STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1072

Eunice W. Chege,
Relator,

vs.

Wells Fargo Bank NA,

Respondent,

Department of Employment and
Economic Development,

Respondent.

Filed July 1, 2008
Reversed and remanded
Wright, Judge

Department of Employment and Economic Development
File No. 2161 07

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Considered and decided by Klaphake, Presiding Judge; Hudson, Judge; and Wright, Judge.

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

WRIGHT, Judge

Relator challenges the decision of the unemployment law judge that she is disqualified from receiving unemployment benefits because she was discharged from her employment because of employment misconduct. Relator asserts that the true reason for her discharge was unlawful retaliation and that she did not receive a fair hearing on the denial of unemployment benefits. Our review establishes that the unemployment law judge did not adequately develop the record regarding the employer's motivation for discharge. We, therefore, reverse the unemployment law judge's decision and remand this matter for further proceedings.

FACTS

Relator Eunice Chege was discharged from her employment with Wells Fargo Bank, NA, on November 28, 2006. Wells Fargo's expressed reason for the discharge is Chege's violation of company policies prohibiting "gaming," which is defined as the manipulation or misrepresentation of sales in an attempt to meet sales goals or to increase compensation. Chege maintains that she was discharged in retaliation for requesting leave pursuant to the Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§ 2601-2654 (2000). The Minnesota Department of Employment and Economic Development (department) denied Chege's application for unemployment benefits based on a determination that she was discharged because of employment misconduct.

Chege appealed the denial of unemployment benefits, and a telephonic hearing was held before an unemployment law judge (ULJ). Before the hearing, Chege went to the Woodbury Workforce Center and asked an employee whether she should have legal representation during the hearing. That employee told Chege that it is just a "procedural hearing," that it would be "easy," that all she had to do was answer the judge's questions, and that most people did not have legal representation.

During the hearing, Chege's supervisor, branch manager Roger Loggins, testified that Chege was discharged for registering sales of the bank's Rewards program to the accounts of customers who denied speaking with Chege or agreeing to pay for the program.[1] Loggins testified that the bank began investigating Chege's conduct after a customer complained that she did not authorize a charge that had been entered into the bank's computer system by Chege. Chege denied entering an unauthorized sale but was unable to provide documentation supporting the sale. Loggins testified that employees were expected to keep notes of their sales calls either on the computer or in their personal files. The bank put Chege on administrative leave and conducted an investigation, which involved speaking with additional customers to whom Chege had registered sales. From the investigation, the bank learned of four additional incidents of allegedly unauthorized sales. Unable to substantiate the sales, the bank terminated Chege's employment.

After questioning the bank's witnesses, the ULJ offered Chege the opportunity to ask questions as well. When Chege began her questioning with a statement, the ULJ

[1] Customers enrolled in the Rewards program earn points for purchases made with their debit cards and can exchange those points for prizes. There is a one-time enrollment fee of $12.95 for the program.

interrupted her and directed her to save statements for her own testimony. Chege then said that she did not have any questions at that time.

The ULJ next questioned Chege, who denied that she had entered any unauthorized sales. Chege testified that she had kept notes of her sales calls to customers on a prospector list provided by the bank. Chege testified that, in preparation for a two-week leave to care for her ailing mother, she shredded the prospector list in compliance with the bank's policies protecting confidential customer information. Chege claimed that the bank records would confirm that she had made calls to the complaining customers but conceded that the records would not establish whether the customers had authorized the sales.

At the end of her questioning, the ULJ asked Chege if she had anything to add. Chege stated: "I just feel that the whole reason I was really let go is because I had requested . . . the family medical leave." Earlier in the questioning, Chege had testified that she planned to begin her leave just two days after she ultimately was discharged. The ULJ did not ask any additional questions about Chege's request for FMLA leave, and the Wells Fargo's witnesses did not refute her allegations.

Following the hearing, the ULJ ruled that Chege was discharged for committing employment misconduct and, therefore, is disqualified from receiving unemployment benefits. Chege returned to the Woodbury Workforce Center and spoke with another employee, who gave her a referral for a legal aid attorney.

With the assistance of her attorney, Chege requested reconsideration of the ULJ's decision, arguing that the ULJ erred by (1) failing to develop the record regarding

Chege's FMLA request, and (2) admitting and relying on hearsay evidence from unidentified declarants. In support of her request for reconsideration, Chege submitted documentation regarding her FMLA request. Chege also submitted an affidavit describing comments from Loggins and another supervisor to the effect that Chege could take FMLA leave but it would "impact [her] career at Wells Fargo." The ULJ denied Chege's request for reconsideration.

On certiorari appeal to this court, Chege reasserts her arguments regarding insufficient record development and inappropriate reliance on hearsay. She also challenges the ULJ's failure to order an additional evidentiary hearing to consider the additional evidence that she submitted with her request for reconsideration. Because we conclude that the ULJ erred by failing to fully develop the record at the initial evidentiary hearing, we do not reach Chege's assertion that the ULJ erred by denying an additional evidentiary hearing.

D E C I S I O N

An employee who is discharged for employment misconduct is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2006). Upon timely appeal of a disqualification determination, the applicant is entitled to an evidentiary hearing before an unemployment law judge (ULJ). Minn. Stat. § 268.105, subd. 1(a) (2006). Following the hearing, the ULJ must issue findings of fact and a decision. *Id.*, subd. 1(c) (2006). The ULJ's decision is subject to review by this court on a petition for writ of certiorari. *Id.*, subd. 7(a) (2006).

