

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	1
I. RESPONDENT MISSTATES THE FACTUAL RECORD IN ASSESSING MS. OBLE’S ENGLISH COMPREHENSION AND IN STATING THAT SHE DID NOT REQUEST LANGUAGE ASSISTANCE.....	1
II. RESPONDENT’S ENGLISH-ONLY NOTICE FAILED TO ENSURE MEANINGFUL LANGUAGE ACCESS AS MANDATED BY FEDERAL AND STATE LAWS	5
III. THE MINNESOTA AND U.S. CONSTITUTIONS REQUIRE THIS COURT TO BALANCE COMPETING AND DYNAMIC INTERESTS BASED ON ALL THE CIRCUMSTANCES.....	10
IV. THIS COURT SHOULD REVERSE THE COMMISSIONER’S FINDING OF FACT THAT A DETERMINATION WAS ISSUED AND REMAND FOR A HEARING ON THE MERITS OF MS. OBLE’S CLAIM	12
CONCLUSION.....	13
EXHIBIT A	15

TABLE OF AUTHORITIES

	Page
Federal Cases	
<i>Drake v. Honeywell, Inc.</i> , 797 F.2d 603 (8th Cir. 1986)	7
<i>Mullane v. Cent. Hanover Bank & Trust Co.</i> , 339 U.S. 306 (1950)	10, 11
<i>Sandoval v. Hagan</i> , 197 F.3d 484 (11th Cir. 1999).....	8
State Cases	
<i>Schulte v. Transp. Unlimited, Inc.</i> , 354 N.W.2d 830 (Minn. 1984)	10
<i>Schwartz v. First Trust Co. of St. Paul</i> , 52 N.W.2d 290 (Minn. 1952)	10
State Statutes	
Minn. Stat. § 268.101, subd. 2(e)	12, 14
Minn. Stat. § 268.101, subs. 2, 3	13
Federal Regulations	
20 C.F.R. § 614.....	13
29 C.F.R. § 31.3(b)(2)	6

29 C.F.R. § 37.2(a)(1).....	8
29 C.F.R. § 37.35.....	5
29 C.F.R. § 37.4.....	8
29 C.F.R. § 37.6(d).....	6
65 Fed. Reg. 50121.....	8
66 Fed. Reg. 4596.....	7, 8
68 Fed. Reg. 32291.....	5
68 Fed. Reg. 32300.....	9

Miscellaneous

Minnesota Department of Human Services website, “Limited English Proficiency Plan” TUhttp://edocs.dhs.state.mn.us/lfserver/Legacy/ MS-2254-ENG UT.....	9, 10
Minnesota Department of Human Services website, Notices and other LEP materials TUhttp://www.dhs.state.mn.us/Language/default.htm U.....	10T

INTRODUCTION

Respondent has failed to provide any convincing argument that its English-only notice meets the statutory, regulatory or constitutional requirements at issue in this case. Federal and state law require that respondent take reasonable steps to ensure meaningful language access for Ms. Oble. It did not. The state and federal constitutions require notice that was reasonably calculated under all the circumstances. The English-only notice was not. Because respondent's English-only notice was statutorily and constitutionally infirm, it was insufficient to begin the limitations period on her appeal. Ms. Oble is entitled to a hearing on the merits of her claim.

ARGUMENT

1. RESPONDENT MISSTATES THE FACTUAL RECORD IN ASSESSING MS. OBLE'S ENGLISH COMPREHENSION AND IN STATING THAT SHE DID NOT REQUEST LANGUAGE ASSISTANCE

Respondent misrepresents the factual record in at least three respects and then relies heavily on its misrepresentation in arguing against Ms. Oble's request for a hearing.

First, respondent asserts that Ms. Oble “understood that [the determination] was appealable” citing to page six of the hearing transcript. (Resp. Br. 3.) But Ms. Oble’s testimony shows that she understood the basic idea that she was being denied benefits, not that she could appeal the decision or how. *See* T. 6. In fact, Ms. Oble did not understand that the determination was appealable, how to appeal, or that there would be a time limit to an appeal. For example, when asked why she felt she needed Legal Aid’s help, she responded through an interpreter: “When I saw the letter or the determination I wanted somebody who could explain it to me, and tell me what it is . . . or why it is that I cannot get unemployment benefits.” (T. 10.) Indeed, it is unlikely that Ms. Oble, at the time she received respondent’s determination, would have even understood the English term “appeal” given her very limited English proficiency.

