STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1762

Shatante Boyd,
Respondent,

vs.

Atterro, Inc.,
Relator,

Department of Employment and Economic Development,
Respondent.

Filed June 16, 2014
Reversed and remanded
Ross, Judge

Department of Employment and Economic Development
File No. 31335487-3

Shatante Boyd, St. Paul, Minnesota (pro se respondent)

Radd Kulseth, Aafedt, Forde, Gray, Monson, & Hager, P.A., Minneapolis, Minnesota (for relator)

Lee B. Nelson, Munazza Humayun, Christine E. Hinrichs, St. Paul, Minnesota (for respondent department)

Considered and decided by Hooten, Presiding Judge; Ross, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

ROSS, Judge

Atterro Inc. employed Shatante Boyd until her latest temporary assignment ended. Boyd applied for unemployment benefits. The department deemed Boyd ineligible. An unemployment law judge (ULJ) held that Boyd was eligible for benefits, finding that although she failed to ask Atterro to give her a new assignment, she had a good reason for not doing so. A different ULJ reconsidered that decision and determined that Boyd is eligible not because she had good reason for failing to ask for a new assignment but because she had in fact requested a new assignment. Because the evidence does not support the second ULJ's finding that Boyd affirmatively requested a new assignment, we reverse. But because the final decision supersedes the previous ULJ's decision and includes no finding as to whether Boyd had a good reason for not making the request, we remand for the necessary findings.

FACTS

Shatante Boyd worked various assignments in 2012 and 2013 for Atterro, an employment agency operating under the name Pro Staff. Before Boyd received any assignment, Pro Staff notified her in writing in July 2012 that she could be eligible for unemployment benefits only if she affirmatively requested a new position from Pro Staff within five days after her work assignment ended. Boyd began her first assignment with one of Pro Staff's clients, Rust Consulting, in September 2012. After that assignment ended, Boyd began another assignment in March 2013, also at Rust Consulting. Boyd worked there full time until Pro Staff terminated her assignment on May 29, 2013.

Boyd applied for unemployment benefits in June 2013, and the department of employment and economic development denied her application. Boyd appealed, and a ULJ received evidence bearing on her claim for benefits. Pro Staff talent manager Erin Bunch testified that Pro Staff left Boyd an automated message on May 29 telling her that her assignment was over and instructing her not to return to Rust Consulting. Boyd said she did not receive the message and showed up for work on May 30. Boyd's boyfriend did receive the message, and he relayed it to Boyd the morning of May 30. Boyd called Pro Staff and spoke to Bunch, who informed Boyd that the assignment was over and instructed her to leave Rust Consulting. Boyd did not ask Bunch if Pro Staff had other assignments available for her either at Rust Consulting or elsewhere.

Bunch testified that her Pro Staff supervisor, Rachel Van Dusen, was at Rust Consulting on May 30 and that Boyd spoke to Van Dusen in person before leaving. Bunch said that, according to Van Dusen, Boyd did not request a new assignment during that conversation. She did not know exactly what Van Dusen told Boyd, but she believed it was substantially the same as what she had told Boyd by phone.

Boyd testified that she told Van Dusen that she needed a job and would be in touch with Pro Staff. Boyd did not actually contact Pro Staff within the five-day statutory period after this call to inquire about or request any new assignment. She said that she did not inquire about additional assignments because another Pro Staff employee previously told her that Pro Staff would contact her if any new assignment became available. Boyd testified that she was willing to accept temporary work and assumed that Pro Staff would contact her if an assignment opened.

Bunch said she did not offer Boyd a new assignment during their call because none was available. She did not know about the conversation in which Boyd's unidentified coworker allegedly told Boyd that Pro Staff would contact Boyd if a new assignment became available, but she confirmed that it is Pro Staff's typical practice to contact employees as positions develop. But she added that Pro Staff expects its employees to call weekly to explore openings and to update their availability.

The ULJ found that Boyd had been discharged. She decided that "[t]here [was] no dispute" that Boyd had not contacted Pro Staff to ask about new assignments within the five-day window, but she found that Boyd was reasonable in not seeking a new assignment based on her expectation that Pro Staff would take the initiative and contact her if a position became available. She held Boyd eligible for unemployment benefits.

Pro Staff requested reconsideration, and a different ULJ agreed with the finding that Boyd had received proper notice of her duty to request an additional assignment. But unlike the first ULJ, the second ULJ concluded that Boyd had satisfied the requirement to request a new assignment by implying that she was available for additional work. Because the second ULJ deemed Boyd eligible for benefits and modified the previous decision by finding that Boyd had requested a new assignment, she never considered whether Boyd had a good reason *not* to request a new assignment.

