006, he broke his left heel bone while off duty. His orthopedic surgeon released him to work with certain restrictions, including the restrictions that he perform duties only while sitting and that he not drive his manual-transmission truck because it requires him to use his left foot to operate the clutch.

Behrens asked his employer for work that would comply with his restrictions, but there was no such work available, so he was placed on a medical leave of absence. While on leave, Behrens did not seek or apply for any other employment that would accommodate his work restrictions because he expected to return to work for his employer soon thereafter. He did return to work on September 11, 2006, performing light-duty work repairing tools while sitting. His restrictions were lifted effective October 3, 2006.

While on leave, Behrens established an unemployment-benefit account with the Department of Employment and Economic Development. The Department made an

initial determination that he was ineligible to receive benefits because he was on a voluntary leave of absence from work. Behrens appealed that determination. After a telephone hearing, the ULJ upheld the denial of benefits but on different grounds. The ULJ determined that Behrens was on an involuntary medical leave of absence but that he could not receive benefits because he was not actively seeking suitable employment. Behrens filed a request for reconsideration, and the ULJ affirmed his decision.

D E C I S I O N

This court reviews a ULJ's decision to determine whether the substantial rights of a 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) (2006). Findings of fact are viewed in the light most favorable to the ULJ's decision, and we will reverse the ULJ only if his or her findings are "unsupported by substantial evidence in view of the entire record as submitted." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). The ultimate determination whether an employee is disqualified from receipt of unemployment benefits is a question of law, which this court reviews de novo. *Ress v. Abbot Nw. Hosp., Inc.*, 448 N.W.2d 519, 523 (Minn. 1989).

Unemployment benefits may be paid to an applicant if "the applicant has met all of the ongoing eligibility requirements under sections 268.085 and 268.086." Minn. Stat. § 268.069, subd. 1(3) (2006). An applicant who is on a *voluntary* leave of absence is

ineligible for unemployment benefits, while an applicant who is on an *involuntary* leave of absence is not ineligible for unemployment benefits. Minn. Stat. § 268.085, subd. 13a(a) (2006). “A medical leave of absence shall not be presumed to be voluntary.” *Id.* Thus, Behrens’ medical leave of absence is deemed to have been involuntary, which means he may receive benefits if he has satisfied all other applicable criteria.

An applicant, however, also must be (1) able to work, (2) available for suitable employment, and (3) actively seeking suitable employment. *Id.*, subd. 1(4) (2006). The ULJ found that Behrens satisfied the first and second of these requirements but did not satisfy the third. The statute defines “actively seeking suitable employment” to mean that the applicant is making “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.” *Id.*, subd. 16(a) (2006). “Limiting the search to positions that are not available” does not constitute “actively seeking suitable employment.” *Id.*

During the telephone hearing before the ULJ, Behrens admitted that he had not conducted a job search or submitted applications for employment because he was “waiting to be off restrictions” and “still had [his] regular job.” While on leave, Behrens made only one inquiry, and that was the inquiry with his employer as to whether any light-duty work was available. Behrens admitted that, while he was under work restrictions, he was capable of working as a welder or doing light body work on vehicles for other employers because he could complete those tasks while seated. Based on this evidence, the ULJ did not err in determining that Behrens did not satisfy the “actively

seeking suitable employment” requirement of Minn. Stat. § 268.085, subd. 1(4). *See Pyeatt v. Department of Employment Servs.*, 263 N.W.2d 394, 395 (Minn. 1978) (holding that applying for six or seven positions in eight months constituted inadequate job search); *Monson v. Minnesota Dep’t of Employment Servs.*, 262 N.W.2d 171, 172 (Minn. 1978) (holding that applying for only two or three positions in three months constituted inadequate job search); *James v. Commissioner of Econ. Sec.*, 354 N.W.2d 840, 844 (Minn. App. 1984) (holding that four telephone contacts in three weeks constituted inadequate job search), *review denied* (Minn. Dec. 20, 1984).

Behrens argues that his leave of absence should be deemed a “temporary lay-off due to work restrictions” with a confirmed return-to-work date within 30 days, which he contends would excuse him from the requirement that he actively seek suitable employment. Behrens does not cite any legal authority for this assertion, and we are unable to find any. The statutory provision that most resembles Behrens’ argument is Minn. Stat. § 268.095, subd. 1(6) (2006), which states that if an employee quits because the employer notified him or her of a lay-off occurring within 30 days due to lack of work, the employee is not disqualified from receiving unemployment benefits. But this section is inapplicable. The record supports the ULJ’s determination that Behrens was on a medical leave of absence but was not laid off.

Furthermore, Behrens’ argument has been waived because it is based on his assertion that his supervisor told him that there would be light-duty work available for him by September 1, 2006, which would be within 30 days of his application for benefits. But Behrens did not offer any such evidence to the ULJ, which precludes him from

relying on it on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1998) (limiting appellate review to issues that were presented and considered below).

In sum, substantial evidence supports the ULJ's determination that Behrens was ineligible for unemployment benefits under Minn. Stat. § 268.085, subd. 1(4), for failure to conduct an active search for suitable employment.

Affirmed.