Second, a thorough examination of the record reveals that Ms. Oble did not understand multiple parts of the unemployment benefits application. Respondent’s contention that she asked for help with only one question (Resp. Br. 3, 7-8) is not supported by the record. Ms. Oble testified that she asked the English-speaking person who gave her the application for someone to explain uquestionsu on the application. (T. 22.) She testified that she then asked a Somali employee “a few uquestionsu that [she] didn’t understand.” (T. 21.) She failed to complete any parts of the application that required written answers (as opposed to checkmarks in boxes) other than those for her name and address. (Rel. Br. App. 1-6). A review of the record in its entirety does not support respondent’s claim that she understood all but one question on the application.

Third, respondent relies heavily on its unfounded assertion that it had no way of knowing Ms. Oble needed language assistance because she did not inform them. Respondent’s contention is directly contradicted by the record evidence and inappropriately places the burden on

Ms. Oble to demand language assistance when respondent is legally bound to offer it. *See infra*, p. 9. Ms. Oble, in fact, testified that she specifically asked the employee who provided her with the application for someone who could help her understand the questions; she then received some assistance from a Somali-speaking employee. (T. 21-22.) (“Q: Did you inform anyone at the workforce center or anywhere else at the Department of Economic Security that you needed help with language? A: Yes, I asked the man a few questions that I didn’t understand.”)

Respondent has the burden of making language assistance available and known to applicants. But in this case, even ignoring the burden, respondent cannot argue that it had no knowledge of Ms. Oble’s language needs. At least two of respondent’s employees had direct contact with her and knew she had very limited English proficiency.

Finally, as an offer of proof that Ms. Oble’s English proficiency is very limited, this Court has allowed the attached summary of testing evidence showing that Ms. Oble reads English at or below a first-grade level. *See Exhibit A (attached); see also* January 20, 2004 Order (Case No. A03-1487) (granting relator’s motion to submit testing evidence). Following the surprise findings of the Commissioner’s representative that Ms. Oble “reads and understands English,” Legal Aid had Ms. Oble’s English proficiency tested by English as a Second Language (ESL) professionals at an Adult Basic Education program. Based on standard ESL measures, the evaluator found that her speaking ability was that of a “high beginner” and her reading at “beginning literacy.” The evaluator concluded: “Adar may read at or below a first grade reading level.” (Exh. A.)

Respondent’s determination notice uses a passive verb, “to become,” in the future tense followed by a conditioning clause with the verb, “to file,” in present passive:

“The determination will become final unless an appeal is filed in writing within 30 calendar days from the date of mailing shown above.”

See Rel. Br. App. 10-11. The construction “will become final unless” requires advanced language skills, both in terms of grammar and vocabulary. It uses a verb with modifier, “to become final,” in the future tense followed by a long clause conditioning the first. The phrase “to become final,” used here to mean barring future appeals, is legal jargon requiring not only an understanding of the vocabulary words “become” and “final,” but also the specific way in which the terms are interpreted in legal matters. The second clause, “unless an appeal is filed” uses a passive construction in which the agent is unidentified. Moreover, the reference to “the date of mailing shown above” is confusing even if the words were understood: the mailing date is, in fact, not “shown above” but rather is on the preceding page of the notice. Given the complicated structure of the sentence and the confusing reference to a date on the preceding page, respondent cannot realistically believe that Ms. Oble and other LEP applicants can understand the meaning of this appeal notice without language assistance.

The record evidence shows that respondent failed to take any reasonable steps to ensure that Ms. Oble would have meaningful language assistance to understand its determination and what she had to do to appeal. The evidence further shows that Ms. Oble, in fact, did not understand that she could appeal the adverse determination, how to appeal, that there was a limitations period on the appeal, or the consequences of not appealing within the limitations period.

