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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0276

Loralyn R. Brandt,
Relator,

vs.

LaMettry's Collision Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed September 23, 2019
Affirmed
Cochran, Judge

Department of Employment and Economic Development
File No. 36788220-3

Loralyn R. Brandt, Hastings, Minnesota (pro se relator)

LaMettry's Collision Inc., Inver Grove Heights, Minnesota (respondent employer)

Munazza Humayun, Anne B. Froelich, St. Paul, Minnesota (for respondent department)

Considered and decided by Larkin, Presiding Judge; Cochran, Judge; and Kalitowski, Judge.[*]

[*] 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

COCHRAN, Judge

Relator Loralyn R. Brandt challenges the decision of an unemployment-law judge (ULJ) that she is ineligible for unemployment benefits. Brandt argues that she was deprived of due process, that the ULJ failed to support her credibility determinations, and that the ULJ erred in concluding that Brandt was discharged for employment misconduct. Because we conclude that Brandt was not deprived of due process, that the ULJ properly explained her credibility determinations, and that substantial evidence in the record supports the ULJ's conclusion that Brandt was discharged for employment misconduct, we affirm.

FACTS

From April 24, 2018 to September 11, 2018, Brandt worked as a detailer for LaMettry's Collision, an automotive repair shop. Brandt was a full-time, hourly employee before she was discharged.

Brandt and Steve Daniel, LaMettry's chief financial officer (CFO), testified during the unemployment-benefits hearing. Daniel testified that LaMettry's has a written policy requiring every employee who works eight or more consecutive hours to take an unpaid one-hour lunch break and to punch out for that lunch break. Employees are also expected to take two additional 15-minute paid breaks, one in the morning and one in the afternoon. Every new employee attends orientation, which covers LaMettry's break policy. Brandt received a manual containing the policy and testified that she read the manual, but did not

remember whether the policy was in the manual.[1] Brandt testified that, when she first interviewed for a job at LaMettry's, she told her interviewers that she only could take half-hour lunch breaks, rather than the standard one-hour lunch breaks. She testified that she made this request because of her childcare needs. She further testified that the interviewers told her that would not be a problem.

Daniel testified that LaMettry's makes efforts to enforce the break policy. Daniel acknowledged that the policy is not always followed, but he stated that when management finds out that an employee is not following the policy, management does force the employee to follow the policy. Daniel noted that all employees need to take breaks during the day and that it is a problem when management asks an individual to follow the policy and that person nevertheless defies it. Daniel testified that it creates a problem for LaMettry's because LaMettry's can get into trouble if it does not "provide time for breaks *and document that*." (Emphasis added.)

On August 29, 2018, a manager confronted Brandt about the requirement that she take a lunch break. Brandt responded that she did not want to take an unpaid lunch break because she had missed shifts earlier that week and wanted to work through lunch to add additional paid hours to increase her paycheck, which she relied on to pay her mortgage.

The record includes Brandt's time cards starting July 27, 2018. From July 27 to August 28, Brandt worked six or more hours 16 times, including 10 instances in which she

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[1] Daniel testified that LaMettry's has an "employee manual." The ULJ later asked Brandt whether she received and read the "employee handbook," and Brandt responded that she did. It appears that these comments refer to the same document.

worked eight or more hours. Brandt punched out for lunch breaks only three times during that time frame, all on days that she worked fewer than eight hours. Beginning August 29, Brandt took a lunch break on each of the four occasions that she worked at least eight hours. Her breaks on those days varied in length, lasting 40 minutes, 30 minutes, one hour, and 20 minutes.

Daniel initially testified that Brandt was told that this was a problem in July 2018. Upon further questioning, Daniel stated, "I don't know if it was July. It's probably incorrect [to say it was July] but it was well before that though because on the 28th of August is when [Brandt's supervisor] brought it to my attention that [Brandt was not] following that policy." On September 7, 2018, Brandt emailed Daniel to complain about the breaks, writing, "So if I have to take Forced breaks! Why is it no one helps or fills in for those times but if some one . . . leaves for lunch I'm supposed to fill in where he didn't finish." Daniel responded that all employees need to take breaks and that he would speak to her about other ongoing issues the next week.

On September 11, 2018, LaMettry's discharged Brandt based on a variety of factors, including her objections to taking assigned work breaks. Brandt applied for unemployment benefits, and a hearing was held before the ULJ. During the hearing, Brandt argued that she was actually discharged due to a sexual-harassment complaint that she had made. The ULJ did not find Brandt credible, credited Daniel's testimony, and expressly found that "Brandt was not discharged because she complained about sexual harassment."[2] The ULJ

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[2] On appeal, Brandt discusses the alleged harassment, but does not argue that the ULJ erred in finding that she was not discharged due to her sexual-harassment complaint.

found that Brandt was discharged based on her objections to taking breaks, among other reasons. The ULJ concluded that Brandt's objections to taking breaks, as well as the other bases for her discharge, did not amount to employment misconduct. The ULJ reasoned that, although Brandt complained about the requirement to take lunch breaks, she complied with the directive starting August 29.

