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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0328**

Lennis Bentrud,
Relator,

vs.

Robin Drug Corp.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed November 18, 2013
Reversed and remanded
Larkin, Judge**

Department of Employment and Economic Development
File No. 29094553-6

Lennis Bentrud, Minneapolis, Minnesota (pro se relator)

Robin Drug Corp., New Brighton, Minnesota (respondent)

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

Considered and decided by Larkin, Presiding Judge; Rodenberg, Judge; and
Chutich, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

In this certiorari appeal, relator challenges an unemployment-law judge's (ULJ) determination that she is ineligible for unemployment benefits because she did not quit her job for a good reason caused by her employer. Because the ULJ did not make findings of fact necessary to that determination and the ULJ's credibility determination is inadequate, we reverse and remand for the ULJ to make the necessary findings and to determine relator's eligibility in light of those findings.

FACTS

Relator Lennis Bentrud's employment as a respiratory therapist at respondent Robin Drug Corp. ended when she quit on December 16, 2011. Bentrud established an unemployment-benefits account with respondent Department of Employment and Economic Development (DEED). DEED determined that Bentrud was ineligible for unemployment benefits because Bentrud's reason for quitting would not cause an average reasonable worker to quit.

Bentrud appealed DEED's ineligibility determination, arguing that she quit "because [she] felt threatened and harassed" after her "supervisor falsified [her] time card and physically came at [her] when [she] asked him about it." The ULJ held a hearing and determined that Bentrud was ineligible for unemployment benefits. Bentrud requested reconsideration, and the ULJ affirmed his initial decision. Bentrud appealed to this court. DEED moved this court to remand because it had discovered the ULJ lacked statutory authority to conduct the hearing and issue the orders because his license to practice law

had been suspended. By order opinion, we granted DEED's motion, reversed, and remanded "for an additional evidentiary hearing, to be conducted by an unemployment law judge who is licensed to practice law." *Bentrud v. Robin Drug Corp.*, No. A12-1092 (Minn. App. Nov. 1, 2012).

DEED assigned another ULJ to the case, and he held an evidentiary hearing. Bentrud testified at the hearing. Two representatives from Robin Drug's human resources department, Nancy Finke and Cindy Mollet, also testified. Additionally, the ULJ received exhibits, including a letter from Bentrud containing "a summary of the experiences that led to [her] separation" from Robin Drug. Bentrud alleged that on December 16, 2011, her supervisor, Paul Joy,

charged at [her] with his hands reaching toward [her] throat as if he was going to strangle [her]. [Joy] opened his palms when he neared [her] face as if he was going to slap [her] then abruptly stopped and placed both palms directly in front of [her] face taunting that he could do whatever he wanted to [her].

In her letter, Bentrud further alleged that (1) on December 16, Joy "falsified [her] time card and bragged about it"; (2) Joy erroneously accused one of Bentrud's coworkers of reporting him to the board of medical practice after Bentrud had reported him for "working as [an] unlicensed therapist"; (3) Joy favored male employees and was "disrespectful" and "mean" in his "attitude and actions toward [her]"; (4) "there was blatant and persistent sexual innuendo and inappropriate behavior in the office and at staff meetings," including dirty jokes; and (5) she "was required to work with full knowledge that other employees were working without credentials" after unlicensed

therapists were instructed to continue working despite a requirement from a client hospital that all therapists be licensed.

After the hearing, the ULJ issued written findings of fact and a decision. The ULJ found that Bentrud “became frustrated with her supervisor, Paul Joy,” and “would voice concerns to her coworkers indicating that she felt Joy did not treat her appropriately.” The ULJ also found that “Bentrud would also voice frustrations to a supervisor, Brenda Parsons, about a joke that was pulled up on her computer, that Joy would ignore her, and about concerns with time off.” But the ULJ found that “Bentrud did not indicate to Parsons that she wanted help resolving her issues with Joy or . . . that she wanted Parsons to take action to resolve the issues” and that “Bentrud did not voice concerns to human resources or Joy’s supervisors and request that the issues be resolved.”

Regarding the incidents on December 16, the ULJ found that “Bentrud realized that she had been paid for vacation that she intended to take as unpaid vacation.” Bentrud “confronted Joy about the issue” and “Joy indicated he changed [her] timesheet and that he could do what he wanted.” The ULJ found that “Joy called human resources with Bentrud in the room and there was a discussion that Bentrud must use her paid vacation before taking unpaid leave.” The ULJ found that Bentrud “expressed concerns about Joy regarding her paycheck issue” to Andrea Samuelson, a human resources representative, but that “Bentrud did not express concerns about the other issues she was experiencing with [Joy] outside of the December 16, 2011 incident.” And regarding the December 16 incident, the ULJ found: “the evidence shows that Bentrud did not express concerns about anything other than her paycheck issues to Samuelson.” The ULJ further

found that “[a]fter expressing concerns, Bentrud indicated she was going to quit because of the paycheck issue,” tendered a written resignation letter, and “quit effective immediately.” The ULJ did not make any explicit findings regarding Bentrud’s allegation that Joy had charged at her with his hands reaching toward her throat.