2. RESPONDENT’S ENGLISH-ONLY NOTICE FAILED TO ENSURE MEANINGFUL LANGUAGE ACCESS AS MANDATED BY FEDERAL AND STATE LAWS

Respondent agrees that it must operate the unemployment benefits program in compliance with federal and state statutes and regulations. Resp. Br. 13. But respondent misapprehends and understates its obligation with regard to language access for people with limited English proficiency.

Respondent acknowledges that the Workforce Reinvestment Act regulations require it to “take reasonable steps to provide services and information in appropriate languages.” Resp. Br., 15 - 16 (quoting 29 C.F.R. § 37.35). Respondent further agrees that Title VI and its regulations require it to “take reasonable steps to ensure meaningful access by LEP persons.” Resp. Br., 22 (quoting 68 Fed. Reg. at 32291, n.2 (May 29, 2003)). Thus, respondent has conceded that the conduct at issue here involves a legal mandate, not “best practices.”

Respondent is apparently arguing to this Court that its densely-worded, English-only notice meets the federal mandate to “ensure meaningful access for LEP persons” and “provide information in appropriate languages.” Respondent’s position is unconvincing; indeed, it makes no sense. Respondent has failed to point to any “reasonable step” it took to provide the determination--a document with vital information--in an appropriate language or to ensure that Ms. Oble had meaningful language access so she could understand it.

The obligation to ensure meaningful language access to programs funded with federal dollars flows directly from Title VI, WIA, and their implementing regulations based on the prohibition of national origin discrimination. Sending an English-only notice of determination and appeal rights erects barriers that exclude people from the benefits of this public program based on their national origin and has the effect of defeating the objectives of the program for disproportionate numbers of LEP persons because of their national origin. “[A] recipient must

not use . . . administrative methods that have any of the following . . . effects: . . . (ii) defeating or substantially impairing, on a prohibited ground, accomplishment of the objectives of either . . . the program . . . or the nondiscrimination and equal opportunity provisions of WIA . . .” 29 C.F.R. § 37.6(d) (WIA Regulations, quoted by respondent at Resp. Br. 17); *see also* 29 C.F.R. § 31.3(b)(2) (Title VI Regulations prohibiting “methods of administration which have the effect of subjecting individuals to discrimination because of . . . national origin . . . or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular . . . national origin”). By sending an English-only notice of determination and appeal rights with no language block or other meaningful access, respondent has employed an “administrative method” that runs afoul of the non-discrimination mandates.

The Department of Labor (DOL) Guidance offers an analytical framework for evaluating the extent to which a state’s language practices meet the statutory and regulatory requirements of Title VI and WIA. *See* Rel. Br. App. 63 - 79 (DOL Guidance).^{TP1PT} Respondent has offered no analysis under that framework that would justify its choice to administer its notice provisions in English only. Respondent apparently chooses to ignore the federal government’s directive to ensure that LEP applicants have meaningful access to its programs. But this Court should not. *See Drake v. Honeywell, Inc.*, 797 F.2d 603 (8thP Cir. 1986) (“[c]ertainly a court should give

^{TP1PT} Respondent’s claim that its “process could hardly have violated a document that had not been issued yet” (Resp. Br. 23) is a red herring. DOL Guidance on LEP was issued in 2001. *See* 66 Fed. Reg. 4596 (January 17, 2001). The provisions cited here are from revised Guidance issued in 2003. The 2001 Guidance in effect when Ms. Oble received her determination notice was equally clear in stating that Title VI and WIA require states to provide meaningful access to LEP persons and applied the same analysis. *Id.*

great weight to an agency's interpretation, as reflected in its interpretive rule . . . to determine the scope of the statute and whether it has been violated").

Respondent not only ignores the analysis in the DOL Guidance, it misapprehends the basic principles of discrimination law. Respondent contends that "[a] regulation prohibiting discrimination only prohibits notices in English if notices in English are *per se* discriminatory." Resp. Br. 18. Respondent cites no authority for its blanket statement and is simply wrong.^{TP²PT} The federal statutes and regulations at issue here (as well as the Minnesota Human Rights Act) prohibit intentional discriminatory acts (not just *per se* discriminatory policies) as well as policies and procedures that have the effect of discriminating. *See* Rel. Br. 6 - 9 (statutes, regulations and cases cited therein). English-only language policy has been viewed by courts not only as having an exclusionary and, thus, discriminatory *effect* but as evidence of intentional discrimination. *See, e.g.*, 66 Fed. Reg. 4596, 4598 (January 17, 2001) (DOL Guidance citing early case law on language policy). It is certainly well understood that English-only notices such as the one sent to Ms. Oble will have a disproportionately adverse impact based on national origin. *See Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999) (holding that Alabama policy of administering drivers license exams in English had adverse effect based on national origin) *rev'd on other grounds* 532 U.S. 275 (2001). Indeed, the President's Executive Order explicitly states

