

*This opinion is nonprecedential except as provided by  
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A21-1144**

Kenneth Kuller,  
Relator,

vs.

Supervalu, Inc.,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed May 16, 2022  
Affirmed  
Bryan, Judge**

Department of Employment and Economic Development  
File No. 45743377

Kenneth Kuller, Burnsville, Minnesota (pro se relator)

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

SuperValu Inc., St. Louis, Missouri, (respondent employer)

Considered and decided by Bryan, Presiding Judge; Jesson, Judge; and Wheelock,  
Judge.

## **NONPRECEDENTIAL OPINION**

**BRYAN**, Judge

Relator challenges the decision by the unemployment law judge (ULJ) to deny relator's request for reconsideration, arguing that the ULJ did not adequately address each of the nine issues raised in his request. Because relator's arguments misconstrue the ULJ's decision and do not accurately reflect the applicable law and procedures, we affirm.

### **FACTS**

From June 2017 until his discharge on March 14, 2021, relator Kenneth Kuller worked for respondent Supervalu, Inc. (Supervalu). Between April 2020 and March 2021, customers and co-workers repeatedly complained that Kuller made inappropriate jokes, harassed co-workers, and offended customers. Following the last incident, Kuller was suspended pending additional investigation, and Supervalu discharged him approximately one week later. Respondent Department of Employment and Economic Development (DEED) determined that Kuller was eligible to receive benefits, but Supervalu appealed the determination. The case proceeded to an evidentiary hearing to determine whether Kuller was discharged from Supervalu for employment misconduct.

At the hearing, both Kuller and his manager, A.K., testified about the separate incidents for which management received complaints. A.K. and Kuller also testified regarding discussions that management had with Kuller and the disciplinary actions taken against him by management, which incrementally progressed in severity. The parties also testified about an incident from the fall of 2020, which became the subject of the parties' mediation. As a result of mediation, the parties agreed that the incident would be removed

from Kuller's file if he met behavioral expectations for the next year. A.K. testified that the incident related to the mediation was not considered in Supervalu's decision to terminate Kuller. The ULJ also admitted six exhibits.<sup>1</sup>

On July 8, 2021, the ULJ issued a decision (the posthearing decision) that Kuller was ineligible for unemployment benefits. In its findings of fact, the ULJ referenced six incidents, including two from the "spring of 2020," and four others that occurred on June 1, 2020; September 27, 2020; December 17, 2020; and March 5, 2021. The ULJ also found that A.K.'s testimony was credible because he "presented his testimony in a clear and straightforward manner without anything to suggest inaccuracy or deception. His testimony presented a logical sequence of events culminating in Kuller's discharge." The ULJ found that Kuller's testimony was not credible, explaining the following:

Kuller denied every claim against him. He said the customers must have misheard what they claimed to overhear. He said he never harassed [his co-worker] and that [the co-worker] was harassing him. He placed the fault for his discharge on [A.K.], who he claimed treated him unfairly. It is highly unlikely that every customer and co-worker complaint against Kuller resulted from him being misheard. Kuller also contradicted his own testimony, suggesting he was not providing accurate testimony. Kuller's testimony was not credible.

Based on these findings, the ULJ determined that Kuller "engaged in a pattern of inappropriate behavior that resulted in multiple customer and co-worker complaints,"

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<sup>1</sup> Kuller also submitted a 30-page document that was referred to as Exhibit 7. On the first day of the hearing, although the ULJ had a copy of it, Supervalu had not received a copy of this document. The ULJ described the contents of the document and explained that evidence need not be in written form to be valid. The ULJ permitted Kuller to introduce the contents of the document into the record through his testimony at the hearing.

Kuller continued this pattern of behavior even after being “told to stop,” and this behavior constituted employment misconduct because it “showed clearly a serious violation of the standards of behavior the employer has a right to reasonably expect of [Kuller].”