Pro Staff challenges the second ULJ's decision by writ of certiorari.

D E C I S I O N

We quickly dispose of the department's procedural argument that Boyd never received proper notice of her duty to affirmatively request a new assignment. It bases this

argument on the fact that Pro Staff notified Boyd of the duty about five weeks before her first assignment for Pro Staff, and it asserts that Pro Staff's notice was *too early*. It maintains that the statute requires the notice to have been repeated later, maybe about seven to ten days before the employee begins a work assignment. The department cites no statutory authority or caselaw for this notion, and, in any event, it raised the challenge for the first time in its response brief on appeal. It filed no cross-appeal. We reject the department's notice argument as not properly raised.

We review a ULJ's order to decide whether the findings, inferences, conclusion, or decision violate a constitutional provision, exceed statutory authority or departmental jurisdiction, rest on an unlawful procedure, result from an error of law, find support in substantial evidence, or are arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d) (2012). We review the ULJ's factual findings in the light most favorable to the decision and defer to the ULJ's credibility determinations. *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). We will not modify the ULJ's findings of fact if substantial evidence supports them. Minn. Stat. § 268.105, subd. 7(d). But we review questions of law de novo. *Schmidgall v. Filmtec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

An applicant for unemployment benefits is ineligible if she quit her job, unless she qualifies for an exception. Minn. Stat. § 268.095, subd. 1 (2012). An applicant who worked for a staffing service quits if she "fails without good cause to affirmatively request an additional suitable job assignment" within five calendar days after completing a suitable assignment she received from the staffing service. *Id.*, subd. 2(d). '"[G]ood

cause' is a reason that is significant and would compel an average, reasonable worker, who would otherwise want an additional suitable job assignment with the staffing service . . . to fail to contact the staffing service." *Id.* This staffing-service-specific provision applies only if the applicant signed and received a writing, "at the . . . beginning of employment with the staffing service," that clearly informs her of her obligation to contact her employer to remain eligible for unemployment benefits. *Id.*

Atterro argues that the second ULJ erred by finding that Boyd satisfied the statutory requirement that she affirmatively request a new assignment. The record settles Atterro's argument. The two discussions relied on by the ULJ—Boyd's call to Bunch and her in-person exchange with Van Dusen—included no affirmative request for another job assignment. Boyd's discussion with Bunch focused on confirming that Boyd's assignment at Rust Consulting had ended and that she needed to leave the Rust Consulting premises. Boyd admitted that she did not request a new assignment during that call, and she testified that she told Van Dusen only that she needed work and *would be in touch* with Pro Staff about future opportunities.

The ULJ interpreted these two discussions as communicating Boyd's request for a new assignment. At most, the exchanges support the inference that Boyd wanted another position with Pro Staff. But the statute is not satisfied by an employee's statements merely *implying* interest in another assignment; it requires an *affirmative* request for one. An affirmative request is one that is direct and express, not implied. By accepting an inference where the statute requires an affirmative request, the ULJ misapplied the law and reached an inaccurate finding that Boyd affirmatively requested a new position.

Atterro also contends that the ULJ erred by concluding that Boyd had a good reason for not requesting a new assignment, and it urges us to conclude that Boyd is therefore ineligible for benefits. But this argument challenges the first ULJ's decision, which was subject to ULJ reconsideration, not the second ULJ's ultimate decision after reconsideration, which did not reach the issue. When a ULJ decides a party's request for reconsideration and the reconsideration order modifies or affirms the previous findings of fact, that order constitutes the department's final, binding decision "unless judicial review is sought." Minn. Stat. § 268.105, subd. 2(f). When a party requests judicial review by writ of certiorari, we "review the [ULJ's] decision." *Id.*, subd. 7(a). So we review the final decision, not any interim, superseded decisions. *Cf. Pierce v. DiMa Corp. (1992)*, 721 N.W.2d 627, 629 (Minn. App. 2006) (noting that, under then-existing judicial review procedure, court of appeals did not review initial decision of ULJ but rather decision of senior ULJ who reviewed initial decision).

The ULJ's order after reconsideration did not affirm (or even address) the question of reasonableness. And neither will we because the issue is not before us on review of the final decision. Our judicial review allows us to "remand the case for further proceedings." Minn. Stat. § 268.105, subd. 7(d). This is what we will do. Addressing only those issues properly before us, we reverse the second ULJ's determination that Boyd affirmatively requested another assignment, and we remand for further proceedings to allow a ULJ to render a final determination on the disputed factual and legal issue of the reasonableness of Boyd's failure to affirmatively request a new assignment.

Reversed and remanded.