**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A20-0309**

Carol Johnson,
Relator,

vs.

MSB Marketing, LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed December 21, 2020**
**Affirmed**
**Bratvold, Judge**

Department of Employment and Economic Development
File No. 37624308-3

Madeline F. Buxton, Barnes & Thornburg LLP, Minneapolis, Minnesota (for relator)

MSB Marketing, LLC, Brooklyn Park, Minnesota (respondent employer)

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

Considered and decided by Slieter, Presiding Judge; Bratvold, Judge; and Cochran, Judge.

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

**BRATVOLD**, Judge

Relator argues that an unemployment-law judge (ULJ) erred by denying her unemployment benefits because substantial evidence did not support the ULJ's determination that relator quit her job. Because the record supports the ULJ's finding that relator voluntarily quit and that relator did not reasonably believe that her employer discharged her, we affirm.

## FACTS

This summarizes the facts found and the evidence received by the ULJ during a telephone hearing. Witnesses included relator Carol Johnson, her daughter, and an owner ("the owner") of the business that employed Johnson. The owner also supervised Johnson.

Johnson worked for respondent MSB Marketing LLC ("MSB") as an "appointment setter" from April 11, 2017, to September 23, 2019. The owner described Johnson as his "best telemarketer." The owner testified that MSB is a small call center that works for clients in the hearing-health industry and schedules free hearing exams. The office is physically small; it is a single room and holds up to "a dozen people" with 12 low-rise cubicles. Johnson's daughter testified that she also worked at MSB as an appointment setter and sat immediately next to Johnson. The owner testified that he sat in a cubicle across the room from Johnson, roughly 30 feet away.

Around noon on September 23, 2019, the owner overheard Johnson talking on the telephone with a customer who asked to be removed from a client's mailing list. Johnson testified she told the customer that only MSB's clients can remove a customer from a

mailing list and the customer should call the client directly. According to Johnson, the customer responded that she had contacted the client several times requesting removal. Johnson replied, "Unfortunately, they may never take you off the mailing list."

The owner approached Johnson and asked her "not to say things that would put [their] clients in a bad light." Johnson testified that she disagreed with the owner and that she did not want to lie to a customer. Johnson's daughter testified that, during the conversation, Johnson became frustrated with the owner and told him to leave her alone. The owner testified that Johnson was "loud," and he asked her to "keep it down," but Johnson "kept going."

The parties dispute what the owner said next. Johnson testified that the owner told her to "get [her] stuff and leave." The owner testified that he told Johnson to "just go." The parties agree that the owner then walked back to his cubicle. The ULJ found that the owner "told Johnson, 'just go.' [The owner] did not tell Johnson to pack her things."

Johnson packed her personal items from her desk and left at 12:05 p.m. The owner testified that he did not know Johnson had packed her things until an hour later. Johnson testified that she stood up and made noise while packing her things, and she assumed the owner saw what she was doing.

Starting at 12:32 p.m., Johnson and the owner began exchanging text messages; the ULJ received a printed version of the text exchange as exhibit 5. Johnson's first text said she would like her "last paycheck" the next day. The owner responded, "You are quitting?" Johnson replied, "No, you fired me, you told me to get my stuff and leave." The owner replied, "I said 'go.' That was it. I did not intend to fire you. I would have said it. You were

getting loud and losing your temper." The text messages continued; Johnson denied being loud or losing her temper and they disagreed about what had been said. The owner texted that he would "accept [Johnson's] resignation," but if she wanted "to return to work for [her] next shift and set some ground rules for [] communication . . . we are willing to do that too." Johnson responded that she did not resign and asked when her check would be ready.

The ULJ found that, before September 23, 2019, Johnson had left work twice after getting upset and saying she was leaving. The owner testified that he had never told Johnson to leave before, but that Johnson had left "more than once" when she was upset. Johnson testified that, once, she got upset and told the owner she "just needed to leave for the day." The other time, she left because a coworker used a diffuser that made her feel nauseous. Johnson also testified that she saw the owner fire another MSB employee after an argument by telling the employee to leave.