The ULJ found that “Bentrud quit because of perceived harassment and mistreatment at work,” and concluded that “[a]n average, reasonable worker would not quit and become unemployed due to the issues that Bentrud experienced with Joy at Robin Drug.” The ULJ also found that “Bentrud did not complain through the appropriate channels such as Joy’s supervisor or human resources or allow the employer reasonable opportunity to correct her concerns.” The ULJ therefore concluded that “Bentrud did not quit because of a good reason caused by the employer and is ineligible for unemployment benefits.” Bentrud requested reconsideration. In her request for reconsideration, Bentrud explained: “My supervisor falsified my time card and when I asked about it he physically attacked me. Nancy Finke was not present and cannot say it did not happen.” The ULJ affirmed the determination of ineligibility, and this certiorari appeal follows.

D E C I S I O N

A hearing to determine qualification for unemployment benefits is an “evidence gathering inquiry.” Minn. Stat. § 268.105, subd. 1(b) (2012). At the evidentiary hearing, the ULJ “must ensure that all relevant facts are clearly and fully developed.” *Id.* After the hearing, the ULJ “must make findings of fact and decision.” *Id.*, subd. 1(c) (2012).

On appeal, this court may reverse or modify the ULJ’s decision

if the substantial rights of the petitioner may have been prejudiced because the 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 entire record as submitted; or (6) arbitrary or capricious.

Id., subd. 7(d) (2012). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Minneapolis Van & Warehouse Co. v. St. Paul Terminal Warehouse Co.*, 288 Minn. 294, 299, 180 N.W.2d 175, 178 (1970) (quotation omitted).

An applicant who quits employment is ineligible for unemployment benefits, subject to certain exceptions. Minn. Stat. § 268.095, subd. 1 (2012). An exception to ineligibility exists if “the applicant quit the employment because of a 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) (2012). However, “[i]f an applicant was subjected to adverse working conditions by the employer, the applicant must complain to the employer and give the employer a reasonable opportunity to correct the adverse working conditions before that may be considered a good reason caused by the employer for quitting.” *Id.*, subd. 3(c) (2012).

An employee's reason for quitting employment is an issue of fact for the ULJ. *See Embaby v. Dep't of Jobs & Training*, 397 N.W.2d 609, 611 (Minn. App. 1986) (stating that "the reason for an employee's separation [from employment] is a factual determination"). But whether that reason meets the statutory standard of "a good reason caused by the employer" is a legal question, which this court reviews de novo. *Peppi v. Phyllis Wheatley Cmty. Ctr.*, 614 N.W.2d 750, 752 (Minn. App. 2000).

Bentrud argues that she "quit for good reason" and that Joy's actions toward her "would compel an average, reasonable worker to quit and become unemployed rather than remaining in [the] employment." *See* Minn. Stat. § 268.095, subd. 3(a). Specifically, Bentrud argues that she "quit [her] job after being physically attacked by [her] supervisor on December 16, 2011," and that "[t]he threat of physical harm from [her] supervisor together with the history of [her employer's] tolerance of his behavior left [her] no alternative other than to leave the company." On appeal, DEED notes that the ULJ "lamentably made no findings as to whether Joy actually waved his hands near Bentrud's face and neck," but acknowledges that "there was no testimony that this interaction did not occur." DEED also acknowledges that "there is certainly a strong argument that this type of threat of physical violence would constitute an adverse working condition that would cause an average, reasonable employee to quit." But DEED argues that even if Joy did threaten Bentrud, "[she] did not complain and give her employer a reasonable opportunity to address her complaints," which is required under section 268.095, subdivision 3(c), before an adverse working condition "may be considered a good reason caused by the employer for quitting."

