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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0118
A20-0352**

Don Modeen,
Relator,

vs.

Meribel Enterprises LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed December 14, 2020
Affirmed
Connolly, Judge**

Department of Employment and Economic Development
File No. 36561782-6

Davida S. McGhee, Greene Espel, Minneapolis, Minnesota (for relator)

Meribel Enterprises LLC, Minneapolis, Minnesota (respondent employer)

Anne B. Froelich, Keri A. Phillips, Department of Employment and Economic
Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Connolly, Presiding Judge; Reyes, Judge; and Gaïtas,
Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Relator challenges an unemployment-law judge's (ULJ) determination that he was not "available for suitable employment" as defined in Minn. Stat. § 268.085, subd. 15 (2018). Relator also challenges a second ULJ's determination that relator owes respondent Department of Employment and Economic Development (DEED) a debt in the amount of \$4,275 that is properly recoverable under the Minnesota Revenue Recapture Act, Minn. Stat. § 270A.03 (2018 & Supp. 2019). We affirm.

FACTS

Don Modeen (Relator) worked for Meribel Enterprises LLC (Meribel), a custom sheet metal fabrication shop located in Minneapolis, from September 20, 2010, to November 16, 2017. He worked the second shift, from 2:30 p.m. to 1:00 a.m., four days a week. He earned \$25.26 per hour.¹ Relator commuted from his home in Elk River, which was 40 miles each way. On November 1, 2017, Meribel informed relator that it was ending his second-shift position and opening up a position on the first shift for him. Relator did not want to work the first-shift position. Relator wanted to remain on the second shift because his wife had multiple sclerosis (MS); the commute would take an hour and a half each way and relator and his wife "were not comfortable with [her] being 'on her own' in the morning." Initially, Meribel and relator agreed that relator would continue work on the second shift through the end of 2017, but that relator was not accepting the first-shift

¹ This includes a \$0.65 premium for working the second shift.

position. Meribel “changed its mind” on November 17, 2017 and “did not want [relator] to work through the rest of the year.” Relator did not go to work after that date.

Relator applied for unemployment benefits beginning on November 19, 2017. On June 13, 2018, an evidentiary hearing was held to determine whether relator was eligible for unemployment and whether he was “available for and actively seeking suitable employment” under Minn. Stat. § 268.085, subs. 1, 15 (2018). At the hearing, relator testified about his wife’s MS, his preference to be home in the mornings, and his unwillingness to work further than 20 miles from home on the first shift. He was actively applying to jobs that were located within 10 to 20 miles from his home. He testified that he also applied to jobs that were “too far away,” i.e. greater than 20 miles from home. The ULJ determined that relator quit his job. The ULJ also found that relator was “not available for suitable employment” because he was “not available for work located more than a 20-minute drive from his home.” Relator filed a request for reconsideration on July 6, 2018. On September 5, 2018, the ULJ issued an Order of Affirmation. On October 2, 2018, relator filed an appeal with this court.

In an unpublished opinion on June 17, 2019, this court determined that the ULJ’s finding that relator “quit” was not supported by substantial evidence and reversed the ULJ’s determination on that issue. *Modeen v. Meribel Enterprises, LLC*, A18-1610, 2019 WL 2495655 (Minn. App. June 17, 2019). This court further determined that substantial evidence did not support the finding that relator was not available for work, and that the ULJ failed to make any findings regarding relator’s labor market area. This court remanded for the ULJ to “(1) make findings regarding [relator’s] labor market area and (2) determine

whether [relator's] 20-mile limitation is a restriction that renders him unavailable for suitable employment based on his labor market area." *Id.* at *5.

The ULJ held a hearing August 2019 pursuant to the remand order and issued a second decision. The ULJ determined that relator's labor market area was "Sherburne, Anoka, Wright, Hennepin, Benton, and Stearns counties." In these counties, between November 2017 and November 2018, there were 18,627 manufacturing openings; 65% of these paid at least \$50,000 annually. The average commute was 33 minutes, and nearly half of all residents left for work between 6:00 a.m. and 8:00 a.m. Accordingly, "suitable employment for [relator] included first shift positions located 45 minutes from his home." The ULJ determined that relator's 20-mile restriction on his job search was a personal restriction that rendered him "not ready and willing" to accept a position. For that reason, relator was not available for suitable employment and was ineligible for unemployment benefits. This decision resulted in an overpayment of \$4,275 in unemployment benefits, which the court determined was recoverable under the Minnesota Revenue Recapture Act. Relator now appeals both decisions.

