STATE OF MINNESOTA
IN COURT OF APPEALS
A11-970

Tony E. Miller,
Relator,

vs.

Department of Employment and Economic Development,
Respondent.

Filed April 23, 2012
Affirmed
Collins, Judge[*]

Department of Employment and Economic Development
File No. 27115936-5

Tony E. Miller, Bloomington, Minnesota (pro se relator)

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

Considered and decided by Hudson, Presiding Judge; Halbrooks, Judge; and Collins, 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.

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

COLLINS, Judge

Relator Tony Miller challenges the decision of an unemployment-law judge (ULJ) ruling him ineligible to receive unemployment benefits because: (a) he was a student and was unwilling to quit school to accept suitable employment, and (b) he has not made reasonable, diligent efforts to obtain suitable employment. Because the ULJ's findings and conclusions are supported by substantial evidence in the record, we affirm.

FACTS

Tony Miller was employed as a security officer from April 1, 2008 until December 29, 2009. He applied for and began receiving unemployment benefits from respondent Minnesota Department of Employment and Economic Development (DEED). In or around January 2011, Miller advised DEED that he was enrolled as a full-time student and was unwilling to quit school to obtain employment; DEED then determined that Miller is ineligible for unemployment benefits.

Miller appealed the decision. During a March 2011 telephonic hearing, Miller testified that he had been enrolled as a student at Normandale Community College since January 2010 and that he was currently attending classes on Tuesday and Thursday afternoons and Monday and Wednesday afternoons and evenings. He devoted approximately 80 hours each week to schoolwork, including 10 hours attending class. Miller testified that he would not quit school if he were forced to choose between school and employment similar to his previous job.

Miller also testified that since he became unemployed, he has spent about five hours per week seeking employment by contacting acquaintances and looking at job listings online and in the newspaper. He reported getting "some interviews" from his efforts.

The ULJ found that Miller is ineligible for unemployment benefits because he was a student and was unwilling to quit school to accept employment that conflicts with his school work, and because he has not made reasonable, diligent efforts to obtain suitable employment. The ULJ determined that, as a result, Miller received a $13,816 overpayment of unemployment benefits. Following Miller's request for reconsideration, the ULJ affirmed the earlier decision, finding that a different result was not warranted based on Miller's arguments or the record. Regarding additional evidence that Miller submitted, the ULJ determined that Miller's school enrollment does not qualify as "reemployment assistance training" because there is no evidence that a reasonable opportunity for suitable employment does not exist, and his four-year degree program is not vocational or short-term academic training. This certiorari appeal followed.

D E C I S I O N

When reviewing the decision of a ULJ, we may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the 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) (2010). We view the ULJ's factual findings in the light most favorable to the decision and defer to the ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We will not disturb the ULJ's findings when supported by substantial evidence, but we review questions of law de novo. *Id.*

I.

Miller contends that he is available for suitable employment and is actively seeking suitable employment, but that his efforts have been limited by his disability and adverse references from his previous employer. An applicant may be eligible for unemployment benefits if the applicant is both "available for suitable employment" and "actively seeking suitable employment." Minn. Stat. § 268.085, subd. 1(4), (5) (2010).

We first address whether Miller was "available" for suitable employment while he was a student. "A student who has regularly scheduled classes must be willing to discontinue classes to accept suitable employment when . . . class attendance restricts the applicant from accepting suitable employment . . . [and] the applicant is unable to change the scheduled class or make other arrangements that excuse the applicant from attending class." *Id.*, subd. 15(b) (2010). Miller testified that he devotes approximately 80 hours each week to his classes and studying. Although Miller testified that he would adjust or reduce his class schedule to accommodate a job, he also testified that he would not be willing to quit school entirely and that he "would choose school" if he had to choose between school and employment comparable to his previous job. Thus, there is substantial evidence in the record to support the ULJ's determination that Miller is

ineligible for unemployment benefits because he was unwilling to quit school and therefore was unavailable for suitable employment.