We are unable to resolve the legal questions of whether Bentrud's reason for quitting "would compel an average, reasonable worker to quit" and whether she gave her "employer a reasonable opportunity to correct the adverse working conditions" because the ULJ did not make a finding as to whether or not Joy "charged" at Bentrud "with his hands reaching toward [her] throat as if he was going to strangle [her]." In addition to the letter Bentrud introduced as an exhibit describing the incident, Bentrud repeatedly referenced the incident during her oral testimony at the November 29, 2012 hearing. She testified that she went to the human-resources department on December 16, 2011, in part because of "[Joy's] violent reaction." Bentrud further testified that "the harm to [her] was that . . . he came at [her]. There was no reason for it to be handled that way." Lastly, Bentrud testified that "[she] knew [she] couldn't go back and work with someone that was coming at [her] like that. That was just that physical right at [her] with his hands toward [her] neck . . . that's not okay." Despite this testimony, the ULJ did not ask questions to fully develop the record regarding the alleged incident and did not make findings regarding the alleged incident. *See* Minn. Stat. § 268.105, subd. 1(b) (stating that the ULJ "must ensure that all relevant facts are clearly and fully developed").

Instead, the ULJ found that "Bentrud quit because of perceived harassment and mistreatment at work." But the ULJ's decision does not explain what he means by "mistreatment." If the ULJ means that Bentrud was mistreated because her supervisor changed her timecard to comply with company policy, our analysis of whether Bentrud's decision to quit was reasonable under section 268.095, subdivision 3(a), would be very different than if the ULJ means that Bentrud was mistreated because Joy charged at her

with his arms extended in a way that made Bentrud believe Joy was going to physically assault her. Because the ULJ did not make findings regarding the alleged aggressive behavior and did not indicate whether that behavior was the reason Bentrud quit, the ULJ's findings are insufficient to determine whether Bentrud had a reason to quit that "would compel an average, reasonable worker to quit and become unemployed rather than remaining in the employment." *See* Minn. Stat. § 268.095, subd. 3(a).

DEED argues that this court nonetheless should affirm because the record supports the "ULJ's findings that Bentrud did not complain about Joy's waving his hands at her in a threatening manner, or make any other complaint apart from the issue of the timesheet." We are not persuaded. It is true that an unemployment-benefits applicant "must [have] complain[ed] to the employer and give[n] the employer a reasonable opportunity to correct the adverse working conditions" before the applicant has "a good reason caused by the employer for quitting." *Id.*, subd. 3(c). And the ULJ found that "Bentrud did not express concerns about anything other than her paycheck issues to Samuelson." But this finding is not supported by substantial evidence in view of the entire record. Samuelson did not testify at the November 29 hearing. Of the witnesses who testified at the November 29 hearing, only Bentrud had first-hand knowledge of the December 16, 2011 conversation between Bentrud and Samuelson. Bentrud testified that she told Samuelson about Joy's "[f]alsification of [her] timecard, and him coming at [her] like that, and what he said to [her], and what he did." (Emphasis added.)

DEED points out that the ULJ found that the testimonies of Robin Drug's witnesses, Finke and Mollet, "[were] more credible than Bentrud's regarding Bentrud's

complaints to human resources and her concerns expressed on December 16, 2011 because it followed a more logical chain of events and was more reasonable under the circumstances.” At the November 29 hearing, Finke testified that Bentrud told Samuelson “about the paystub, and not about other things.” She further testified that if Bentrud had told Samuelson about “all of these potential concerns” during their December 16 meeting, the company would have “done an investigation.” Mollet added only that “our knowledge of this came through the unemployment process versus [Bentrud] clearly, you know, bringing, bringing any concerns or issues.”

DEED cites *Skarhus v. Davanni’s*, 721 N.W.2d 340, 345 (Minn. App. 2006), and *Whitehead v. Moonlight Nursing Care*, 529 N.W.2d 350, 352 (Minn. App. 1995), to argue that “the credibility of an individual’s testimony is the exclusive province of the ULJ,” and that this court “‘must defer’ to the fact finder’s weighing of . . . evidence, and the [c]ourt ‘may not weigh that evidence on review.’” But DEED concedes that these rules bind this court only if “the [ULJ’s] credibility assessment is supported by substantial evidence.” See *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 29 (Minn. App. 2007) (stating that this court “will uphold a ULJ’s credibility determinations if supported by substantial evidence”).

During Finke’s testimony, she conceded that she did not have any written documentation from Samuelson regarding Samuelson’s December 16 meeting with Bentrud. Instead, Finke testified that Samuelson “mentioned that [Bentrud] had come in, turned in her badge, and put her notice in, because she was upset that her vacation was

paid rather than unpaid.” According to the record, that was the extent of the communication between Samuelson and Finke regarding Bentrud’s decision to quit.

We recognize that a “witness at an evidentiary hearing is not required to have firsthand knowledge because a ULJ may receive any evidence which possesses probative value, including hearsay.” *Skarhus*, 721 N.W.2d at 345 (quotation omitted). However, “[w]hen the credibility of an involved party or witness testifying in an evidentiary 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. 1(c). And that reason must be supported by substantial evidence before this court will defer to it. *See Wichmann*, 729 N.W.2d at 29.

