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STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1964

Nse Umana,
Relator,

vs.

FedEx Ground Package System, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed September 5, 2017
Affirmed
Bratvold, Judge

Department of Employment and Economic Development
File No. 34822164-3

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

Considered and decided by Bratvold, Presiding Judge; Jesson, Judge; and Randall, Judge.[*]

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[*] 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

BRATVOLD, Judge

Relator challenges the unemployment-law judge's (ULJ) decision that he was ineligible for unemployment benefits because he was discharged for employment misconduct after he failed to work three scheduled shifts and did not report his absences. Relator argues that the ULJ: (1) made unsupported factual findings and credibility determinations; (2) erred by determining that he committed employment misconduct; and (3) failed to adequately develop the record. We affirm.

FACTS

From August 2015 to June 8, 2016, relator Nse Umana was employed as a part-time package handler for respondent FedEx Ground Package System, Inc. (FedEx). When Umana began his employment, he signed an "employee handbook acknowledgment" form stating that he received a copy of FedEx's employee handbook and understood its policies. The handbook included a "no call/no show" policy, which provided that employees may be terminated for failing to report to work for two consecutive days without notifying management of their absence.

On May 27, 2016, Umana's direct supervisor, A.N., sent him home during the middle of his shift because he was not working "to the best of his ability" and fell behind. Umana initially thought A.N. was joking, and he spoke with A.N.'s boss, K.F., who told him "today you have to go home, try and come back tomorrow, put a full effort in, we'd have you back again tomorrow."

On May 28, Umana called A.N. to report that he would be absent from his scheduled shift that day. Umana testified that he did not go to work "because of what happened yesterday," and he called A.N. because he did not understand what he had done wrong. A.N. told Umana to call the attendance hotline. Umana then reported his absence by leaving a voice message on the hotline, which was later retrieved by K.F. According to K.F., Umana's message did not say why he was absent.

On June 1, 2, and 3, Umana did not report to work his scheduled shifts, nor did he call the hotline, or otherwise contact management to report his absences. Each day, K.F. left Umana a voice message and documented his absence. On June 8, 2016, FedEx discharged Umana for his three consecutive no call/no shows.

Umana applied for unemployment benefits, and respondent Minnesota Department of Employment and Economic Development (DEED) determined that he was ineligible because FedEx had discharged him for employment misconduct. Umana appealed the decision, and the ULJ held a telephone hearing. Umana, K.F., and a FedEx human resources (HR) business partner testified. A.N. was scheduled to testify but did not appear for the hearing.

Umana testified that he did not know he was allowed to return to work on May 28, and he believed his return was conditioned on him being able to work harder. Umana also testified he did not work on June 1, 2, and 3 because he had "already been ordered to go home" on May 27. Umana explained that he was afraid to return to work, but added that he did not tell anyone at FedEx that he was afraid. K.F. testified that he did not know that

Umana was afraid or witness anything that would have made Umana fearful. The HR business partner testified similarly.

On August 29, 2016, the ULJ affirmed the ineligibility determination, concluding that Umana's three consecutive no call/no shows amounted to employment misconduct because they "seriously violated" FedEx's reasonable expectation that "employees will work their scheduled shifts." The ULJ found K.F. more credible than Umana. The ULJ discredited Umana's claim that he feared going to work, and found that neither A.N. nor K.F. "did anything threatening or inappropriate." After Umana requested reconsideration, the ULJ affirmed her order. Umana appeals by writ of certiorari.

D E C I S I O N

An employee who is discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4 (2016). "Employment misconduct means any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly: (1) a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee; or (2) a substantial lack of concern for the employment." Minn. Stat. § 268.095, subd. 6(a) (2016). This statutory definition is "exclusive and no other definition applies." Minn. Stat. § 268.095, subd. 6(e); *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 456–60 (Minn. 2016). The legislature has carved out an exception to the definition of misconduct for "conduct an average reasonable employee would have engaged in under the circumstances." Minn. Stat. § 268.095, subd. 6(b)(4). Because the unemployment-benefits statute is "remedial in nature," it "must be

applied in favor of awarding" benefits, and disqualifying provisions "must be narrowly construed." Minn. Stat. § 268.031, subd. 2 (2016).

