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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0405**

Ajullu A. Niygwo,
Relator,

vs.

Employer Solutions Staffing Group II,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed February 3, 2014
Reversed and remanded
Toussaint, Judge***

Department of Employment and Economic Development
File No. 30286461-3

Ajullu A. Niygwo, Rochester, Minnesota (pro se relator)

Employer Solutions Staffing Group II, Rochester, Minnesota (respondent)

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

Considered and decided by Kirk, Presiding Judge; Johnson, Judge; and Toussaint,
Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

TOUSSAINT, Judge

Relator Ajullu A. Niygwo challenges the decision of an unemployment law judge (ULJ) that she was discharged for employment misconduct, and is therefore ineligible for unemployment benefits. Because respondent Department of Employment and Economic Development (DEED) failed to notify Niygwo of the statutory provisions regarding additional evidence and Niygwo presents additional evidence that necessitates an additional evidentiary hearing, we reverse and remand.

FACTS

In September 2010, Niygwo began her employment with respondent Employer Solutions Staffing Group II; she was assigned to client Reichel Foods as a production worker. On October 1, 2012, Employer Solutions discharged Niygwo. Niygwo applied for unemployment benefits and DEED determined that she was eligible. Employer Solutions appealed DEED's determination and a ULJ conducted an evidentiary hearing; Niygwo did not participate in the hearing. At the evidentiary hearing, Employer Solutions' staffing specialist Kelsey Sikkink testified that on Friday, September 28—after a previous work-related injury caused Niygwo to miss multiple days of work—she informed Niygwo that she was to work both Saturday and Sunday. Sikkink testified that Niygwo said she was unable to come in over the weekend, as her injury prevented her from driving, but after Sikkink told her it was “required” Niygwo said “okay.” Sikkink testified that Niygwo did not call in or appear for work on Saturday, Sunday, or the following Monday. Sikkink testified that she discharged Niygwo after her scheduled

start time on Monday. Describing the incident as a “miscommunication,” the ULJ concluded that Niygwo was eligible for unemployment benefits because she was discharged for reasons other than employment misconduct.

Niygwo requested reconsideration, stating that “[t]he decision was completely incorrect. Most of the things Kelsey Sikkink said were absolutely not correct.” Specifically, Niygwo asserted that she “did work on Monday, October 1, 2012, from 5:00 AM to 11:30 AM,” in accordance with her workers’ compensation work restrictions. Niygwo subsequently withdrew her request for reconsideration, thanking DEED for giving her unemployment benefits.

Employer Solutions also requested reconsideration. DEED notified Niygwo of this request and informed her:

You may submit written comments on the request of reconsideration. If you did not participate in the evidentiary hearing, you should submit a written statement setting out the reason you did not participate. If you had a good cause for failing to participate in the hearing, an additional evidentiary hearing will be held. “Good cause” for purposes of Minnesota Statutes, section 268.105, subdivision 2, is a reason that would have prevented a reasonable person acting [with] due diligence from participating at the evidentiary hearing.

In response, Niygwo informed DEED that she missed the hearing because she “got things late” and “did not know [she] was schedule[d] for [a] telephone hearing,” because she had been away from home “looking for work.”

A second ULJ reconsidered the decision, without an additional evidentiary hearing, and concluded that Niygwo had been discharged for employment misconduct,

resulting in an overpayment of unemployment benefits in the amount of \$3,472.¹ This appeal followed.

D E C I S I O N

When reviewing the decision of a ULJ, we may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator 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.” Minn. Stat. § 268.105, subd. 7(d) (2012).

