

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1400**

Shari Flanagan,
Relator,

vs.

Department of Employment and Economic Development,
Respondent.

**Filed March 6, 2017
Affirmed
Cleary, Chief Judge**

Department of Employment and Economic Development
File No. 34694899-3

Shari Flanagan, Lino Lakes, Minnesota (pro se relator)

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

Considered and decided by Halbrooks, Presiding Judge; Cleary, Chief Judge; and
Jesson, Judge.

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

CLEARY, Chief Judge

In this certiorari appeal, relator Shari Flanagan challenges the decision of an unemployment-law judge (ULJ) affirming his earlier determination that Flanagan was ineligible for unemployment benefits. Because the ULJ's determination that Flanagan was

not available for, or actively seeking, suitable employment is supported by substantial evidence in the record, and because Flanagan received proper notice of the subject matter of the hearing, we affirm.

FACTS

Flanagan worked full time at Buys Chiropractic for about 14 years. On May 2, 2016, her employment temporarily ceased because her employer, a chiropractor, was injured and unable to work. Flanagan expected to return to work at Buys Chiropractic when her employer was able to return to work.

Flanagan established an unemployment-benefits account with the Minnesota Department of Employment and Economic Development (DEED) effective April 24, 2016. DEED scheduled a reemployment-assistance session for Flanagan in May, 2016, at its workforce center, but she missed the appointment. In a phone conversation on May 23, 2016, Flanagan told a DEED employee that she missed the reemployment-assistance session because she was at a hospital. Flanagan was not at a hospital on the date of her session, but she visited a hospital emergency room on May 22 after having back spasms. Flanagan later explained at a hearing before a ULJ that she missed the reemployment-assistance session because she forgot about the appointment.

Flanagan released her medical records to DEED regarding her May 22 emergency-room visit. On June 1, 2016, Flanagan attended her reemployment-assistance session at DEED's workforce center. Flanagan's healthcare provider stated that Flanagan had a lumbar strain and that her "ability to return to work duties are best evaluated after rest . . . typically in 7-10 days after ED visit." In response, on June 13, 2016, DEED sent

Flanagan a determination-of-ineligibility letter stating that, because her ability to work was in question, she was not eligible for unemployment benefits beginning May 15 until she was able to work “and is ready and willing to seek and accept a job.” DEED determined that it overpaid Flanagan \$1,074 in unemployment benefits.

Flanagan appealed the determination of ineligibility, stating in her reason for appeal that she was able to work. A second medical provider stated that Flanagan had been able to work without restrictions since May 15. DEED sent Flanagan notice of a hearing before a ULJ to determine whether Flanagan had been available to accept suitable employment and whether she was actively seeking suitable employment.

At the June 28, 2016 hearing, Flanagan acknowledged that she made a false statement to DEED when she stated she missed her May reemployment-assistance session for a medical reason. Flanagan stated that she was not looking for work during the work weeks beginning April 24 and May 1. Flanagan testified that, during the week of May 8, she searched for work for about two hours in a newspaper and online. From May 15 until the June 28 hearing, Flanagan spent about two hours and fifteen minutes per week looking for work online and in newspapers. Flanagan testified that she spent the weekends up at her cabin, which is located an hour and ten minutes from her home, and that she was at her cabin from May 19 until May 22. Flanagan did not create a resume until on or shortly before May 30. At the time of the hearing, other than asking the clinic that took her employer’s patients if they needed help, she had not yet applied for a single job. She testified that, had she permanently lost her employment at the chiropractic center, she

would have been more willing to take a position at lower pay and outside a five- to ten-minute commute time.

On June 29, 2016, the ULJ ruled that Flanagan was not eligible for unemployment benefits between April 24 and June 28, 2016, because she was not “available for suitable employment or actively seeking suitable employment.” The ULJ determined that Flanagan was overpaid \$1,790 in benefits. That day, Flanagan filed a request for reconsideration arguing that she did what a DEED employee told her to do: put her resume on DEED’s workforce website by June 20 and “say I just got a job if called and to check the [DEED’s] web site [sic] to look for jobs and to call my boss everyday which is actively seeking employment every day.” After considering the request, the ULJ affirmed his June 29 decision.

Flanagan now appeals.