We review a ULJ's decision to determine whether it prejudiced the relator's substantial rights because it was affected by legal error, "unsupported by substantial evidence" in the record, or "arbitrary or capricious." Minn. Stat. § 268.105, subd. 7(d)(3)– (6) (2016). Whether an employee engaged in employment misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether an employee did a particular act is a fact question. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We view factual findings in the light most favorable to the ULJ's decision and will not disturb them if reasonably supported by the record. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted). Whether a particular act is regarded as disqualifying misconduct is a legal question, which we review de novo. *White v. Univ. of Minn. Physicians Corp.*, 875 N.W.2d 351, 355 (Minn. App. 2016). We defer to the ULJ's credibility determinations. *Id.*

I. The record supports the ULJ's factual and credibility determinations.

Umana challenges the ULJ's finding that neither A.N. nor K.F. did "anything threatening or inappropriate." Umana relies on his own testimony that A.N. yelled at him on May 27, and that he was afraid to return to work. The ULJ, however, discredited Umana's testimony. Generally, "[c]redibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Bangtson v. Allina Med. Grp.*, 766 N.W.2d 328, 332 (Minn. App. 2009) (quotation omitted).

Umana nonetheless argues that substantial evidence does not support the ULJ's stated reasons for the credibility determinations. A ULJ must "set out the reason for crediting or discrediting" testimony when credibility plays a "significant" role in the decision. Minn. Stat. § 268.105, subd. 1a(a) (2016). Credibility played a significant role in this case because the ULJ stated that its findings were based "in large part" on its decision to credit K.F.

"When assessing witness credibility, the ULJ may consider all relevant factors, including, but not limited to, the witness's interest in the case's outcome, the source of the witness's information, the witness's demeanor and experience, and the reasonableness of the witness's testimony." *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007). Here, the ULJ explained that K.F. was credible because his testimony "was based, in part, on firsthand knowledge, it was supported by [the HR business partner], and it presented a more logical explanation of events." The ULJ discredited Umana because nothing he "alleged would lead an employee to fear for his life," "[h]e did not report his alleged fears to" FedEx, and "[i]t is simply not credible that, first, Umana felt threatened, and second, that he would then call both [of] the people he felt threatened by."

Umana argues that the ULJ's decision to credit K.F. was erroneous for three reasons. First, K.F. did not witness the May 27 conversation between A.N. and Umana. But the ULJ stated that K.F.'s testimony was based "in part" on first-hand knowledge. K.F. had first-hand knowledge about several key facts; for example, A.N. came to talk to K.F. about Umana's poor work performance, and K.F. authorized A.N. to send Umana home. K.F.

also spoke with Umana that day and told him to go home. Additionally, K.F. received Umana's May 28 voice message on the attendance hotline. We conclude that the record supports the ULJ's reasoning.

Second, Umana contends that FedEx testimony was based on hearsay, and he was the only witness who had first-hand knowledge of the conversation with A.N. on May 27. But a ULJ is not bound by the rules of evidence and "may 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. We conclude that it was reasonable for the ULJ to rely on testimony from K.F. and the HR business partner because each were familiar with Umana's discharge and the no call/no show policy.

Third, Umana argues, and DEED concedes, that the ULJ mischaracterized a portion of his testimony. Umana testified that "I'm a very peaceful person. I like [the] workplace, the job is done in a peaceful atmosphere." The ULJ interpreted this testimony to mean that it was "unlikely" Umana felt threatened by his manager's "tone" in a peaceful atmosphere. We agree that the ULJ misinterpreted Umana's testimony, but Umana does not point to any resulting prejudice. The ULJ did not rely heavily on this portion of Umana's testimony, and the record supports the ULJ's other reasons for crediting K.F. over Umana.

For the reasons discussed, the record supports the ULJ's factual and credibility determinations.

II. The ULJ did not err in concluding that Umana was ineligible for unemployment benefits because FedEx discharged him for employment misconduct.

