STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2060

Thomas E. Charley,
Relator,

vs.

Northern States Power Company Minnesota,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed July 22, 2013
Affirmed
Connolly, Judge

Department of Employment and Economic Development
File No. 29910721-4

Thomas E. Charley, Inver Grove Heights, Minnesota (pro se relator)

Northern States Power Company Minnesota, RSM Enterprises, Inc., Denver, Colorado (respondent)

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

Considered and decided by Rodenberg, Presiding Judge; Stoneburner, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

In a certiorari appeal from an unemployment-law judge's (ULJ) decision that relator is ineligible for unemployment benefits because he quit employment without good reason caused by the employer, relator argues that (1) he did not quit but was forced to retire under duress; and (2) the hearing was unfair because the ULJ admitted hearsay testimony and, during a period in which his phone had stopped working, testimony continued to be taken from the employer's witness. Because relator quit his employment, not under duress, and received a fair hearing, we affirm.

FACTS

Relator Thomas Charley worked for respondent-employer Northern States Power Company Minnesota (NSP) for 36 years. He serviced gas lines and was a member of the electrical workers union. Unlike other employees in the construction area who used company cars for work, relator used his own car due to back problems and received mileage reimbursement from the company.

In August 2011, Gary Witzany took over management of the construction area at NSP. He discovered that in 2011, relator had claimed mileage reimbursement on ten occasions when he had taken vacation days and one day when he had called in sick. On March 13, 2012, Witzany held a meeting with relator, a human resources (HR) representative, and the union steward to discuss his findings. Relator's response to the information was that he had been trained to never record more than 80 miles in a day, so

he recorded mileage on days he didn't work to get full reimbursement for days when he drove more than 80 miles.

After the meeting, Witzany investigated further, and found that relator had recorded more than 80 miles in a day 42 times in 2010 and 12 times since Witzany began managing the construction group in August 2011. Witzany reported this information to the HR department for their investigation. After conducting their own inquiry, relator's union representatives informed him that "basically what it come[s] down to is [NSP] is going to fire you." The union representative suggested that relator preemptively retire: "before they fire you . . . I would just retire because you're going to lose $160,000 in your severance package." Relator then filled out the paperwork to retire.

On March 22, 2012, Witzany called relator to schedule a meeting with him and HR. Relator told Witzany that he had retired and a union representative confirmed relator's retirement later that same day. Relator was allowed to use his accumulated unused vacation from March 22 through June 8. Relator subsequently applied for unemployment benefits.

An employee from respondent, the Minnesota Department of Employment and Economic Development (DEED), initially determined that relator was discharged from his employment and was eligible for unemployment benefits. NSP appealed the determination, and a ULJ conducted a de novo evidentiary hearing. The ULJ found that relator quit his employment and did not meet any statutory exceptions for doing so, and was therefore ineligible for benefits. Relator requested reconsideration and the ULJ affirmed his decision. Before the ULJ's order became final, the Chief ULJ ordered the

decision set aside and ordered the matter reconsidered by a different ULJ.[1] The second ULJ issued a decision on reconsideration finding that relator quit his employment and did not come under an exception to ineligibility, and was therefore ineligible for unemployment benefits. This certiorari appeal follows.

D E C I S I O N

When reviewing an unemployment-benefits decision, the Court of Appeals may affirm the decision, remand for further proceedings, reverse, or modify the decision if the relator's substantial rights were prejudiced because the decision of the ULJ violated the constitution, was based on an unlawful procedure, was affected by error of law, was unsupported by substantial evidence, or was arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d) (2012).

I. Quit Determination

Relator challenges the ULJ's finding that he quit, arguing that he was forced to retire under duress. We review a ULJ's determination that an applicant is ineligible for unemployment benefits de novo. *Stassen v. Lone Mountain Truck Leasing, LLC*, 814 N.W.2d 25, 30 (Minn. App. 2012). We review the ULJ's findings of fact in the light most favorable to the decision and will not disturb the findings where the record substantially supports them. *Id.* at 31.