D E C I S I O N

This court may reverse or modify a ULJ’s decision if the substantial rights of the petitioner may have been prejudiced because the ULJ’s findings, inferences, conclusion, or decision are, among other things, “in violation of constitutional provisions,” “made upon unlawful procedure,” or “unsupported by substantial evidence in view of the entire record as submitted.” Minn. Stat. § 268.105, subd. 7(d) (2016). “Substantial evidence is (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety.” *Dourney v. CMAK Corp.*, 796 N.W.2d 537, 539 (Minn. App. 2011) (quotation omitted). This court reviews de novo a

ULJ's legal determination that an applicant is ineligible for unemployment benefits. *Fay v. Dep't of Emp't & Econ. Dev.*, 860 N.W.2d 385, 387 (Minn. App. 2015). We review a ULJ's factual findings "in the light most favorable to the decision" and will not disturb findings that are substantially supported by the record. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

I. Available for and Actively Seeking Suitable Employment

Flanagan first claims that the ULJ's decision that she was not available for and not actively seeking suitable employment to be eligible for unemployment benefits was unsupported by the substantial evidence because she (1) had a doctor's note saying she was able to work and (2) relied on inaccurate advice from a DEED employee.

Flanagan may be eligible for unemployment benefits for any week where she was (1) "available for suitable employment" and (2) "actively seeking suitable employment." Minn. Stat. § 268.085, subd. 1(4)-(5) (2016). "'Available for suitable employment' means an applicant is ready, willing, and able to accept suitable employment," and "[t]he attachment to the work force must be genuine." *Id.* at subd. 15(a) (2016). "An applicant may restrict availability to suitable employment, but there must be no other restrictions, either self-imposed or created by circumstances, temporary or permanent, that prevent accepting suitable employment." *Id.*

'Actively seeking suitable employment' means 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. Limiting the search to positions that are not available or are above the applicant's training, experience, and qualifications is not 'actively seeking suitable employment.'

Id. at subd. 16(a) (2016). Whether an applicant is available for and actively seeking suitable employment, and whether the applicant's attachment to the workforce is genuine, are factual determinations. *Goodman v. Minnesota Dep't of Emp't Servs.*, 312 Minn. 551, 553, 255 N.W.2d 222, 223 (1977).

The ULJ determined that Flanagan was not available for suitable employment throughout the period that she was paid unemployment benefits because she was not willing to work at a job other than at Buys Chiropractic, and was "only willing to work at jobs within a ten mile radius of her home in Lino Lakes." Flanagan asserts that she was available for suitable employment because she had a doctor's note stating she was able to work effective May 15. Because the ULJ never determined Flanagan was unavailable for suitable employment because of a medical condition, Flanagan's medical note stating she was able to work is not material.

The ULJ also determined that Flanagan was out of her labor market when she was at her cabin. Flanagan argues that the ULJ unfairly used the fact that she visited her cabin on the weekends against her because (1) her cabin is only one hour and ten minutes from her home, (2) she only goes up to her cabin on the weekends, and (3) other people commute much longer than one hour and ten minutes to work.

The ULJ's finding that Flanagan was not available for suitable employment was supported by substantial evidence. Regarding her weekend cabin trips, Flanagan testified that she would accept employment only five to ten miles from her home in Lino Lakes, but Flanagan was willing to drive to her cabin one hour and ten minutes from her home every

weekend. Substantial evidence also supports the ULJ's finding that Flanagan was waiting for her job at Buys Chiropractic to restart and was not interested in finding other suitable employment. In the context of explaining her frustrations about the requirements to receive unemployment benefits, Flanagan testified "but I have a job," and she stated that she expected to return to her job when her employer became well. Flanagan testified that she would take a position that was higher paying. But the ULJ determined that this statement was not credible because the record as a whole showed "Flanagan is clearly waiting to return to Buys Chiropractic and is not willing to work at another job." This court gives deference to the credibility determinations made by a ULJ. *Skarhus*, 721 N.W.2d at 344. Further, Flanagan admitted that, if she did not have a job to return to, she would have been more willing to accept a job under her pay scale or ability. This shows Flanagan placed self-imposed restrictions on her job search that prevented her from accepting suitable employment, and as a result, under Minn. Stat. § 268.085, subd. 15(a), Flanagan cannot be deemed "available for suitable employment."

Substantial evidence also supports the ULJ's determination that Flanagan was not actively seeking suitable employment. The ULJ determined that had Flanagan been interested in new employment, she would have been spending substantially more time searching for work, and she would have expanded her job search. The record supports this finding: Flanagan only spent about two hours and fifteen minutes per week looking for work online and in newspapers.

Flanagan also argues that she is being punished for relying on inaccurate advice from a DEED employee. Flanagan asserts that the DEED employee told her that she "did

not have to look for jobs.” Flanagan also claims that the DEED employee told her that she only needed to post a resume on DEED’s workforce-center website by late June 2016, attend a reemployment-assistance session, log on to the workforce-center website, and call her employer daily, and then she could check the box that states she is seeking employment. Flanagan claims that the DEED employee told her at a meeting that if she got a call for a job, “just say I got a job.”