^{TP²PT} Respondent's implying that it is not subject to WIA regulations is also wrong. Resp. Br. 18, n.6 ("this particular regulation is likely inapplicable to the unemployment insurance program . . ."). The WIA non-discrimination regulations apply to all "recipients" as defined by 29 C.F.R. § 37.4. 29 C.F.R. § 37.2(a)(1). Recipients include "state-level agencies that administer, or are financed in whole or in part with, WIA Title 1 funds," "One-Stop operators," and "One-Stop partners." 29 C.F.R. § 37.4. There is no question that respondent is a "recipient" under this definition.

that the regulatory guidance is needed to address the discrimination that results from programs that are not made accessible to LEP persons:

[This guidance] sets forth the compliance standards that recipients must follow to ensure that the programs and activities they normally provide in English are accessible to LEP persons and thus do not discriminate on the basis of national origin in violation of title VI of the Civil Rights Act of 1964, as amended, and its implementing regulations.

65 Fed. Reg. 50121 (August 16, 2000) (Rel. Br. App. 61).

Finally, respondent attempts to shift the burden of seeking assistance onto Ms. Oble in an effort to avoid any responsibility. But it is clear that the burden is on the state to “take reasonable steps” to provide language access. *See* DOL Guidance, 68 Fed. Reg. at 32300 (part of compliant LEP plan is providing notice to LEP persons about availability of services). Respondent cannot blame Ms. Oble for failing to ask for an interpreter or translator when those services, if available, were not made known to her. No one at the Workforce Center told Ms. Oble that Somali documents were available; no one asked her whether she needed interpretation; no question on the application inquired about the need for language services; no signs indicated the availability of interpreters; no mailings told her where to go or call for language assistance. Indeed, it is clear that respondent took no steps to ensure that Ms. Oble had meaningful language access to its English-only determination and notice of appeal.

Respondent exaggerates the difficulty of learning whether an applicant would require language assistance. Its unemployment application already, for example, asks for “ethnic heritage” (for Latinos and non-Latinos only) and race. *See* Rel. Br. App. 1-2. It could easily add a question for language. Moreover, respondent’s excuses are belied by the experience of other state agencies, such as the Department of Human Services, that have fully acknowledged their

obligation to provide language access and developed appropriate LEP plans that provide notice to LEP clients. See “Limited English Proficiency Plan” (Minn. DHS) (available at <http://edocs.dhs.state.mn.us/lfserver/Legacy/MS-2254-ENG>). DHS has multiple language access telephone lines, language blocks, and translated documents, all created to be “consistent with federal requirements” that respondent seeks to avoid. *Id.*, at 3. Notices and other LEP materials can be found on the DHS website on language access at <http://www.dhs.state.mn.us/Language/default.htm>.

In summary, respondent admits that federal laws require that it take reasonable steps to provide information in appropriate languages and ensure meaningful access for LEP persons. Resp. Br. 15-16, 22. Under no reasonable construction of these mandates can respondent say that its English-only determination and notice complied with its obligation. In choosing to administer its program by sending out vital documents such as the determination and notice of appeal to LEP people like Ms. Oble in English only, respondent violates federal law.

3. THE MINNESOTA AND U.S. CONSTITUTIONS REQUIRE THIS COURT TO BALANCE COMPETING AND DYNAMIC INTERESTS BASED ON ALL THE CIRCUMSTANCES

Respondent agrees that the due process analysis requires a balancing of the interest at stake and value of additional safeguards against the burdens any such safeguard would place on the state. Resp. Br. 24, 25 (citing *Schulte v. Transportation Unlimited, Inc.*, 354 N.W.2d 830, 832 (Minn. 1984); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Schwartz v. First Trust Co. of St. Paul*, 52 N.W.2d 290 (Minn. 1952)). Respondent fails, however, to provide a legal analysis that applies the relevant factors. The Court should reject respondent’s approach.

