STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0374

Amber McCorison,
Relator,

vs.

Pizza Luce III, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed December 10, 2018
Affirmed
Smith, Tracy M., Judge

Department of Employment and Economic Development
File No. 35984257-3

Amber E. McCorison, Duluth, Minnesota (pro se relator)

Gina K. Janeiro, Jackson Lewis P.C., Minneapolis, Minnesota (for respondent-employer)

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

Considered and decided by Smith, Tracy M., Presiding Judge; Rodenberg, Judge; and Reilly, Judge.

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

SMITH, TRACY M., Judge

Relator Amber E. McCorison was discharged by her employer, respondent Pizza Luce III. She failed to participate in an evidentiary hearing and was found by an unemployment-law judge (ULJ) to be ineligible for unemployment benefits on the basis of employment misconduct. She now challenges the ULJ's order of affirmation denying her an additional hearing and affirming her ineligibility. Because McCorison did not present good cause for her failure to participate in the hearing or new evidence in satisfaction of statutory requirements, we affirm the ULJ's decision denying an additional hearing. In addition, because the record substantially supports the ULJ's findings of fact and there was no error in the legal conclusion, we affirm the ineligibility decision.

FACTS

McCorison worked in a kitchen for Pizza Luce III in Duluth before she was discharged in October 2017. A few weeks later, she submitted responses to an unemployment-insurance request for information. Explaining why she had been discharged, McCorison presented a short account of her altercation with a former coworker that had taken place on September 29, 2017. She wrote:

> [The former coworker] told me to calm down because I asked him not to walk through the expo area.[1] He crossed expo again and I told him again not to cross expo. He turned around and flung his hands in the air and said what are you going to do about it. As he walked away I said I should smack you. I did

[1] "Expo" is an abbreviation for a job position called expeditor. Employees who work in that position expedite food at the end of an oven. "Expo area" is where expeditors carry hot food.

> not mean or say that as a threat. He was directly breaking kitchen policy and causing a dangerous work environment by crossing the expo area and I was trying to remind him and he was treating me rudely. My comment was not made aggressively or in a threatening tone.

McCorison also noted that she would be sending "written statements from co-workers and previous management," but no such documents were submitted.

McCorison was administratively determined by the Minnesota Department of Employment and Economic Development (DEED) to be eligible for unemployment benefits. The determination found that McCorison's conduct was not disqualifying employment misconduct. Pizza Luce III appealed the determination. An evidentiary hearing before a ULJ was scheduled.

About three weeks before the hearing, a notice of hearing was sent to each party. The notices informed the parties that the hearing would be held by telephone conference call and that the ULJ would call the parties to participate in the hearing. The notice sent to McCorison stated: "The telephone number we currently have listed for you is 000-000-0000. If this is not correct, please log into your [online] account . . . to make any changes."

Enclosed with the notices was a document titled "Telephone Hearing Instructions." The instructions warned against failure to participate in the hearing:

> If you do not answer when the judge calls you, the judge will either dismiss your appeal or make a decision based on the information we have, including testimony from others who participated in the hearing. If you do not receive a phone call from the judge within 10 minutes of the start time, call the Appeals Office.

On the date of the hearing, the only phone number listed for McCorison was 000-000-0000. The ULJ managed to find a different number in the system and called that number, but the person answering the telephone stated that she did not know McCorison. McCorison did not participate in the hearing. Nothing in the record suggests, nor does McCorison argue, that she called the appeals office on the hearing date.

The Telephone Hearing Instructions also advised that the participants "should submit all evidence before the hearing." Pizza Luce III submitted an 11-page exhibit including (1) part of the Pizza Luce Employee Handbook, (2) McCorison's termination notice, and (3) her performance improvement plans. At the hearing, two representatives of Pizza Luce III testified, one of whom was the general manager at the restaurant where McCorison worked. The record does not contain any evidence submitted by McCorison.

Two days after the hearing, McCorison called DEED and said that she had not received a call for the hearing. She was told that DEED had not had "a phone number listed for her for the hearing" and that she would have to wait for the ULJ's decision.

The ULJ thereafter issued his decision. Based on the general manager's testimony and the documents submitted by Pizza Luce III, the ULJ found that "McCorison was discharged for a pattern of behavior of disrespect to coworkers and for calling a customer a 'f---ing idiot.'" Specifically, the ULJ found that McCorison "threatened" a coworker on September 29, 2017, saying, "I am going to strangle you" and "I am going to kill you." The ULJ considered but discredited McCorison's written statements to the contrary in her earlier responses to the request for information. The ULJ concluded that McCorison was

discharged due to employment misconduct and that she was therefore ineligible for unemployment benefits.