Kuller requested reconsideration,<sup>2</sup> raising a variety of challenges to the merits of the posthearing decision, divided into the following three categories: (1) eight separate challenges to the factual findings made by the ULJ in its posthearing decision (including separate challenges to six specific factual findings, a challenge to the ULJ’s credibility determinations, and an argument that the ULJ failed to make necessary factual findings regarding the context of disciplinary actions against Kuller); (2) four challenges labeled as errors of law (including a challenge that the ULJ failed to properly defer to the findings of fact in the department’s initial determination of eligibility, an argument that the ULJ failed to make necessary factual findings regarding Kuller’s intent and the definition of “employment misconduct”); and (3) four challenges labeled as “procedural errors” (including arguments regarding the standard of review applied by the ULJ to DEED’s initial determination of eligibility, the ULJ’s admission of evidence, consideration of issues Kuller believes were irrelevant, and the failure to consider a relevant issue). In support of this request, Kuller submitted a one-page document, titled “Mediation Result Kenneth Kuller” (the mediation statement), which indicated that management agreed not to suspend Kuller. This document stated:

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<sup>2</sup> Kuller made an initial request, submitted a supplemental letter, and filed an amended motion. Because Kuller refers to the amended motion as the request for reconsideration in his briefs to this court, we do the same.

Management reported an incident on October 23rd where he claimed [Kuller] had told an inappropriate joke. Company believes this report was antagonistic and unlikely to be accurate. Management agreed not to discipline [Kuller] for this incident that would have called for a 3-day suspension and agreed not to bring it up again. [Kuller] agreed to refrain from future comments that may be deemed inappropriate.<sup>3</sup>

On August 12, 2021, the ULJ issued a decision (the decision on reconsideration) denying Kuller's request for reconsideration, declining to hold a new hearing, and concluding that "the [posthearing decision], is factually and legally correct." The ULJ explained that the posthearing decision "came down largely to credibility." The ULJ concluded that nothing in the request for reconsideration would change the outcome:

[T]he ULJ found that the employer's witnesses were credible and Kuller was not. . . . Kuller claimed that everyone who complained about him was either lying or was mistaken about what happened. This is not likely to be true. Kuller also at one time contradicted himself. In his initial request for reconsideration, Kuller described this as "an inadvertent misstatement." In the context of the testimony, however, this was not a slip of the tongue; Kuller blatantly contradicted his prior testimony.

Kuller's testimony in the hearing was not credible. There is nothing in Kuller's request for reconsideration that leads the ULJ to change the credibility findings.

In addition, the ULJ addressed the mediation statement. The ULJ concluded that a new hearing was not needed because the mediation statement did not relate to the employment decision and would not change the outcome of the hearing:

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<sup>3</sup> While testimony suggested that the mediation related to the September 27, 2020 incident, the mediation statement itself refers to an incident date of October 23, 2020. In addition, the mediation statement concerned an inappropriate joke, but the September incident related to Kuller calling a coworker inappropriate names.

Kuller argues that a new hearing is required because Supervalu did not provide the mediation agreement. Supervalu did not discharge Kuller because of what happened in the mediation session. Nothing in the hearing suggested that the mediation agreement was necessary for the decision. Kuller does not credibly explain how the contents of the mediation agreement would change the decision. The mediation agreement was not necessary for the decision. The ULJ will not reopen the record to receive it.

Finally, the ULJ determined that the factual findings in the posthearing decision supported the conclusion of employment misconduct and specifically determined that Kuller's arguments regarding the standard of review was an incorrect statement of law:

Kuller argues that the ULJ made errors of law. He argues that the findings of fact do not support a finding of employment misconduct and that the ULJ applied the wrong standard of law. Kuller was discharged because he intentionally made numerous statements at work that were inappropriate and unprofessional. He was warned about this and continued to engage in the same behavior. His actions showed clearly a serious violation of the standards of behavior the employer has a right to reasonably expect of the employee. Kuller claimed the ULJ should have given greater deference to the original determination of [ ]eligibility. This is not a correct statement of the law.

Kuller appeals by writ of certiorari.

## **DECISION**

In his brief to this court, Kuller identifies the following nine issues<sup>4</sup> from his request for reconsideration of the posthearing decision: various challenges to the factual findings (numbered on appeal as issues 1, 2, and 9); an assertion that the ULJ failed to rule out each

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<sup>4</sup> We observe that the request for reconsideration is not numbered and that the nine issues identified by Kuller on appeal do not exactly match those issues raised in the request for reconsideration. None of the discrepancies, however, impacts our opinion.

statutory exception to the definition of “employment misconduct” (numbered on appeal as issue 3); an argument that the ULJ applied the incorrect standard of review in its posthearing decision (numbered as issue 4); a variety of procedural errors regarding notice and admission of evidence (numbered as issues 5, 6, and 7); and a belief that the ULJ failed to address his claim of retaliation (numbered as issue 8). Kuller argues that the ULJ’s failure to address each of the issues in the decision on reconsideration compels reversal and remand because the ULJ’s defective decision does not satisfy the factors set forth in section 268.105, subd. 7(d) (2020). We are not convinced, however, and we conclude that relator’s arguments misconstrue the ULJ’s decision and rest on a misunderstanding of the applicable law and procedures below.