Respondent has not, for example, suggested that it would be an administrative or financial burden to include a language block with its mailings, nor could it. The obligation to provide access is a statutory mandate and, therefore, any burden it imposes is superfluous in the constitutional analysis. Moreover, as the record demonstrates, respondent already has a translated language block that it could easily send with its determination and notice of appeal rights. Weighed against the value of language assistance and the importance of unemployment benefits, respondent's burden, if any, is de minimus.

Respondent's castigating Ms. Oble for suggesting that recent developments in language access law under Title VI and other non-discrimination statutes affects the constitutional analysis misses the point. The due process test for adequate notice requires the balancing of factors that are dynamic, not static. What in one era or geographic region might be of little value and high government cost, may, in a different era and region, be of great value and require little government expense. The federal obligation to provide meaningful language access is separate from the constitutional obligation to provide notice that is "reasonably calculated, under all the circumstances, to apprise interested parties . . ." *Mullane*, 339 U.S. at 314. But the federal mandate to provide language assistance, along with the enormous swell in numbers of immigrants in the Minnesota workforce, changes the circumstances, and thus affects the due process analysis.

4. THIS COURT SHOULD REVERSE THE COMMISSIONER’S FINDING OF FACT THAT A DETERMINATION WAS ISSUED AND REMAND FOR A HEARING ON THE MERITS OF MS. OBLE’S CLAIM

Respondent overstates the effect of Minnesota Statutes, section 268.101, subdivision 2(e) in denying jurisdiction for a remanded hearing. Under both federal preemption and constitutional principles, Ms. Oble would be entitled to a hearing. *See* Rel. Br. 26.

Perhaps the most direct and relevant analysis, however, is based on the language of Section 268.101 itself:

A determination of disqualification or a determination of non-disqualification shall be final unless an appeal is filed by the applicant or notified employer within 30 calendar days after mailing. The determination shall contain a prominent statement indicating the consequences of not appealing. . . .

Minn. Stat. § 268.101, subd. 2(e).

The conclusion that Ms. Oble’s appeal request is untimely rests on a finding of fact that a determination of disqualification was issued on a specific date. While the date of issuance is not disputed, whether the document can constitutionally and statutorily qualify as a “determination” is disputed. If the determination is constitutionally or statutorily insufficient, it is not a valid “determination of disqualification” as the statute requires and the time limit has not been triggered.

The unemployment statute does not contain a definition of a “determination.” Rather, it describes the determination in functional terms, stating that it must decide an issue of disqualification or eligibility, must be mailed to the employer and applicant, and must contain a prominent statement of the consequences of not appealing. Minn. Stat. § 268.101, subs. 2, 3. DOL Regulations set out further requirements to ensure that individuals whose unemployment claims are denied receive an opportunity for a fair hearing as required by the Social Security Act,

Section 303(a)(3). 20 C.F.R. § 614, Appendix B (Rel. Br. App. 101 - 105). These functional requirements are clearly intended to protect applicants' due process rights. The determination issued here did not meet the functional requirements because it was constitutionally and statutorily defective; therefore, the finding that a determination of disqualification ever issued was error and should be reversed. The conclusion that the Department lacked jurisdiction is likewise error because the required determination was never issued.

CONCLUSION

Respondent sent Ms. Oble a determination and notice that was defective because it failed to meet the requirements of federal and state statutes and regulations and the requirements of the state and federal constitutions. Therefore, the finding of the Commissioner that respondent issued the determination required by Minn. Stat. § 268.101, subd. 2(e), was in error. As a consequence, the Commissioner's legal conclusion that the Department lacked jurisdiction must be reversed. Ms. Oble is entitled to a hearing on the merits of her claim.

LAW OFFICE OF THE LEGAL AID
SOCIETY OF MINNEAPOLIS

Date: _____

Kevin Reuther
Attorney License No. 266255
430 First Avenue North, Suite 300
Minneapolis, MN 55411
(612) 746-3713
(612) 334-5755 (Fax)

Attorneys for Relator