D E C I S I O N

Availability

To be eligible for unemployment benefits, an applicant must be "available for suitable employment." Minn. Stat. § 268.085, subd. 1(4). "Available for suitable employment' means an applicant is ready, willing, and able to accept suitable employment." *Id.*, subd. 15. "An applicant may restrict availability to suitable employment, but there must be no other restrictions, either self-imposed or created by

circumstances, temporary or permanent, that prevent accepting suitable employment.” *Id.* Relator argues that there is not substantial evidence to support the ULJ’s determination that he was not available for suitable employment. Accordingly, the issue is whether relator’s self-imposed 20-mile limitation on his job search rendered him “not available.”

Whether an applicant is available for suitable employment is a question of fact. *Semanko v. Dep’t of Emp. Serv.*, 244 N.W.2d 663, 665 (Minn. 1976). “This court views the ULJ’s factual findings in the light most favorable to the decision. This court also gives deference to the credibility determinations made by the ULJ. As a result, this court will not disturb the ULJ’s factual findings when the evidence substantially sustains them.” *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008) (citations omitted), *review denied* (Minn. Oct. 1, 2008).

Faced with conflicting testimony from the June 2018 and the August 2019 hearings, the ULJ made a credibility determination that is supported by substantial evidence. Consequently, we are bound by that credibility determination. “This court views the ULJ’s factual findings in the light most favorable to the decision. This court also gives deference to the credibility determinations made by the ULJ.” *Id.* at 774.

In the order finding that relator was unavailable for suitable employment, the ULJ stated that relator’s testimony in August 2019 was inconsistent with “several statements he made during the June 13, 2018 hearing.” During the June 2018 hearing, relator stated numerous times that a daytime job located more than 20 miles from his home was “too far.” For example, in June 2018, relator stated that he would only be willing to accept a

day-shift job if it was “[n]o more than maybe 20 minutes away,” and several positions he applied to were “too far away.” *Modeen*, 2019 WL 2495655, at *5.

Relator now argues that the 20-mile limitation was merely a preference, not a restriction, and he relies on the fact that he applied to many jobs that were outside of the 20-mile radius. But the ULJ stated, in her order following both the June 2018 and August 2019 hearings that an application to a job “is not per se proof of availability for suitable employment” and that relator’s testimony about the importance of working a first-shift job within 20-minutes of his home was more persuasive. Specifically, in June 2018, relator stated: “you know, I really don’t mind where I go to work or what I do . . . it’s not important as long as I’m close to home if I have to work during the day. That’s what’s more important.” But, in August 2019, he stated that he would be willing to accept positions that were located over 30 miles away. The ULJ pointed out the conflicting nature of these statements and asked relator what would make the hour-long drive “okay” now and he stated: “I guess I didn’t think clearly my last answer at the last hearing.” She also asked relator, “Why are you telling me today that you would drive 60 minutes” to which relator replied, “I don’t have an adequate answer for that.”

In making her credibility determination, the ULJ also considered the fact that relator rejected Meribel’s offer to work the first shift. Relator argues that the ULJ improperly relied on this evidence because this court “reversed that finding and held that [he] was terminated.” This argument fails. The ULJ did not base her determination on the fact that relator quit his job, as opposed to being discharged. Instead, the ULJ took into consideration the fact that relator was presented with a job offer for the first shift but had

already decided, at the time the employment relationship ended, that he did not want to work that shift “due to the commute” and because his wife had MS and was “accustom[ed] to their routine.” The record supports the ULJ’s credibility determination. The evidence of relator’s labor market area supports the ULJ’s finding that suitable employment included first-shift positions located 45 minutes from his home. The record supports the finding that relator was not ready and willing to accept employment located more than 20 miles from his home and was therefore not available for suitable employment.

Revenue Recapture

Relator challenges a second ULJ’s finding that he owes a debt to DEED which is recoverable under the Minnesota Revenue Recapture Act. The determination, discussed above, that relator was ineligible for unemployment benefits, resulted in an overpayment of unemployment benefits in the amount of \$4,275.

Due to the COVID-19 pandemic, DEED cancelled all revenue recapture claims on March 28, 2020. DEED had not collected any amount from relator before this date. This court’s decision that relator was unavailable for suitable employment means that relator does owe a debt in the amount of \$4,275 payable under the Minnesota Revenue Recapture Act. However, if DEED intends to recover the amount in the future, it must restart the collection process.

Affirmed.