While Flanagan first raised this argument after her hearing in her request to reconsider and in a communication to the ULJ, this court may consider an issue that was only first considered by the ULJ after a request for reconsideration. *Work Connection, Inc. v. Bui*, 749 N.W.2d 63, 66 (Minn. App. 2008), *review granted* (June 18, 2008) and *order granting review vacated* (Minn. July 6, 2009).

The ULJ found in an order affirming his decision that Flanagan did not “show that the evidence submitted at the hearing was likely false” and that the likely false evidence would affect the outcome of the decision. The ULJ did not err because even if Flanagan’s assertions regarding the inaccurate advice are true, they would not make the evidence submitted at the hearing showing Flanagan was not available for or actively seeking suitable employment “likely false,” as required by Minn. Stat. 268.105, subd. 2(c)(2) (2016). The ULJ also found that Flanagan did not have good cause for failing to provide the information during the hearing. The ULJ did not err because, again, even if Flanagan’s assertions regarding the inaccurate advice are true, the law requires in a request for reconsideration that “there was good cause for not having previously submitted that evidence.” *Id.*, subd. 2(c)(1) (2016). Flanagan cannot show good cause for failing to

present this evidence at her hearing because the ULJ explained to Flanagan at that hearing that she could have rescheduled the hearing to subpoena witnesses, such as the DEED employee. See Minn. R. 3310.2914 (2015) (allowing for the request of a subpoena to compel attendance of witnesses at an administrative hearing). Flanagan did not explain in her request for reconsideration why she did not ask the ULJ to subpoena the DEED employee who allegedly gave her erroneous advice.

Flanagan also argues that, because she was eventually told by DEED that she was required to actually seek out work, she should not have to pay back the benefits she received while following DEED's alleged inaccurate advice. However, Flanagan missed her initial reemployment-assistance session where she could have clarified what was required to obtain unemployment benefits. Further, assuming that Flanagan did receive inaccurate advice, Flanagan's argument is essentially an argument of equitable estoppel—"[a] defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way." *Black's Law Dictionary* 630 (9th ed. 2009). Equitable estoppel is an equitable doctrine, *Olson v. Synergistic Techs. Bus. Sys., Inc.*, 628 N.W.2d 142, 155 (Minn. 2001), and a person is not entitled to unemployment benefits on an equitable or common law basis. Minn. Stat. § 268.069, subd. 3 (2016). Finally, in her unemployment-application materials, Flanagan answered "Yes" to the question "Did you look for work?" during the work weeks beginning on May 15, May 22, and May 29. This gave Flanagan notice that she was required to actively look for work.

Because substantial evidence supports the ULJ's finding that Flanagan was not available for and not actively seeking suitable employment, the ULJ did not err in concluding that Flanagan was ineligible for unemployment benefits.

II. Proper Notice of Issues at Hearing

Flanagan next claims that she did not have proper notice of the issues to be addressed at her unemployment-benefits hearing, and that as a result she did not have a fair opportunity to be prepared and heard. In effect, Flanagan is claiming the ULJ's decision was made in violation of constitutional due-process provisions and made upon unlawful procedure requiring reversal under Minn. Stat. § 268.105, subd. 7(d).

The Minnesota Rules “establish procedures for hearings conducted by unemployment law judges.” Minn. R. 3310.2901 (2015). The rules provide that a ULJ must send notice of a hearing to each party at least ten calendar days before the hearing date, and the notice must state the issues to be considered at the hearing. Minn. R. 3310.2905, subp. 2 (2015). The ULJ followed this notice requirement. A notice dated June 14, 2016, was sent to Flanagan by mail, more than ten days before the June 28 hearing. Further, in bold lettering the notice stated that the issues to be considered at the hearing were: “Whether . . . Flanagan has been available to accept suitable employment and actively seeking suitable employment.” The ULJ's decision was not made upon unlawful procedure for failing to grant notice.

The ULJ's decision also comports with constitutional due-process requirements of proper notice. The United States and Minnesota Constitutions provide that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amends.

V, XIV; Minn. Const. art. I, § 7. “Unemployment benefits are an entitlement protected by the constitutional right to procedural due process.” *Godbout v. Dep’t of Emp & Econ. Dev.*, 827 N.W.2d 799, 802 (Minn. App. 2013). When a due-process challenge revolves around the adequacy of notice, this court determines whether the notice was “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* (quotation omitted). Here, the notice comported with constitutional due-process requirements because it informed Flanagan in writing more than ten days before the hearing of the issues that Flanagan would be expected to address.

The ULJ’s decision was not made in violation of constitutional provisions or upon unlawful procedure.

Affirmed.