Johnson applied for unemployment benefits and respondent Department of Employment and Economic Development (DEED) determined she was ineligible because she quit and "expected to be discharged." Johnson appealed this determination, and the telephone hearing followed.

The ULJ's written decision determined that Johnson was ineligible for unemployment benefits. The ULJ found that "Johnson quit because she was mad that [the owner] corrected her and that he had sent her home for the day." Johnson requested reconsideration. The ULJ granted reconsideration and affirmed the previous determination that Johnson was ineligible for unemployment benefits because she had quit. The ULJ

modified the previous written decision, in part, by revising the reasons for her decision on credibility, as explained below. The ULJ's memorandum also explained that she "did not use [the owner]'s intent to decide the case." Rather, upon further review, the "finding of credibility [included] that [the owner] would be unlikely to mean to fire" Johnson. This review by certiorari follows.

**D E C I S I O N**

We review the ULJ's findings of fact "in the light most favorable to the decision," and we defer to those findings if "there is evidence in the record that reasonably tends to sustain them." *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 460 (Minn. 2016); *see* Minn. Stat. § 268.105, subd. 7(d)(5) (Supp. 2019) (authorizing court of appeals to reverse or remand if ULJ decision is unsupported by "substantial evidence"). "Substantial evidence" is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Gonzalez Diaz v. Three Rivers Cmty. Action, Inc.*, 917 N.W.2d 813, 816 n.4 (Minn. App. 2018) (emphasis omitted). We review the ULJ's legal determination that an applicant is ineligible for unemployment benefits de novo. *Id.* We may reverse or modify the ULJ's decision only if the relator's substantial rights were prejudiced. Minn. Stat. § 268.105, subd. 7(d).

"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). We will affirm if substantial evidence supports the ULJ's findings, and the ULJ provides reasons for credibility determinations. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 533 (Minn. App. 2007); Minn. Stat. § 268.105, subd. 1a(a) (2018)

(providing that, when witness credibility affects the outcome, the ULJ must state the reason for crediting or discrediting testimony).

## I. Substantial record evidence supports the ULJ's determination that Johnson voluntarily quit her job.

Under Minnesota law, an employee who quits employment is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 1 (Supp. 2019). "A quit from employment occurs when the decision to end the employment was, at the time the employment ended, the employee's." Minn. Stat. § 268.095, subd. 2(a) (2018). On the other hand, "[a] discharge from employment occurs when any words or actions by an employer would lead a *reasonable employee* to believe that the employer will no longer allow the employee to work for the employer in any capacity." Minn. Stat. § 268.095, subd. 5(a) (2018) (emphasis added).

Johnson argues she is eligible for unemployment benefits because she was discharged from employment based on her reasonable belief that the owner fired her when he told her to leave. DEED contends that substantial evidence supports the ULJ's determination that Johnson voluntarily quit and that her subjective belief that the owner discharged her was unreasonable. In support of reversal, Johnson makes five arguments, which we address in turn.

### A. The ULJ considered the owner's intent when making credibility determinations and not as evidence of whether Johnson voluntarily quit.

Johnson argues that the ULJ erred by considering the owner's intent as evidence that she voluntarily quit. Johnson is correct that an employer's intent does not determine whether an employee was fired. "[T]he employer's intent is immaterial; what is important

is the employee's perception of the situation." *County Mkt. v. Dahlen*, 396 N.W.2d 81, 83 (Minn. App. 1986). DEED does not disagree with this point of law, but argues that the ULJ properly considered the owner's intent when determining witness credibility.

Johnson does not specifically identify the error in the ULJ's decision. Based on our review, Johnson appears to be challenging the ULJ's credibility findings.[1] The relevant portion of the ULJ's initial reason for the decision stated:

> [The owner's] testimony is more likely, because he had kept Johnson employed previously despite her temperament and he testified she was one of his best telemarketers in his 35 years of work, and would be *unlikely to mean to fire her* because she was again showing a temper outburst. [The owner's] testimony is consistent with his text messages in evidence and in which he clarified to Johnson that she was not fired.