Following the ULJ's determination, LaMettry's filed a request for reconsideration, arguing that Brandt was aware of LaMettry's lunch break policy and that she ignored the policy for several weeks. After reconsidering the evidence in the record from the original hearing, the ULJ modified her determination and concluded that Brandt's "failure to take lunch breaks on multiple occasions does amount to employment misconduct." Based on her conclusion that Brandt was discharged for employment misconduct, the ULJ determined that Brandt was not eligible for unemployment benefits under Minn. Stat. § 268.095, subd. 4(1) (2018).

This appeal follows.

D E C I S I O N

Brandt argues that she was deprived of due process, that the ULJ failed to support her credibility determinations, and that the ULJ erred in concluding that Brandt was discharged for employment misconduct. When reviewing a ULJ's decision, this court may affirm or remand for further proceedings, "or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced" because, among other reasons, the decision is affected by an error of law or is unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2018). When we review a ULJ's

determination on eligibility for unemployment benefits, we view "findings of fact in a light most favorable to the decision, and will not disturb the findings so long as there is evidence in the record that substantially supports them." *Gonzalez Diaz v. Three Rivers Cmty. Action, Inc.*, 917 N.W.2d 813, 815-16 (Minn. App. 2018). We review the ULJ's interpretation of the unemployment statutes and the ultimate question of whether the relator is eligible to receive unemployment benefits de novo. *Id.* at 816. If an error by the ULJ did not prejudice Brandt, then the error does not provide a basis for reversal. *See* Minn. Stat. § 268.105, subd. 7(d) (stating that we may reverse the ULJ "if the substantial rights of the petitioner may have been prejudiced"); Minn. R. Civ. P. 61 (stating that harmless error is to be ignored). We consider Brandt's various claims of error in turn.

I. Brandt was not deprived of due process.

Brandt first argues that her due-process rights were violated by the manner in which the request for reconsideration was handled. The statute governing requests for reconsideration provides that "[u]pon a request for reconsideration having been filed, the chief unemployment law judge must send a notice, by mail *or* electronic transmission, to all parties that a request for reconsideration has been filed." Minn. Stat. § 268.105, subd. 2(b) (2018) (emphasis added).

Brandt asserts that her online account at UIMN.org[3] did not contain notice of the request for reconsideration and that she was not aware of the request for reconsideration until after the ULJ issued her second decision, which determined that Brandt was ineligible

[3] UIMN.org is the official website of the Minnesota Unemployment Insurance Program, administered by the Department of Employment and Economic Development (DEED).

for benefits. Brandt argues that because she was not aware of the request for reconsideration, she was not able to argue against the request. Brandt does not allege that notice of the request for reconsideration was never mailed to her by DEED.

In response to Brandt's argument, DEED asserts that it mailed notice of the request for reconsideration to Brandt. DEED included a copy of the notice addressed to Brandt in the addendum to its brief. The notice of the request for reconsideration lists the same address for Brandt as all the other filings in this case, including her appellate brief.

While DEED did not include the notice in the record on appeal, it appears that the notice was omitted from the record by accident. Further, Brandt did not object to the inclusion of the notice in the addendum to DEED's brief. For these reasons, we will, on our own initiative, consider the notice of the request for reconsideration addressed to Brandt to be part of the record on appeal. *See* Minn. R. Civ. App. P. 110.05; *Stanek v. A.P.I., Inc.*, 474 N.W.2d 829, 832 (Minn. App. 1991) (declining to strike documents from a party's brief, despite the absence of those documents from the official record, based on the conclusion that the documents were actually presented to the district court), *review denied* (Minn. Oct. 31, 1991).

The statute governing reconsideration only requires that the chief ULJ provide notice "either by mail *or* electronic transmission." Minn. Stat. § 268.105, subd. 2(b) (emphasis added). The statute does not require DEED to provide electronic notice of the request for reconsideration. *Id.* We conclude that DEED complied with this statute by mailing the notice of the request for reconsideration to Brandt at her address on file with DEED.

Brandt relies on *Anderson v. Moberg Rodlund Sheet Metal Co.* to argue that this case should be reversed and remanded. 316 N.W.2d 286 (Minn. 1982). In *Anderson*, the supreme court reversed where an employer appealed an unemployment-benefits decision, but the employer's notice of appeal, containing the basis for the employer's appeal, was never sent to the employee. *Id.* at 288.