Generally, an employee's refusal "to abide by an employer's reasonable policies and requests amounts to disqualifying misconduct." *Schmidgall*, 644 N.W.2d at 804. An employer has the right "to establish and enforce reasonable rules governing employee absences." *Cunningham v. Wal-Mart Assocs., Inc.*, 809 N.W.2d 231, 235 (Minn. App. 2011). A single unexcused absence from work may constitute misconduct. *Hanson v. Crestliner Inc.*, 772 N.W.2d 539, 543 (Minn. App. 2009).

Umana does not dispute that he violated the no call/no show policy or that the policy establishes a reasonable expectation of employee behavior. Rather, relying on the exception under Minn. Stat. § 268.095, subd. 6(b)(4), Umana argues that his violation of the policy was reasonable under the circumstances because: (1) management ordered him to go home on May 27, and "the issue" was "not resolved"; and (2) management's "actions" caused him "great fear."

Umana's "unresolved-issue" argument is raised for the first time on appeal as a reason for violating the absence policy. During the administrative proceeding and in his reconsideration request, Umana argued that he violated the absence policy because he felt afraid. We consider Umana's "unresolved-issue" argument because our review of the hearing transcript shows that Umana alluded to an unresolved issue with his supervisors, which he believed justified his unreported absences. The ULJ considered this testimony, but rejected it and found that Umana "chose not to work."

The record supports the ULJ's factual determination. Umana testified that he knew he needed to report any absence from his shift. Umana also testified that K.F. told him that he could "try and come back tomorrow, put a full effort in, we'd have you back again tomorrow." Additionally, Umana complied with the no call/no show policy on May 28, which demonstrates he knew he needed to report his absence, even if he believed there was an unresolved issue. Finally, K.F.'s testimony, which the ULJ credited, contradicts Umana's assertion that he told his supervisors on May 28 that he wanted to discuss the reasons for being sent home. Umana's claim is based solely on his own testimony, which the ULJ discredited.

Turning to Umana's second argument, the ULJ found that neither K.F. nor A.N. acted in a threatening manner towards Umana, and Umana's testimony that he felt afraid lacked credibility. The ULJ also concluded that, even if Umana's testimony were to be credited, he should have either "reported to work or reported his absences on June 1, 2, and 3." Because record evidence supports the ULJ's factual and credibility determinations, the ULJ did not err in concluding that FedEx discharged Umana for employment misconduct. In short, the ULJ did not err in its conclusion that a reasonable employee under the circumstances would have either reported to work or notified FedEx that he would be absent on June 1, 2, and 3. *Stagg*, 796 N.W.2d at 316 (concluding that employee's five attendance-policy violations constituted misconduct); *Cunningham*, 809 N.W.2d at 235 (same); *Wichmann*, 729 N.W.2d at 28 (affirming denial of benefits based on employment misconduct because employee "gave no notice of his absence"). Therefore, Umana is ineligible for unemployment benefits.

III. The ULJ adequately developed the record and assisted Umana in developing the record.

A ULJ must "ensure that all relevant facts are clearly and fully developed," and assist all parties in developing an adequate record. Minn. R. 3310.2921; *see also White*, 875 N.W.2d at 355–57 (remanding case to ULJ because ULJ did not assist appellant in developing record regarding a relevant fact). But unemployment hearings are adversarial in nature; the ULJ must not act as a party's advocate and must "maintain neutrality to assure fairness to all parties." *Stassen v. Lone Mountain Truck Leasing, LLC*, 814 N.W.2d 25, 32 (Minn. App. 2012).

Umana argues that the ULJ did not ask questions about his alternative reasons for violating the no call/no show policy and points to three ways in which the ULJ could have better developed the record. First, the ULJ did not ask Umana whether he believed he could return to work on June 1, 2, and 3. Umana testified that he did not know he could return to work on May 28. The ULJ then specifically asked Umana what he expected after he reported his absence on May 28, and whether he believed the employment relationship was over; Umana responded that he did not believe the relationship was over, but he was "afraid" to return to work. The ULJ also asked Umana about what K.F. had said to him on May 27, and Umana testified that K.F. told him to return if he could "work harder." We conclude the ULJ sufficiently developed the record regarding whether Umana reasonably expected that he could return to work.