(Emphasis added.) Johnson raised this as a reason for reconsideration. After granting Johnson's request for reconsideration, the ULJ modified this portion of her reason for the decision:

> [The owner's] testimony is more credible than Johnson's and [Johnson's daughter's] testimony, because it is supported by the text messages, which are in evidence, and is a more convincing and likely explanation of events. [The owner's] testimony is consistent with his text messages in evidence and in which he clarified to Johnson that she was not fired. Johnson's testimony is unlikely because she could not reasonably have believed she was fired when [the owner] never previously fired her for any temper outburst.

[1] The owner specifically mentioned his intent in his text messages to Johnson, saying, "I said 'go'. That was it. I did not intend to fire you. . . . My [intent] was to get you to cool off before [I needed] to fire you."

The ULJ also explained in her memorandum that she "did not use [the owner's] intent to decide the case"; rather, she considered the owner's intent in the "finding of credibility."

A ULJ must provide reasons for its credibility determinations and the owner's testimony about his intent was one fact that the ULJ weighed in determining witness credibility. *See* Minn. Stat. § 268.105, subd. 1a(a); *see, e.g.*, *Ywswf*, 726 N.W.2d at 533. Thus, the ULJ did not err because she only considered the owner's intent, among other facts, as a basis for her credibility determinations and not as a basis for her legal determination that Johnson voluntarily quit.

**B. Substantial evidence supports the ULJ's credibility determinations.**

Generally, we defer to the ULJ's credibility findings. As stated above, "[c]redibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Bangtson*, 766 N.W.2d at 332. Minnesota law provides, "[w]hen the credibility of a witness testifying in a hearing has a significant effect on the outcome of a decision, the unemployment law judge must set out the reason for crediting or discrediting that testimony." Minn. Stat. § 268.105, subd. 1a(a).

The ULJ gave four reasons for finding the owner's testimony more credible than Johnson and her daughter's testimony: (1) the owner's testimony aligned with the text messages that stated he did not fire Johnson and she could return to work if she chose; (2) the owner's testimony was "a more convincing and likely explanation of events"; (3) Johnson's testimony was "unlikely" because the owner had not fired her in the past for a "temper outburst"; (4) Johnson's daughter's testimony was "likely biased" because she is Johnson's daughter and she quit MSB on the same day as her mother.

Johnson disagrees with the ULJ's conclusion that the owner's testimony was more credible than her testimony, but she does not contend that no substantial evidence supports the ULJ's credibility findings. Because the ULJ provided reasons for her credibility determinations, and the reasons rest on substantial record evidence, we defer to the ULJ's determination that the owner's testimony was more credible than Johnson and her daughter's testimony.

### C. The ULJ considered Johnson's belief that she was discharged and found it unreasonable.

Johnson argues that the ULJ erred "by failing to consider Ms. Johnson's good faith and reasonable belief that she was discharged on September 23, 2019." The ULJ found Johnson's testimony "unlikely because she could not reasonably have believed she was fired when [the owner] never previously fired her for any temper outburst." Relying on caselaw that applies the statutory standard for discharge, Johnson states that "the determinative factor is the employee's good faith belief that she was discharged."

To support her position that she reasonably believed that the owner fired her, Johnson cites her own testimony that (1) this was the first time the owner had told her to leave work, (2) the owner did not explain that he intended for her to return to work when he told her to "go," and (3) the owner previously had fired an MSB employee by telling the employee to "get their stuff and leave." Preliminarily, we note that the ULJ found that the owner did not tell Johnson to "pack her things." But the heart of Johnson's argument is that her actions fit with the owner discharging her—she removed all of her belongings from her desk and left. No one stopped her or asked why she had packed her things.