An applicant who quits his employment is ineligible for unemployment benefits unless he falls under a statutory exception to ineligibility. Minn. Stat. § 268.095, subd. 1

[1] The first ULJ let his attorney's license lapse. Because licensure is a requirement for ULJs, the ULJ's decision was set aside by the Chief ULJ so that a licensed ULJ could issue a decision. *See* Minn. Stat. § 268.105, subd. 1(e) (2012).

(2012). "Whether an employee has been discharged or voluntarily quit is a question of fact subject to our deference." *Stassen*, 814 N.W.2d at 30. Minn. Stat. § 268.095, subd. 2 (2012) defines "quit":

> (a) A quit from employment occurs when the decision to end the employment was, at the time the employment ended, the employee's.
> (b) An employee who has been notified that the employee will be discharged in the future, who chooses to end the employment while employment in any capacity is still available, is considered to have quit the employment.

"A discharge from employment occurs when any words or actions by an employer would lead a reasonable employee to believe that the employer will no longer allow the employee to work for the employer in any capacity." Minn. Stat. § 268.095, subd. 5(a) (2012).

This court has addressed several cases where an employee claims that he was "forced" to quit because his employer would otherwise have discharged him. In *Ramirez v. Metro Waste Control Comm'n*, 340 N.W.2d 355, 356 (Minn. App. 1983), Ramirez was told by a supervisor that the plant manager was seeking to have Ramirez discharged. Ramirez decided to resign in order to protect his work record. *Id.* We held that, because a formal decision had not been made to discharge Ramirez, he voluntarily terminated his employment by resigning and was ineligible to receive unemployment compensation. *Id.* at 357-58. Similarly, in *Seacrist v. City of Cottage Grove*, 344 N.W.2d 889, 892 (Minn. App. 1984), we found a police officer voluntarily quit and was ineligible for unemployment benefits where the officer resigned in order to protect his work record before the city took action to terminate his employment.

Here, relator claims that he was "forced to retire." But, like Ramirez and Seacrist, relator chose to voluntarily terminate his employment before his employer had taken action to terminate him. And, like Ramirez and Seacrist who chose to quit to protect their work records, relator chose to quit to protect his severance package. There is nothing in the record showing that relator would not have been allowed to work in any capacity while the investigation into his reimbursement claims was ongoing. Rather, the record reflects that it was relator's decision to end his employment. The record substantially supports the ULJ's determination that relator quit his employment and was not discharged.

II. Fairness of Evidentiary Hearing

Finally, relator argues that the evidentiary hearing was unfair. Specifically, relator argues that (1) the ULJ erred in admitting testimony from NSP's representative in Colorado because he "has no physical knowledge of what transpires in Minnesota and solely depends on the information given by Human Resources . . . or Mr. Witzany through the telephone"; and (2) the ULJ erred by continuing to take testimony from his manager, Witzany, during the time that relator was disconnected from the hearing.

First, applicable rules permit a ULJ to "receive any evidence that possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." Minn. R. 3310.2922 (2011). Under this rule, the fact that testimony is based on hearsay or concerns documents not presented as evidence does not mandate its exclusion but is a factor for the ULJ to weigh in judging the credibility of the witnesses. *See Ywswf v.*

Teleplan Wireless Servs., Inc., 726 N.W.2d 525, 533 (Minn. App. 2007) (discussing factors for ULJ to weigh in assessing credibility). Relator has not demonstrated that the ULJ erred by admitting the testimony of NSP's representative.

Next, relator argues that the evidentiary hearing was unfair because, during a period in which his telephone was disconnected, the ULJ continued to take the testimony of relator's manager, Witzany. It is true that relator was disconnected during Mr. Witzany's testimony. Witzany testified about the meetings that had taken place with relator and HR regarding relator's mileage claims and testified that relator told him on March 22 that relator had retired. Following Witzany's testimony, the ULJ was able to get relator back on the line. The ULJ provided relator with a very detailed summary of Witzany's testimony. The ULJ then asked relator if he had any questions for Witzany, and relator asked Witzany several questions. The ULJ then asked relator if he had any further testimony or evidence to add in response to Witzany's testimony, and he indicated that he did not. A review of the transcript reveals that the ULJ ensured that "all relevant facts [were] clearly and fully developed." Minn. Stat. § 268.105, subd. 1(b) (2012). On the record before us, relator received a fair evidentiary hearing.

Affirmed.