Anderson is inapposite because, in that case, notice was never sent. *Id.* As noted above, Brandt does not allege that DEED did not mail the notice to her, rather she contends that she was unaware of it. Also, Brandt's online appeal of DEED's initial determination of ineligibility included a notice informing Brandt that she needed to keep her contact information up to date and required Brandt to verify her current address. The notice also stated that "[e]ven after you stop requesting payments, your account may be reviewed or we may need to contact you for other reasons. If we can't reach you, determinations may be made without your input." Thus, Brandt was on notice that she had to maintain her current address and that DEED could mail important notices to her address. Brandt's assertion that she was not aware of the request for reconsideration is insufficient to support her claim that DEED failed to provide her notice as required by the statute and thereby violated her due-process rights.

II. The ULJ made explicit credibility determinations supported by the record.

Minnesota law requires the ULJ to set out the reason for crediting or discrediting testimony "[w]hen the credibility of a witness testifying in a hearing has a significant effect on the outcome of a decision." Minn. Stat. § 268.105, subd. 1a(a) (2018). "Credibility 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).

Brandt argues that the ULJ failed to support her credibility determinations. DEED counters that the ULJ made explicit credibility determinations that are supported by the record.

Our review of the ULJ's order after reconsideration shows that the ULJ made express credibility determinations and set out the reasons for those determinations. The ULJ found Daniel credible, noting that his testimony was forthcoming and sincere and that Daniel provided detailed testimony, including specific dates. The ULJ found that Brandt's testimony was exaggerated, inconsistent, and misconstrued Daniel's testimony. The ULJ noted that Brandt testified that LaMettry's agreed that she did not have to follow LaMettry's break policy, but Brandt did not reference this alleged agreement when complaining to Daniel about being forced to take breaks. We conclude that the ULJ set out her reasons for her credibility determinations in accordance with Minn. Stat. § 268.105, subd. 1a(a).

Brandt further contends that the ULJ's credibility determinations were based on erroneous findings or flawed reasoning. For example, Brandt argues that the ULJ erred by considering that Daniel offered a specific date for when he found out about Brandt's complaint in determining that he was credible. Brandt argues that she also provided a specific date for initially making the sexual-harassment complaint to her supervisor. But the ULJ's order does not indicate that the ULJ disregarded Brandt's assertion that she first told a supervisor about the alleged harassment on June 20, 2018, as she testified. Rather,

the ULJ's order references the date that Daniel, the CFO, found out about the alleged harassment to credit his testimony that the alleged harassment occurred well before Brandt was discharged and that her complaint did not lead to her discharge. The ULJ's order specifically notes Brandt's testimony that she initially complained in June; that Daniel found out about the complaint, investigated it, and took action in response to it in July; and that Brandt did not provide an explanation for why the complaint led to her firing in September.

Similarly, Brandt argues that the ULJ erred by concluding that she was not credible when she testified that she had an agreement with LaMettry's that she did not have to follow the break policy. Brandt argues that she testified only that she *believed* there was such an agreement, not that the agreement existed. Brandt testified that, on the day she interviewed, she told her interviewers that she could not take a full hour break and "[t]hey said they didn't have an issue with that." Based on our review of the record, we conclude that the ULJ properly characterized Brandt's testimony as a statement that an agreement existed. But, even accepting Brandt's assertion that she only testified that she believed an agreement existed, Brandt's argument misses the point of the ULJ's analysis. The ULJ found the testimony not credible because Brandt did not reference the alleged agreement in written emails she sent to Daniel complaining about the policy on September 7, 2018. The ULJ's reasoning that Brandt would have mentioned the agreement, if it existed, applies equally whether Brandt testified that the agreement actually existed or only that she believed that the agreement existed.

In sum, the ULJ made express credibility findings, and supported those findings with specific references to the record. We see no error in the ULJ's credibility determinations, and we must defer to those determinations. *See Bangtson*, 766 N.W.2d at 332.

III. The ULJ did not err in concluding that Brandt was discharged for employment misconduct.

Brandt argues that the ULJ erred in concluding that her conduct constituted misconduct. Employment misconduct includes "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." Minn. Stat. § 268.095, subd. 6(a)(1) (2018). "Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law." *Id.* (quotation omitted). "Determining whether a particular act constitutes disqualifying misconduct is a question of law that we review de novo." *Id.*

In the decision after reconsideration, the ULJ concluded that "Brandt's failure to take lunch breaks on 10 occasions seriously violated the standards of behavior LaMettry's had the right to reasonably expect because she failed to comply with a reasonable directive required by law." Brandt argues that the ULJ erred by stating that LaMettry's break policy was "a reasonable directive required by law." As Brandt notes, Minn. Stat. § 177.254, subd. 1 (2018), provides that "[a]n employer must permit each employee who is working for eight or more consecutive hours sufficient time to eat a meal." The statute also provides that "[n]othing in this section requires the employer to pay the employee during the meal

break." *Id.*, subd. 2 (2018). While the statute requires LaMettry's to offer an employee time to eat if the employee works eight or more consecutive hours, it does not require an employee to accept that opportunity.[4] Thus, the ULJ erred in stating that mandatory lunch breaks are "required by law."