McCorison filed a request for reconsideration. In her request, McCorison wrote that she had not been contacted at her telephone number for the hearing. Further, she wrote: "I also have documentation stating why I was let go that contradicts information made by the Manager at Pizza Luce during the court process that leads me to believe false statements had been made." McCorison did not submit the "documentation" referred to in her request. In fact, the record does not contain any evidence submitted by McCorison in support of reconsideration.[2] The only information she provided to the ULJ was her paragraph-long comment in her request for reconsideration. The ULJ issued an order of affirmation denying an additional hearing and affirming his original decision.

This certiorari appeal follows.

D E C I S I O N

This court does not disturb a ULJ's findings of fact as long as there is evidence in the record that substantially supports them. *See Gonzalez Diaz v. Three Rivers Cmty. Action, Inc.*, 917 N.W.2d 813, 816 n.4 (Minn. App. 2018) (dismissing the supposed difference between the statutory standard of substantial evidence and the supreme court's standard of reasonable evidence). But the ULJ's interpretation of the unemployment

[2] In her submission to this court, McCorison endeavors to give further explanations of (1) why she did not participate in the hearing, (2) why the testimony at the hearing was false, and (3) why she was discharged from Pizza Luce III. These explanations are not part of the record on appeal and are therefore not considered in our analysis. *See Appelhof v. Comm'r of Jobs & Training*, 450 N.W.2d 589, 591 (Minn. App. 1990). ("[E]vidence which was not received below may not be reviewed as part of the record on appeal.").

statutes and the ULJ's ultimate decision whether an applicant is eligible for unemployment benefits is reviewed de novo. *Menyweather v. Fedtech, Inc.*, 872 N.W.2d 543, 545 (Minn. App. 2015).

I. The ULJ did not abuse his discretion in denying McCorison an additional hearing.

This court does not "reverse a ULJ's decision to deny an additional evidentiary hearing unless the decision constitutes an abuse of discretion." *Kelly v. Ambassador Press, Inc.*, 792 N.W.2d 103, 104 (Minn. App. 2010). A ULJ must order an additional hearing, and hence abuses his discretion if he denies it, when the party requesting reconsideration presents (1) good cause for his failure to participate in the original hearing or (2) new evidence in satisfaction of certain statutory requirements. Minn. Stat. § 268.105, subd. 2(c), (d) (2018).

A. McCorison did not have good cause for her failure to participate in the hearing.

Where a party who files a request for reconsideration "failed to participate in the hearing, the unemployment law judge must issue an order setting aside the decision and ordering an additional hearing if the party who failed to participate had good cause for failing to do so." Minn. Stat. § 268.105, subd. 2(d). "'Good cause' . . . is a reason that would have prevented a reasonable person acting with due diligence from participating in the hearing." *Id.*

McCorison argues that there was "good cause" because she was not contacted at her correct telephone number. The ULJ rejected this argument, saying that a reasonable person

acting with due diligence would have informed DEED of the correct telephone number after reading the notice of hearing.

The ULJ's decision is not an abuse of discretion. In *Eley v. Southshore Invs., Inc.*, the applicant mistakenly believed that the hearing was on a wrong date. 845 N.W.2d 216, 218 (Minn. App. 2014). And she was unable to confirm the hearing date from a document because "the [hearing date] did not print off with everything else" when she "tried to print out all of the necessary appeal documents." *Id.* at 219. However, Eley did not try otherwise to verify her mistaken belief. *Id.* at 219-20. She eventually failed to participate in the hearing. *Id.* at 218. Later, arguing that she missed the hearing for "good cause," Eley offered detailed explanations on why it had been too onerous for her to confirm the hearing date from sources other than the documents she printed out.[3] *Id.* at 219-20. This court held that none of Eley's explanations constituted "good cause." *Id.* at 220. That was because, "if the hearing [date] was not included in the printed documents, a reasonable person acting with due diligence would have logged back into the [online] system to confirm the hearing date or would have contacted DEED by telephone to confirm the date." *Id.*

Just like Eley could not confirm the hearing date from the printed documents, McCorison could not be assured that the ULJ would call her at her correct telephone number. In fact, the notice of hearing, which McCorison does not dispute that she read,

[3] To name a few, Eley explained that: (1) "she had been residing in different locations, which made the receipt of important mail very difficult;" (2) "she [did] not have Internet service readily available to her;" and (3) "DEED's website [was] only active from 6:00 a.m. or 7:00 a.m. until 6:00 p.m., which conflict[ed] with her work schedule and commuting times, so there [was] no time to log onto the website to check her account." *Id.*

gave clear indication that the ULJ would not be able to reach her because it said her only number on file was 000-000-0000. Moreover, McCorison never argued that she had difficulty accessing her online benefits account or otherwise communicating with DEED. Nothing prevented McCorison from seeking confirmation that the ULJ had her correct telephone number. If Eley did not have "good cause," McCorison did not, either. A reasonable person acting with due diligence in McCorison's circumstances would have been able to participate in the hearing.