Johnson relies on a previous unemployment-benefits appeal where this court determined that an employee's "failure to return to work due to a reasonable belief that [the employee] has been discharged does not constitute a voluntary termination." *Midland Elec., Inc. v. Johnson*, 372 N.W.2d 810, 812 (Minn. App. 1985). In *Midland*, the employer appealed the agency's finding that the employer had discharged the employee. *Id.* at 811. This court described the record evidence: the employer previously had told the employee that it was unsatisfied with the employee's work; the employer asked the employee to turn in his tools before taking a leave of absence; the employer told the employee that it could not guarantee work upon the employee's return; and when the employee asked if he should call after the leave of absence, the employer left without responding. *Id.* Based on this substantial evidence, this court affirmed the agency's determination that the employee reasonably believed he had been discharged.

*Midland* differs from Johnson's case in four ways. First, in *Midland*, the ULJ determined that the employee's separation was involuntary, 372 N.W.2d at 811; but the ULJ determined that Johnson's separation was voluntary. Second, in *Midland*, the employer told the employee to turn in his tools, but the ULJ found that the owner said, "just go." Third, in *Midland,* the employer previously complained about the employee's work, but the owner testified that Johnson was MSB's best telemarketer.[2] The ULJ also

[2] The owner testified that Johnson was "the best telemarketer I've worked with in over 35 years. I would have done a lot to try to keep her and I did do a lot over the last couple of years to keep her there." While the ULJ found that "Johnson was one of [the owner's] best telemarketers in his 35 years of work" in her initial decision, she removed this portion from her findings in her modified decision.

found that the owner had not asked Johnson to leave before, but Johnson had gotten upset and left twice before the September 23 incident. Fourth, in *Midland*, the employee asked if he should call after his leave of absence and the employer walked away. Johnson never asked the owner whether she was fired. In contemporaneous text messages, the owner told Johnson she was not fired and could return to work. Based on these differences, we are not persuaded that *Midland* contradicts the ULJ's decision.[3]

DEED argues that this court should consider the totality of the circumstances and that, here, the entire circumstances show that it was the employee's decision to end the employment. DEED contends that the owner's statement that Johnson should "just go" does not support a reasonable belief of termination. Rather, DEED argues the owner's statement merely refers to previous times when Johnson had left work to "cool down in the past."

DEED compares this case to *Gonsior*, which we agree is helpful. *Gonsior v. Alternative Staffing, Inc.*, 390 N.W.2d 801, 803 (Minn. App. 1986), *review denied* (Minn. Aug. 27, 1986). There, the employer discussed with Gonsior her deteriorating job performance and attitude, asked for Gonsior's key, and revoked Gonsior's previously approved vacation time. *Id.*at 804. Gonsior asked if the employer wanted her separation notice and the employer told her to think about it. *Id.* Gonsior then gave the manager her keys, packed up all her things, and left. *Id.* Under the "circumstances viewed in their entirety," this court affirmed the agency's determination that Gonsior had voluntarily quit,

[3] Johnson also cites *Armar Corp. v. Malinski*, 362 N.W.2d 10, 12 (Minn. App. 1985). But *Armar* does not discuss the employee's beliefs, reasonable or otherwise.

reasoning that she unreasonably believed her employer fired her. *Id.* at 805. Based on our review of the record, Johnson had less reason to believe she had been discharged than Gonsior. Thus, we discern no error in the ULJ's determination that Johnson did not reasonably believe the owner had fired her.

### D. The ULJ properly considered texts exchanged between Johnson and the owner.

Johnson argues that the ULJ erred in relying on the text messages exchanged between Johnson and the owner. Johnson asks us to follow *Stassen v. Lone Mountain Truck Leasing, LLC*, where this court concluded that an employee's retraction of a formal resignation did not negate the employee's resignation, unless the employer accepted the retraction.[4] 814 N.W.2d 25, 31 (Minn. App. 2012). There, the employee resigned in an email to his supervisor. *Id.* at 28. After the supervisor accepted the employee's resignation, the employee repeatedly denied that his email was a resignation and tried to retract it. *Id.* This court held that "an employee who seeks to withdraw his previously submitted notice of quitting has quit the employment if the employer does not agree that the notice may be withdrawn." *Id.* at 31.

