STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0455

Christopher Herkal,
Relator,

vs.

Employer Solutions Staffing Group II,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed December 24, 2018
Affirmed
Schellhas, Judge

Department of Employment and Economic Development
File No. 35933492-3

Christopher J. Herkal, Plymouth, Minnesota (pro se appellant)

Employer Solutions Staffing Group II, Eden Prairie, Minnesota (respondent employer)

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

Considered and decided by Schellhas, Presiding Judge; Reilly, Judge; and Florey, Judge.

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

SCHELLHAS, Judge

On certiorari appeal, relator challenges the unemployment-law judge's decision that he is ineligible for unemployment benefits. We affirm.

FACTS

The record clearly reflects that relator Christopher Herkal has a solid and commendable work history. Through no fault of his own, in February 2015, after 16 years of employment, Ameriprise laid off Herkal from his position as a "mail machine operator." In October 2015, Herkal became employed by Adecco, a staffing service, and Adecco assigned him to work at Life Fitness as a "machine operator." Herkal's work at Life Fitness ended in March 2016. Herkal became employed at Atlas Staffing on July 11, 2016. Atlas Staffing assigned Herkal to Proto Labs, where he worked as a "general laborer" until July 31, 2016, and was then "let go."

On July 31, 2016, Herkal established a benefit account with respondent Minnesota Department of Employment and Economic Development (DEED). On August 8, 2016, he began working for respondent Employer Solutions Staffing Group II (ESSG), which partnered with Visions Staffing as ESSG's "recruiting agent." According to Herkal, Visions Staffing informed him that CLP Graphics (CLP) "needed a machine operator," but when he reported for work at CLP, he discovered that he was unfamiliar with their type of equipment and that a suitable title for the position was "general laborer." But Herkal nevertheless took the job because he had been out of work for a week.

On August 9, 2016, Herkal received a call from a different staffing agency, Semper International, and learned of a "mail machine operator" job, which "better fit [his] skillset." Herkal scheduled an interview with that company the following week, and on August 11, informed ESSG that the "next day would be his last." Although on August 12, Herkal quit his employment with ESSG "[f]or another job," Semper International ultimately did not offer him a job.

Herkal was unemployed from August 12, 2016 until September 26, 2016, when he started employment with a new staffing service. In the meantime, Herkal received unemployment benefits, but DEED subsequently determined that he was ineligible for unemployment benefits because he quit his employment with ESSG and no exception to ineligibility applied. DEED therefore determined that Herkal had been overpaid unemployment benefits.

Herkal appealed DEED's determination of ineligibility, and an unemployment-law judge (ULJ) found that Herkal quit his employment with ESSG and concluded that "[n]o exceptions to ineligibility apply." The ULJ therefore decided that Herkal was ineligible for unemployment benefits for the disputed period. Upon reconsideration, a different ULJ issued new findings but affirmed the decision that Herkal was ineligible for unemployment benefits for the disputed period.

This certiorari appeal follows.

D E C I S I O N

In reviewing a ULJ's decision, this court may affirm, 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 in violation of constitutional provisions, in excess of the statutory authority or jurisdiction of DEED, made upon unlawful procedure, affected by other error of law, unsupported by substantial evidence in view of the entire record as submitted, or arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d) (2018).

Whether an employee quit employment is a question of fact for a ULJ to determine. *Posey v. Securitas Sec. Servs. USA, Inc.*, 879 N.W.2d 662, 664 (Minn. App. 2016). We review factual findings in the light most favorable to the ULJ's decision. *Wilson v. Mortg. Res. Ctr.*, 888 N.W.2d 452, 460 (Minn. 2016). We will not disturb a ULJ's factual findings "as long as there is evidence in the record that reasonably tends to sustain them." *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011).

An individual who quits employment is ineligible for all unemployment benefits unless an exception applies. Minn. Stat. § 268.095, subd. 1 (2018). One exception applies if an employee quits "within 30 calendar days of beginning the employment and the employment was unsuitable." *Id.*, subd. 1(3). Another exception applies if an employee quits "because of good reason caused by the employer." *Id.*, subd. 1(1). A good reason to quit caused by an employer "is a reason: (1) that is directly related to the employment and for which the employer is responsible; (2) that is adverse to the worker; and (3) that would compel an average, reasonable worker to quit and become unemployed rather than remaining in the employment." *Id.*, subd. 3(a) (2018).

Herkal argues that "he had good cause under the statute" to quit his employment with ESSG because ESSG misrepresented the job description as a machine operator when

in fact the job title was that of general laborer. But on reconsideration, the ULJ found that the "preponderance of the evidence shows that Herkal did not quit because of a good reason caused by the employer. Herkal quit because he wanted to pursue a potential job opportunity with Semper." The record reasonably supports the ULJ's finding.