B. McCorison did not present new evidence in satisfaction of the statutory requirements.

Apart from good cause for missing the evidentiary hearing, an additional hearing must be ordered if a party presents new evidence that satisfies statutory requirements, as follows:

> [An] unemployment law judge must order an additional hearing if a party shows that evidence which was not submitted at the hearing:
>
> (1) would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence; or
>
> (2) would show that the evidence that was submitted at the hearing was likely false and that the likely false evidence had an effect on the outcome of the decision.
>
> "Good cause" for purposes of this paragraph is a reason that would have prevented a reasonable person acting with due diligence from submitting the evidence.

Minn. Stat. § 268.105, subd. 2(c).

The only information McCorison presented to the ULJ in support of her request for reconsideration was her written statement comprising the request itself. Again, that

statement reads, in relevant part: "I also have documentation stating why I was let go that contradicts information made by the Manager at Pizza Luce during the court process that leads me to believe false statements had been made." The "documentation" that McCorison referenced was not submitted.

Because McCorison's statement has no corroborating evidence, whether it satisfies the statutory requirements must ultimately depend on its credibility. In this case, the ULJ found the general manager's testimony regarding McCorison's discharge more credible than the statements from McCorison. This court "gives deference to [a] ULJ's credibility determinations." *Cunningham v. Wal-Mart Assocs., Inc.*, 809 N.W.2d 231, 235 (Minn. App. 2011). McCorison's bare assertion that she has information that contradicts testimony that the ULJ found credible does not constitute new evidence in satisfaction of the requirements of Minn. Stat. § 268.105, subd. 2(c).

In sum, the ULJ was not required to give, and thus did not abuse his discretion by denying, McCorison an additional hearing under Minn. Stat. § 268.105, subd. 2(c) or (d).

II. The ULJ did not err in deciding that McCorison is ineligible for unemployment benefits.

Minn. Stat. § 268.095, subd. 4(1) (2018) provides that an employee discharged because of "employment misconduct" is not eligible for unemployment benefits. Employment misconduct includes "any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly . . . a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee." *Id.*, subd. 6(a).

The ULJ found that "McCorison was discharged for a pattern of behavior of disrespect to coworkers and for calling a customer a 'f---ing idiot.'" Based upon his findings of fact, the ULJ concluded that McCorison engaged in employment misconduct.

A. The evidence in the record substantially supports the ULJ's findings of fact.

The ULJ's specific findings of fact relevant to the employment-misconduct determination are as follows: (1) "on November 12, 2016, McCorison shouted at a coworker in the kitchen" and received a written warning about the incident; (2) on September 29, 2017, she threatened a coworker stating "I am going to strangle you" and "I am going to kill you"; (3) on September 29, 2017, she called a customer a "f---ing idiot"; and (4) the general manager verbally warned McCorison ten times that "she should keep her voice down and be respectful."

These findings of fact are drawn directly from the general manager's testimony and the performance improvement plans. The only countervailing evidence is the written statements from McCorison that the ULJ found to be less credible. Given the deference due to the ULJ's credibility determination, not only is there evidence in the record supporting the ULJ's fact-finding, but the record consists mostly of such evidence. The ULJ's findings of fact should not be disturbed.

B. The findings of fact warrant the legal conclusion that McCorison engaged in employment misconduct.

"As a general rule, refusing to abide by an employer's reasonable policies and requests amounts to [employment] misconduct." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

According to the Pizza Luce Employee Handbook, Pizza Luce employees are expected to hold themselves to standards of conduct that include: (1) "[t]reating all customers, visitors, and coworkers in a courteous manner" and (2) "[r]efraining from behavior or conduct deemed offensive or undesirable." These policies are reasonable; they are directly related to the workplace environment and customer experience that Pizza Luce provides as a restaurant.

And there can be little doubt that McCorison seriously violated Pizza Luce's reasonable policies on September 29, 2017, by threatening her coworker and insulting a customer. Moreover, before the incident on September 29, 2017, she received multiple warnings—one written and ten verbal—regarding similar behaviors implicating the same policies. "[W]hen there are multiple violations of the same rule involving warnings or progressive discipline," it is particularly true that the employee's failure to abide by the rule constitutes employment misconduct. *Schmidgall*, 644 N.W.2d at 806-07.

In sum, the ULJ did not err in deciding that McCorison is ineligible for the unemployment benefits.

Affirmed.