Although we agree with Brandt that the law does not require mandatory lunch breaks, we nevertheless conclude that LaMettry's policy of requiring employees who work eight or more hours on a shift to take an unpaid lunch break is a reasonable policy for LaMettry's. Daniel testified that LaMettry's needs to document lunch breaks to ensure compliance with legal regulations. Daniel also testified that employees "need to take breaks during the day." Requiring employees to take lunch breaks, and to punch out and back in, is a reasonable way for LaMettry's to ensure that employees are provided a lunch break and to document the length of the lunch break in case of any future litigation. We conclude that LaMettry's has the right to reasonably expect employees to take lunch breaks when working a shift of eight or more hours.

Next we must determine whether Brandt's conduct constituted a "serious violation" of LaMettry's break policy. The supreme court has stated that "an employee's decision to violate knowingly a reasonable policy of the employer is misconduct." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 806 (Minn. 2002). The supreme court noted that "[t]his is particularly true when there are multiple violations of the same rule involving warnings or progressive discipline." *Id.* at 806-07.

[4] Neither the ULJ in her decision, nor DEED in its brief, cite to any other law that would require LaMettry's to force employees to take a lunch break.

In this case, there is substantial evidence in the record, including Brandt's own testimony that she was aware of the policy. Daniel testified that the policy was covered during Brandt's orientation and that it was included in a written employee manual, which Brandt acknowledged receiving and reading. Although Brandt testified that she did not remember whether the policy was in the manual, she testified that she discussed the need to limit her lunch breaks to half an hour during her initial interview with LaMettry's. Thus, by her own testimony, Brandt was aware of the policy requiring breaks and believed that she had an agreement in place to take only half-hour lunch breaks. Despite this knowledge, Brandt did not punch out for lunch on any of the ten days that she worked for more than eight hours between July 27, 2018, and August 29, 2018. Furthermore, even after Brandt was reprimanded on August 29, 2018 for not taking breaks, she continued to take lunch breaks that were under an hour, even when she worked more than eight hours. Thus, the record supports the ULJ's determination that Brandt knew about the break policy and repeatedly violated it.

While the record supports the ULJ's conclusion that Brandt engaged in employment misconduct, Brandt argues that this court should reverse the ULJ's order after reconsideration and reinstate the ULJ's original decision because the ULJ's order after reconsideration includes an erroneous description of one piece of Daniel's testimony. That testimony relates to when Brandt was reminded by her supervisor about the need to take breaks. As Brandt notes, the ULJ's memorandum states that Daniel "specifically testified that after she was asked to take breaks in July, she defied the directive for two months." At the hearing, Daniel did testify in this manner but later equivocated as to the exact date

that Brandt was reminded of the need to take breaks. After additional questioning, he stated, "I don't know if it was July. It's probably incorrect [to say it was July] but it was well before that though because on the 28th of August is when [Brandt's supervisor] brought it to my attention that [Brandt was not] following that policy."

The ULJ's reference to July in the memorandum is inconsistent with Daniel's later testimony. But in the findings of fact section of the ULJ's order on reconsideration, the ULJ found more generally that "Brandt was aware of [the break] policy" and that in "the summer of 2018, management counseled Brandt on the need to take lunch breaks." These findings are consistent with Daniel's testimony. Furthermore, the other substantial evidence discussed above supports the ULJ's findings that Brandt knew about LaMettry's break policy and, nevertheless, repeatedly violated the policy. Where the findings necessary for a legal conclusion are adequately supported, a court's inclusion of other unsupported findings is harmless error. *Hanka v. Pogatchnik*, 276 N.W.2d 633, 636 (Minn. 1979). We conclude that the ULJ's error in referencing the July date is harmless error and is not a basis for reversal. *See* Minn. Stat. § 268.105, subd. 7(d) (stating that we may reverse the ULJ "if the substantial rights of the petitioner may have been prejudiced"); *see also Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 237 N.W.2d 76, 78 (Minn. 1975) (stating that to prevail on appeal, the appellant must show both error and prejudice resulting from the error).

For the reasons discussed above, we conclude that substantial evidence in the record supports the ULJ's finding that Brandt repeatedly and knowingly violated LaMettry's lunch break policy. We further conclude that Brandt's repeated, knowing violation of the

policy constituted employment misconduct. Accordingly, the ULJ did not err in concluding that Brandt was not eligible for unemployment benefits because she was discharged for employment misconduct.

Affirmed.