Minnesota provides “workers who are unemployed through no fault of their own a temporary partial wage replacement.” Minn. Stat. § 268.03 (2020). An employee who is discharged for misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2020). DEED makes an initial determination of eligibility for unemployment benefits, Minn. Stat. § 268.101, subd. 2 (2020), and either party may appeal this initial determination and request a “de novo” evidentiary hearing, Minn. Stat. § 268.105, subd. 1(a) (2020). The ULJ makes a decision “upon the evidence obtained” and issues “written findings of fact, reasons for decision, and decision.” Minn. Stat. § 268.105, subd. 1a(a) (2020). The ULJ’s posthearing decision is final unless a request for reconsideration is filed. *Id.* “Any party, or the commissioner, may . . . file a request for reconsideration” of the ULJ’s posthearing decision. Minn. Stat. § 268.105, subd. 2(a) (2020).

A request for reconsideration must be decided by the ULJ who issued the posthearing decision, and if timely filed, the ULJ makes a decision on reconsideration that either affirms, modifies, or sets aside the findings and conclusions from the ULJ's posthearing decision and orders an additional evidentiary hearing. Minn. Stat. § 268.105, subd. 2(f)(1), (2), (3) (2020). The relator may obtain appellate review by writ of certiorari. Minn. Stat. § 268.105, subd. 7.

When reviewing the ULJ's decision, we may remand for further proceedings, affirm, reverse, or modify the decision if the relator's substantial rights were prejudiced because the ULJ's findings, inferences, conclusion, or decision are "(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the hearing record as submitted; or (6) arbitrary or capricious." Minn. Stat. § 268.105, subd. 7(d). We defer to the credibility determinations of the ULJ and uphold the factual findings regarding ineligibility and employment misconduct if substantial evidence in the record supports them. *Id.*; *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 460-61 (Minn. 2016). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Posey v. Securitas Sec. Servs. USA, Inc.*, 879 N.W.2d 662, 665 (Minn. App. 2016) (citing *Minneapolis Van & Warehouse Co. v. St. Paul Terminal Warehouse Co.*, 180 N.W.2d 175, 178 (Minn. 1970)). When addressing a question of law, this court is "free to exercise . . . independent judgment." *Jenkins v. Am. Exp. Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006). We do not reweigh conflicting evidence, *see Wilson*, 888 N.W.2d at



460, and we will not reverse a ULJ's decision when the claimed error did not prejudice the relator's substantial rights, Minn. Stat. § 268.105, subd. 7(d); *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 530 (Minn. App. 2007) (rejecting the relator's argument of an unfair hearing because the asserted error was harmless).

Kuller argues that the decision on reconsideration inadequately addressed each of the nine issues raised in his request for reconsideration. We are not convinced for two primary reasons. First, we observe that contrary to Kuller's argument, the ULJ addressed the bulk of the issues raised in Kuller's request for reconsideration. For example, in the decision on reconsideration, the ULJ addressed the factual disputes raised in Kuller's request for reconsideration (identified as issues 1, 2, and 9). The ULJ noted that this case "largely came down to credibility," reiterated the prior determination that "Kuller's testimony was not credible," pointed out that Kuller "blatantly contradicted" himself at the evidentiary hearing and explained how the record corroborated the testimony provided by Supervalu's witnesses. Because of these credibility determinations, the ULJ concluded in its decision on reconsideration that the evidence admitted at the evidentiary hearing supported the factual findings in the posthearing decision.

Similarly, the ULJ addressed and rejected Kuller's argument regarding the statutory definition of "employment misconduct" (identified as issue number 3). The ULJ explicitly concluded that Kuller "intentionally made numerous statements at work that were inappropriate and unprofessional," and that Kuller "was warned about this and continued to engage in the same behavior." The ULJ determined that these actions met the statutory definition. The ULJ also rejected the standard-of-review argument Kuller made as issue

number 4. The ULJ concluded that this argument was based on an incorrect statement of the law. Finally, the ULJ addressed Kuller's claim of retaliation (identified as issue number 8). The ULJ disbelieved Kuller's testimony regarding his suspicion that Supervalu retaliated against him. In this regard, the ULJ directly addressed the bulk of the issues raised (including issues 1, 2, 3, 4, 8, and 9) and did not, as Kuller now argues, ignore eight of the nine issues that Kuller identifies from his request for reconsideration.