Although Herkal initially testified that he "left employment at [ESSG] because it was unsuitable for [his] work skills and what [he] was told it would be," he later testified that he quit because he "wanted to pursue other opportunities" with Semper International. And Herkal said yes, when asked if he would have "continued working at [ESSG]" if the "Semper [International] job never came along." In fact, Herkal admitted that he "would not have quit just because [he was] making silk screening," and that he would have kept working at CLP "until the assignment ended," if "no other opportunities came up." Herkal's testimony establishes that he quit his employment to pursue a potential job opportunity with Semper International, and that he did not quit because of a reason caused by his employer. The exception for a quit because he had a good reason caused by the employer therefore does not apply.

Herkal also contends that his employment was unsuitable "based on his extensive experience and training for sixteen years as a mail machine operator, his lack of training or experience as a silk screen employee, and his good prospects of finding work in his field." We disagree. The supreme court has explained that the unsuitability exception to benefit ineligibility is premised on the public policy that "a person receiving unemployment compensation benefits should not be penalized for taking an unsuitable job for a short time," and that a "contrary holding would discourage those persons receiving benefits from

attempting any job that was not technically suitable within the statutes." *Valenty v. Med. Concepts Dev., Inc.*, 503 N.W.2d 131, 134 (Minn. 1993) (footnote and quotation marks omitted). Employment is deemed suitable if it is "in the applicant's labor market area [and] is reasonably related to the applicant's qualifications," in light of "the degree of risk involved to the health and safety, physical fitness, prior training, experience, length of unemployment, prospects for securing employment in the applicant's customary occupation, and the distance of the employment from the applicant's residence," with primary emphasis on "the temporary or permanent nature of the applicant's separation from employment and whether the applicant has favorable prospects of finding employment in the applicant's usual or customary occupation at the applicant's past wage level within a reasonable period of time." Minn. Stat. § 268.035, subd. 23a(a), (b) (2018). Employment is deemed unsuitable if "the wages, hours, or other conditions of employment are substantially less favorable than those prevailing for similar employment in the labor market area." *Id.*, subd. 23a(g)(2) (2018). The supreme court has clearly stated that "the commissioner [of DEED] is vested with wide discretion in determining whether offered work is 'suitable' for a particular individual."[1] *Di Re v. Cent. Livestock Order Buying Co.*, 74 N.W.2d 518, 526 (Minn. 1956).

Herkal argues that the ULJ erred by deciding that he is ineligible to receive unemployment benefits because the "undisputed evidence shows that [ESSG's] general

[1] Although renumbered, the suitability statute at issue in *Di Re* is substantially similar to the suitability statute at issue here. *Compare* Minn. Stat. § 268.09, subd. 1(5) (1954) *with* Minn. Stat. § 268.035, subd. 23a (2018).

laborer job was unsuitable." To support his claim, Herkal makes much of the fact that ESSG represented that the position at CLP was a machine operator when, in fact, the position was a general laborer. But suitability "is not a function of whether there was a gap between what was promised and what was given due to misrepresentation by the employer." *See Holbrook v. Minn. Museum of Modern Art*, 405 N.W.2d 537, 540 (Minn. App. 1987) (stating that whether employer's offer was reasonable or fair is not relevant to eligibility determination), *review denied* (Minn. July 15, 1987).

Here, the record reflects that Herkal's position as a general laborer through ESSG is reasonably related to his prior positions as a machine operator and general laborer. For example, Herkal testified that the title of his position at Proto Labs was "machine operator," but that he did not actually work on a machine, instead performing general labor by using sandpaper to "[s]and down the piece of metal to smooth it out." Similarly, he testified that his duties at CLP were "called silk screening," which involved general labor and operating a machine. And he specifically testified that his duties at CLP involved putting "paint on plastic signs . . . like for political signs that people put in their yards," and that CLP has "machines that splatter out paint and stuff in certain patterns." Although Herkal did not provide any details of his duties as a mail machine operator, both his prior position as a mail machine operator and his position through ESSG required him to operate machines and perform general labor, which is within his qualifications and skill-set. Moreover, Herkal's positions as general laborer and mail machine operator paid substantially similar wages, somewhere between 13 and 16 dollars per hour. And the record contains no indication that the conditions of employment were unsuitable.

Finally, the record reflects that in July 2016, Herkal worked at Proto Labs for about three weeks as a "general laborer." Herkal did not quit that job due to unsuitability; he acknowledged that he was "let go" from that position. The fact that he did not quit his employment at Proto Labs as a general laborer indicates that the position through ESSG as a general laborer was not unsuitable. Viewing the evidence in the light most favorable to the ULJ's decision, we conclude that the ULJ properly determined that Herkal was ineligible for unemployment benefits because the position provided through ESSG was not unsuitable for Herkal.

Affirmed.