On this record, in which Bentrud repeatedly testified that Joy was physically aggressive toward her and that she reported the alleged aggressive behavior to Samuelson, the ULJ’s credibility determination is inadequate. The most important credibility determination concerns Bentrud’s testimony. Yet the ULJ did not indicate whether he found Bentrud’s accusation against Joy credible. And because the ULJ did not make such a finding, we have no way of knowing whether the ULJ considered the incident when he found that “Bentrud did not express concerns about anything other than her paycheck issues to Samuelson.” If Joy was physically aggressive in the manner described by Bentrud, we question whether the record supports a finding that Bentrud lacked credibility when she testified that she told Samuelson about the incident. Moreover, the ULJ’s current credibility determination regarding Bentrud’s report to Samuelson is supported only by generalized findings that are based on the testimony of

witnesses who were not present during Bentrud's report to Samuelson and who do not have the benefit of any type of written documentation regarding Bentrud's report or her reason for quitting. *See* Minn. R. 3310.2922 (2011) (stating that a ULJ "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" and that the "rules of evidence may be used as a guide in a determination of the quality and priority of evidence offered"); Minn. R. Evid. 803(6) (excluding from the hearsay rule reports or memoranda "made at or near the time [of an event] by . . . a person with knowledge, if kept in the course of a regularly conducted business activity"). In sum, we are not satisfied that the ULJ's credibility determination complies with the statutory mandate or is supported by substantial evidence, that is, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Minneapolis Van*, 288 Minn. at 299, 180 N.W.2d at 178 (quotation omitted).

Additionally, although Bentrud quit during the course of her conversation with Samuelson, under the facts of this case it is possible that Robin Drug nonetheless had a "reasonable opportunity" to address Bentrud's concerns during this conversation. *See Munro Holding, LLC v. Cook*, 695 N.W.2d 379, 388 (Minn. App. 2005) (stating that "if upon reporting, an employee is given no assurance that the problem will be corrected, the employee has a good reason to quit"); *Porrazzo v. Nabisco, Inc.*, 360 N.W.2d 662, 664 (Minn. App. 1985) (holding that employee quit with good cause when, after he was given increased work hours and responsibilities, employer gave him no assurances of assistance). Bentrud testified that after she told Samuelson about the alleged physical

incident on December 16, Samuelson did not offer to address or resolve the issue. Rather, Samuelson informed Bentrud that, under the circumstances, she “probably would be paid out the last six hours of vacation.” Bentrud further testified that Samuelson provided a piece of paper and told Bentrud that she needed “to say that [she is] quitting voluntarily.” Additional findings regarding the December 16 conversation are necessary to determine whether Bentrud gave her “employer a reasonable opportunity to correct the adverse working conditions.” *See* Minn. Stat. § 268.095, subd. 3(c).

In sum, the ULJ failed to make findings regarding whether Joy charged at Bentrud with his hands outreached in a threatening manner and whether Bentrud’s reason for quitting included that alleged threatening behavior. Furthermore, the ULJ’s credibility determination regarding what Bentrud told Samuelson on December 16 is inadequate. Under the statutory scheme set forth by the legislature, the ULJ is required to “ensure that all relevant facts are clearly and fully developed” at the hearing and “make findings of fact and decision” after the hearing. Minn. Stat. § 268.105, subd. 1(b), (c). Here, the ULJ is required to decide whether Bentrud “quit the employment because of a good reason caused by the employer.” *See* Minn. Stat. § 268.095, subd. 1(1). This responsibility, in turn, requires the ULJ to determine whether Bentrud’s reason “would compel an average, reasonable worker to quit and become unemployed rather than remaining in the employment,” and whether Bentrud “complain[ed] to the employer and [gave] the employer a reasonable opportunity to correct the adverse working conditions.” *Id.*, subd. 3(a), (c). The ULJ failed to make findings that are necessary to determine those issues.

For that reason, the ineligibility determination is arbitrary and Bentrud's substantial rights have been prejudiced. *See* Minn. Stat. § 268.105, subd. 7(d). We therefore reverse and remand for the ULJ to make the findings of fact and credibility determinations that are necessary to decide the legal issues in this case. We appreciate that the ULJ's task is difficult because neither Joy nor Samuelson testified at the hearing. As a result, findings regarding whether Joy behaved inappropriately, whether Bentrud reported that behavior to Samuelson, and whether Samuelson offered to address the accusation significantly depend on a determination of Bentrud's credibility. The ULJ must provide adequate reasons for that credibility determination, and the record must provide substantial evidentiary support for those reasons. Only then can the ULJ determine, consistent with this opinion, whether Bentrud is eligible for unemployment benefits.

Reversed and remanded.