Johnson urges us to apply the same rationale here, arguing that after an employer has discharged an employee, later communications are immaterial. Because Johnson

[4] Johnson also relies on an unpublished opinion to support her argument that the ULJ should not have considered the text messages sent after the in-office exchange. Unpublished opinions are not precedential, therefore, we do not discuss the unpublished decision cited by Johnson. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c); *see also Gen. Cas. Co. of Wis. v. Wozniak Travel, Inc.*, 762 N.W.2d 572, 582 n.2 (Minn. 2009) (stating that "the unpublished Minnesota court of appeals decision does not constitute precedent" (citing *In re Collier*, 726 N.W.2d 799, 806 (Minn. 2007)).

contends that the owner fired her before the text exchange, she also contends that the text messages are immaterial and do not alter the discharge.

We are not persuaded. The owner's statements in the text messages retracted nothing. The ULJ found that "[t]he [owner] did not make a statement or action that would lead a reasonable employee to believe they could no longer work for the employer in any capacity." The ULJ also found that "[t]he context in which [the owner] told Johnson to go was one in which she was arguing, confrontational, loud, and disruptive. He then clarified in the text messages that she was not fired and could return to work and continue the employment." Thus, the owner's text messages stating that he did not fire Johnson were not a retraction because there was nothing for him to retract.

DEED points out that the ULJ acted within her discretion in considering the text messages. "An unemployment law judge 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 (2014). We observe that Minn. Stat. § 268.095, subd. 7 (2018), provides "[a]n applicant may not be held ineligible for unemployment benefits under this section for any acts or omissions occurring *after the applicant's separation* from employment with the employer." (Emphasis added.) Because the owner did not discharge Johnson while she was in the office, he did not send the text messages *after* Johnson's separation. Thus, the ULJ properly considered the text messages as probative evidence. Indeed, the ULJ determined that Johnson quit. By stating this finding after the ULJ analyzed the text messages exchanged, the ULJ appears to have implicitly found that Johnson quit by text message.

### E. Johnson's other arguments are unavailing.

Lastly, Johnson asserts that the ULJ clearly erred on some specific factual findings as lacking substantial evidence. Johnson provides four examples, two of which rest on Johnson's assertion that the evidence establishes she previously had left the office once because she was upset, not twice. But Johnson ignores that the owner testified that she had left the office upset at least twice previously.[5] We conclude that substantial evidence supported the ULJ's finding that on two previous occasions, Johnson had "gotten upset at work" and "walked off the job."

Johnson also claims that the "there is no mention of any verbal warning anywhere in the record" even though the ULJ found the owner had "verbally warned Johnson." We disagree because the record includes the owner's statement in exhibit 4 that "more than [one] verbal warning had been given [to her] about loud behavior" and that Johnson "was warned that if she left again because she was upset about my correction or another situation in the office it would be her last time."

Finally, Johnson argues that the ULJ erred in attributing a statement to Johnson. The ULJ found that Johnson "stated she had no desire to work out the issues and continue employment." Johnson is correct that she never said this. Instead, the owner stated this in a text to Johnson. While the ULJ clearly erred in attributing this statement to Johnson, the error was harmless because it did not affect the outcome. *See* Minn. Stat. § 268.105,

[5] The owner testified that this has "happened more than once" or "at least a couple times" and that she "had walked off the job before . . . so it wasn't unlike, [he] wasn't all that shocked that she was, you know, getting up to leave."

subd. 7(d) (providing that reversal is authorized only for errors prejudicing substantial rights); *State v. Taylor*, 869 N.W.2d 1, 14 (Minn. 2015) (an "error is harmless if there is no reasonable possibility that it substantially influenced" the outcome of a decision). The ULJ's other findings rest on substantial evidence and support her determination that Johnson voluntarily quit her employment at MSB.

**Affirmed.**