Second, the ULJ did not ask whether Umana intended his May 28 voice message to act as "a type of 'standing call-in' or something similar." But Umana testified that he knew

that "if I am to be absent from a shift I would, I have called." Also, no record evidence indicates that FedEx allowed its employees to make a "standing call-in" for multiple absences.

Third, the ULJ did not ask K.F. about what he said in the three voice messages he left for Umana. Umana testified that he did not talk to anyone at FedEx after May 28. And no record evidence indicates that Umana received or listened to the voice messages. Moreover, Umana does not point to any reason why information about the June voice messages would affect the outcome. We conclude that the ULJ sufficiently developed the record on the relevant facts.

Umana also maintains that the ULJ interrupted him and prevented him from providing relevant testimony.[1] Umana relies on isolated portions of the record; for example, the ULJ told Umana he was getting "a little repetitive" when he testified that "the issue is scheduling," and the ULJ stopped Umana from questioning K.F. about employee retention because it was irrelevant to the eligibility determination. We conclude that the ULJ acted within its authority in controlling the hearing, and we discern no prejudice resulting from these evidentiary rulings. *See* Minn. R. 3310.2921 ("The unemployment law judge may limit repetitious testimony and arguments."); Minn. R. 3310.2922 ("An unemployment law judge may exclude any evidence that is irrelevant, immaterial, unreliable, or unduly repetitious."); *see also Stassen*, 814 N.W.2d at 32 (concluding that

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[1] Umana's reconsideration request and appellate brief contain terse references to a safety issue regarding "understaffing, high turnover, and poor morale." We conclude that the ULJ correctly rejected this issue as unsupported in the record.

the ULJ did not prejudice unrepresented relator by interrupting him during witness examination).

Umana next argues that "if the ULJ was going to rely so heavily on [A.N.'s] actions, it should have sua sponte granted a continuance until [A.N.] was available" to testify. *See* Minn. Stat. § 268.188(1) (2016) (stating that a ULJ may subpoena witnesses); Minn. R. 3310.2908 (stating that a ULJ may continue a hearing if "additional evidence is necessary for a proper result"); Minn. R. 3310.2914 ("The unemployment law judge may issue a subpoena even if a party has not requested one."). A.N. was scheduled to testify, but FedEx informed the ULJ at the beginning of the hearing that he was not available to testify. The ULJ informed the parties that they could request a continuance so that "relevant documents or witnesses can be presented by subpoena if necessary." Umana did not request such a continuance, and he does not point to any reason why A.N.'s testimony would change the outcome. The ULJ did not err by failing to sua sponte subpoena A.N.

In closing, we note that the record suggests that there were language difficulties during the administrative proceedings. For instance, in response to a question whether he quit or was discharged, Umana testified that he did not "know the full meaning of discharge." A ULJ "must provide an interpreter, when necessary, upon the request of a party." Minn. R. 3310.2911. Umana did not request an interpreter when given the option to do so and does not argue on appeal that the ULJ should have provided an interpreter. But even when a party does not request an interpreter, a ULJ "*must* continue any hearing where a witness or party needs an interpreter in order to be understood or to understand the proceedings." Minn. R. 3310.2911 (emphasis added). After reviewing the record, we

conclude that Umana's response alerted the ULJ to language difficulties, and the better practice would have been for the ULJ, at the very least, to have made additional inquiries and given Umana a second opportunity to request an interpreter.

For two reasons, we conclude that Umana received a fair hearing and that neither reversal nor remand is warranted. First, Umana did not raise language as a barrier either before this court or in his reconsideration request to the ULJ. At no point has Umana claimed that he did not understand the proceedings. Second, after reviewing the record as a whole, we conclude that Umana understood the proceedings and the questions asked. *See Lamah v. Doherty Emp't Grp.*, 737 N.W.2d 595, 602 (Minn. App. 2007) (concluding that remand was not necessary when relator did not request an interpreter, and the record as a whole demonstrated that he understood the proceedings); *see also Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 530 (Minn. App. 2007) (concluding that relator received a fair hearing because she did not request an interpreter and there was no indication that "she did not understand the proceedings, or that the ULJ did not understand her.").

Affirmed.