Next, we consider whether Miller was "actively seeking" suitable employment. This is defined as "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." *Id.*, subd. 16(a) (2010). "If reasonable prospects of suitable employment in the applicant's usual or customary occupation do not exist, the applicant must actively seek other suitable employment." *Id.*, subd. 16(c). We have held that an applicant was not actively seeking employment by "ask[ing] around for work" without applying to any positions, or by contacting four employers by telephone and visiting a job-service office twice. *McNeilly v. Dep't of Emp't & Econ. Dev.*, 778 N.W.2d 707, 712 (Minn. App. 2010). And an applicant who reads employment advertisements, searches a job database, and applies for two or three positions in two months also is not considered to be actively seeking employment. *Monson v. Minn. Dep't of Emp't Servs.*, 262 N.W.2d 171, 172 (Minn. 1978).

As to whether he was actively seeking "suitable employment," Miller testified that he spent approximately five hours each week searching for a job during the fourteen months following the termination of his employment. During that fourteen-month period, Miller had "some interviews," talked to people he knows, and searched newspaper and online job listings. This reflects even less effort than the insufficient efforts demonstrated by the applicant in *Monson*. *See id.*

Miller also testified that he has encountered difficulties seeking a job in his usual occupation because his former employer has provided negative references to prospective employers and because of his disability. But he did not indicate that he has actively sought other suitable employment options as a result of those difficulties. *C.F. Valenty v. Med. Concepts. Bev., Inc.*, 491 N.W.2d 679, 684 (Minn. App. 1992) (holding that applicant was actively seeking suitable employment when she applied for 11 jobs in one and a half weeks that she was able to perform despite her medical condition), *aff'd in part, modified in part on other grounds*, 503 N.W.2d 131 (Minn. 1993). Thus, there is ample evidence supporting the ULJ's determination that Miller is ineligible for unemployment benefits because he is not actively seeking suitable employment.

Accordingly, Miller is not entitled to unemployment benefits because he was neither available for nor actively seeking suitable employment.

II.

Miller also argues that his school enrollment through a vocational rehabilitation program constitutes reemployment assistance training, which would excuse him from the requirement that he be available for work. An applicant who is participating in reemployment assistance training need not be available for suitable employment "if the applicant has been determined in need of reemployment assistance services by [DEED]." Minn. Stat. § 268.085, subd. 1(4), (7) (2010). An applicant is considered to be in "reemployment assistance training" when:

> (1) a reasonable opportunity for suitable employment for the applicant does not exist in the labor market area and

> additional training will assist the applicant in obtaining suitable employment;
> (2) the curriculum, facilities, staff, and other essentials are adequate to achieve the training objective;
> (3) the training is vocational or short term academic training directed to an occupation or skill that will substantially enhance the employment opportunities available to the applicant in the applicant's labor market area;
> (4) the training course is considered full time by the training provider; and
> (5) the applicant is making satisfactory progress in the training.

Minn. Stat. § 268.035, subd. 21c(a) (2010).

But Miller's argument is unavailing for three reasons: (1) the record does not demonstrate that a reasonable opportunity for suitable employment does not exist in Miller's labor market area or that additional training will assist him in obtaining suitable employment; (2) Miller's enrollment at the community college in which he was working toward a bachelor of science degree in geology does not constitute "vocational or short term academic training" and does not fall within Miller's "labor market area"; and (3) there has been no determination by DEED that Miller is in need of reemployment assistance training.

Thus the record supports the ULJ's determination that Miller's school enrollment through a vocational rehabilitation program does not constitute reemployment assistance training, and Miller is not entitled to relief on this ground.

III.

Miller also argues that it is unfair that he be required to repay the calculated overpaid unemployment benefits that he received. Under Minnesota's unemployment

insurance laws, any applicant who has received unemployment benefits that the applicant was held not entitled to must promptly repay the overpaid unemployment benefits even if the overpayment was not due to fraud. Minn. Stat. § 268.18, subd. 1(a) (2010). The commissioner of employment and economic development has no discretion to "compromise the amount that has been determined overpaid." *Id.*, subd. 6(a) (2010). Moreover, "[t]here is no equitable or common law denial or allowance of unemployment benefits." Minn. Stat. § 268.069, subd. 3 (2010). Thus we have no basis to grant Miller relief on this ground.

Affirmed.