Second, many of Kuller's contentions misstate the applicable law and administrative procedures. For example, contrary to Kuller's argument, no legal authority requires that the ULJ's decision on reconsideration repeat facts and reasoning already included in the posthearing decision. Similarly, Kuller raises an issue (identified as issue number 3) regarding the exceptions to the statutory definition of "employment misconduct." Contrary to his belief, there is no legal authority requiring the ULJ to specifically address and rule out each of the ten possible exceptions to this definition. This is especially true when, as Kuller did in this case, the relator denies the allegations instead of admitting the conduct and arguing that it is excusable under one of the ten exceptions.

In addition, Kuller argues that in the ULJ's posthearing decision, the ULJ applied de novo review and did not defer to DEED's initial determination of eligibility (identified as issue 4). Kuller also argues that in the ULJ's posthearing decision, the ULJ improperly relied on evidence that was not submitted to DEED prior to the department's initial determination of eligibility (identified as issues 5 and 6). Kuller is mistaken regarding the applicable law. Contrary to his argument, the ULJ applied the correct standard of review and properly relied on the evidence admitted at the evidentiary hearing. *See* Minn. Stat.

§ 268.105, subds. 1(a) (referring to “de novo” evidentiary hearing), 1a(a) (requiring the ULJ to decide the appeal from DEED’s initial determination based “upon the evidence obtained” at the evidentiary hearing). Finally, Kuller raises a concern that the ULJ did not provide sufficient notice that the evidentiary hearing would relate to employment misconduct (identified as issue 7). This argument, however, overlooks the statements in the written notice and at the outset of the hearing, which made clear that the scope of the hearing would include the allegations of misconduct. We decline to reverse the ULJ’s decision on reconsideration because many of the issues identified by Kuller (including issues 3, 4, 5, 6, and 7) are based on misunderstandings of the applicable law and the procedures below.<sup>5</sup>

Finally, portions of Kuller’s brief could be construed to challenge the ULJ’s decision not to hold a new evidentiary hearing or reopen the record. To obtain a new evidentiary hearing, the governing statutory provisions require Kuller to show that some additional evidence not previously submitted would either change the outcome of the proceeding or would cast doubt on the truth of evidence that was previously admitted and that affected the outcome of the proceeding. Minn. Stat. § 268.105, subd. 2(c)(1), (2) (2020). We review this part of the ULJ’s decision on reconsideration for an abuse of

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<sup>5</sup> We note that appellate review of issues 6 and 7 may have been forfeited by Kuller’s conduct and testimony at the evidentiary hearing. We also have concerns that Kuller cannot establish the requisite prejudice to prevail on appeal. *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); *Ywsyf*, 726 N.W.2d at 530 (rejecting the relator’s argument in the absence of prejudice). Given our decision, however, we need not address forfeiture or prejudice.

discretion. *Eley v. Southshore Invs., Inc.*, 845 N.W.2d 216, 218 (Minn. App. 2014); *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006).

Kuller submitted the mediation statement<sup>6</sup> in support of the reconsideration request, but he did not offer an explanation on appeal regarding how the mediation statement would have changed the outcome of the proceeding or would have cast doubt on evidence that affected the outcome. The mediation statement refers to a single incident and does not directly relate to the employment decision at issue or the incidents from the spring of 2020; June 1, 2020; December 17, 2020; or March 5, 2021. Moreover, the ULJ makes factual findings independent of any mediation outcome. We discern no abuse of discretion in the ULJ's determination that the mediation statement would have no impact on the factual findings regarding the incidents at issue and that the mediation statement casts no doubt on the evidence showing a pattern of inappropriate conduct.

**Affirmed.**

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<sup>6</sup> Kuller also submitted a document titled "Exhibit 16—Work Schedule," but makes no reference to this document on appeal. We need not address whether consideration of the document would have compelled a new evidentiary hearing. *See State Dep't of Lab. & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to address issue not adequately briefed); *Waters v. Fiebelkorn*, 13 N.W.2d 461, 465 (Minn. 1944) ("[T]he burden of showing error rests upon the one who relies upon it.").