Under Minnesota law, an employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat § 268.095, subd. 4(1) (2012). Finding that Niygwo did not appear for work and “did not call in prior to the start of her shift for three consecutive days she knew she was otherwise scheduled to work,” the ULJ concluded that Niygwo was discharged for employment misconduct and

¹ On reconsideration, the ULJ acknowledged that Niygwo’s withdrawn request for reconsideration presented additional evidence. Implicitly addressing one potential ground for an additional evidentiary hearing, Minn. Stat. § 268.105, subd. 2(c)(1) (2012), the ULJ found that an additional hearing was not required because the request did not explain why the evidence “was not raised before” and the evidence “would not change the outcome.” The ULJ neither considered the provision regarding false evidence, Minn. Stat. § 268.105, subd. 2(c)(2) (2012), nor determined whether Niygwo showed good cause for failing to participate in the initial evidentiary hearing, *see* Minn. Stat. § 268.105, subd. 2(d) (2012).

is therefore ineligible for unemployment benefits.² On appeal, Niygwo does not challenge the ULJ's legal conclusion. *See Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (whether a particular act constitutes employment misconduct is a question of law). Rather, she alleges that Sikkink's testimony—the basis of the ULJ's decision—is untrue and requests an opportunity “to tell [her] story” to a ULJ. Although Niygwo does not explicitly challenge DEED's reconsideration notice, “under Minn. R. Civ. App. P. 103.04, we have discretion to address any issue as the interests of justice may require, and we exercise that discretion here to address the issue of the adequacy of the notice.” *Jaskowiak v. CM Const. Co., Inc.*, 717 N.W.2d 448, 450 n.1 (Minn. App. 2006), *review granted and remanded* (Minn. Sept. 19, 2006). Generally, we defer “to a ULJ's decision not to hold an additional hearing and will reverse that decision only for an abuse of discretion.” *Skarhus*, 721 N.W.2d at 345. However, the adequacy of statutorily prescribed notice is a question of statutory construction subject to de novo review. *Jaskowiak*, 717 N.W.2d at 451.

On reconsideration, an additional evidentiary hearing may be required based on either additional evidence or a party's failure to participate in the initial hearing. Minn. Stat. § 268.105, subd. 2(c), (d) (2012). Additional evidence necessitates an additional evidentiary hearing if the evidence either (1) would likely change the outcome of the decision and good cause existed for not submitting the evidence earlier, or (2) would

² Referencing Niygwo's withdrawn request for reconsideration, the ULJ noted that whether Niygwo worked on Monday, October 1, “would not change the outcome, because she does not deny that she was a no-call, no show for the preceding two work days.”

show that the evidence presented at the hearing was likely false and that the likely false evidence affected the decision. *Id.*, subd. 2(c). A party's failure to participate necessitates a hearing "[i]f the involved applicant or involved employer who filed the request for reconsideration failed to participate in the evidentiary hearing," and the party had good cause for failing to participate. *Id.*, subd. 2(d). DEED must notify the involved parties of the provisions regarding additional evidence *unless* the paragraph regarding failure to participate is applicable. *Id.*, subd. 2(b), (d) (2012).

The record establishes that when DEED notified Niygwo of Employer Solutions' request for reconsideration, it instructed her to "submit a written statement setting out the reason [she] did not participate" in the evidentiary hearing and informed her that an additional evidentiary hearing would be held if she "had good cause for failing to participate." This notice aligns with subd. 2(d), the paragraph regarding failure to participate. However, subd. 2(d) is inapplicable. Here, the request for reconsideration was filed by Employer Solutions and Employer Solutions *participated* in the evidentiary hearing. Under the plain meaning of the statute, although Niygwo failed to participate in the hearing, the paragraph regarding failure to participate does not apply. *See id.*, subd. 2(d). Because this paragraph does not apply, DEED was required to notify the involved parties of the provisions regarding additional evidence in subd. 2(c). *See id.*, subd. 2(b). The notice at issue does no such thing. The ULJ's decision, therefore, was made on unlawful procedure.

On appeal, Niygwo asserts that she was not scheduled to work on the Saturday or Sunday at issue and that Sikkink did not speak with her the preceding Friday about the

additional shifts. Niygwo also reasserts that she in fact worked her Monday morning shift before Sikkink called and discharged her; Niygwo provides phone numbers for a witness. Because the ULJ's decision hinges on Niygwo's intentional failure to call in or appear for work for two or three consecutive days, Niygwo's appellate brief demonstrates that evidence which was not submitted at the evidentiary hearing falls within the scope of subd. 2(c)(2), regarding false evidence, and an additional evidentiary hearing is required. *See id.*, subd. 2(c).

Reversed and remanded.