We may affirm, reverse, or modify the decision of a ULJ, or remand a case for further proceedings

> if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusions, or decision are:
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> (1) in violation of constitutional provisions;
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> (2) in excess of statutory authority or jurisdiction of the department;
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> (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 and capricious.

Id., subd. 7(d) (2006).

The evidentiary hearing on a disqualification for unemployment benefits is to be conducted "without regard to any common law burden of proof as an evidence gathering inquiry and not an adversarial proceeding." *Id.*, subd. 1(b) (2006). Toward this end, the ULJ must "ensure that all relevant facts are clearly and fully developed." *Id.* "When the reason *for* the discharge is disputed, the hearing process must allow evidence on the competing reasons and provide factual findings on the cause of discharge." *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). And under the department's rules, when a party is not represented by counsel, the ULJ must assist the party with presenting evidence. Minn. R. 3310.2921 (2005).

Chege asserts that the ULJ erred by failing to develop the record regarding Chege's FMLA request and whether her termination was in retaliation of that request. We agree. During her testimony, Chege clearly raised this possible alternative reason for her discharge. But the ULJ posed no questions to either party regarding the FMLA

request and made no meaningful effort to evaluate the impact of the request on Chege's termination. The ULJ compounded the impact of this error by making credibility determinations based on the "unsupported" nature of Chege's allegations that she was discharged for taking FMLA leave. We conclude that, in order to discharge her duty to fully develop the record, the ULJ was required, at a minimum, to explore the reasons that Chege believed her discharge was retaliatory and elicit the employer's response to Chege's retaliation allegations.

Chege also objects to the ULJ's reliance on hearsay testimony regarding complaints from customers who were not identified to Chege or the ULJ. Chege asserts that she was entitled to know the identity of the customers who complained and that the ULJ should have required Wells Fargo to submit documentary evidence corroborating the testimony regarding the investigation of these complaints. We agree that further development of the record is warranted, but we are not persuaded that documentary evidence was required to support the ULJ's decision.

Initially, we observe that hearsay evidence is admissible in unemployment proceedings 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 (2005); *see also* Minn. Stat. § 268.105, subd. 1(b) (directing department to adopt rules governing evidentiary hearings, which need not conform to rules of evidence). We have affirmed reliance on hearsay evidence that is detailed, corroborated, and free from any suggestion of bias on the part of the affiant. *See Posch v. St. Otto's Home*, 561 N.W.2d 564, 566

(Minn. App. 1997) (citing *Holtan v. Gnan Trucking, Inc.*, 379 N.W.2d 571, 574 (Minn. App. 1985)).

We are mindful that due-process considerations are implicated in the admission of hearsay evidence. *See Juster Bros. v. Christgau*, 214 Minn. 108, 119, 7 N.W.2d 501, 507 (1943). Due process guarantees an applicant for unemployment benefits the "opportunity to be present during the taking of testimony or evidence, to know the nature and contents of all evidence adduced in the matter, and to present any relevant contentions and evidence the [applicant] may have." *Id.*

The issue before us is whether the ULJ properly based her decision on hearsay evidence of customer complaints without requiring further development of the facts related to those complaints. The complaints in this case were not anonymous. Rather, the identity of the customers who complained is known to Wells Fargo but has never been disclosed to Chege. It would not have been difficult for Wells Fargo to make this disclosure, given that there were only five complaints. Chege asserts that knowing the identity of the complaining customers would have assisted her in defending against the allegations of employment misconduct because, as a business banker, she was familiar with many of the customers whom she would attempt to enroll in the Rewards program. By affidavit, Chege provides details of her conversation with the customer whom she believes made the initial complaint. If Chege can provide this type of detail with respect to the four other customers who have alleged unauthorized sales, such information would be relevant to the credibility of the customer complaints and the credibility of Chege's denial of any wrongdoing.

We also are mindful that Chege could have requested the identity of the customers by subpoena or through cross-examination during the hearing. *See* Minn. R. 3310.2914 (providing subpoena power), 3310.2921 (providing right to cross-examine adverse witnesses) (2005). Chege attempted to ask questions of Wells Fargo's witnesses but was interrupted by the ULJ, who instructed Chege not to include statements in her questioning. Apparently confused by this instruction, Chege opted not to pose any questions. This type of circumstance illustrates precisely why the department's rules require the ULJ to assist unrepresented parties in developing the evidence. Under the circumstances presented, we conclude that the ULJ erred by relying on the testimony regarding customer complaints without requiring disclosure of the customers' identities and providing Chege with an opportunity to respond to each customer's allegations.

With respect to Chege's assertion that documentary evidence should have been required, we observe that the ULJ's decision must be supported by substantial evidence. *See* Minn. Stat. § 268.105, subd. 7(d)(5) (2006); Minn. R. 3310.2922. But we find no support for Chege's argument that documentary evidence is required to support a ULJ's decision. Accordingly, whether documentary evidence is necessary to reach the substantial-evidence threshold rests within the ULJ's discretion to determine.

In sum, the ULJ erred by failing to fully develop the record regarding the reason for Chege's discharge, by failing to require disclosure of the identity of the customers who complained, and by failing to offer Chege an opportunity to respond to those complaints. Because the denial of unemployment benefits must "turn on the actual cause of separation," *see Harringer v. AA Portable Truck & Trailer Repair Inc.*, 379 N.W.2d

222, 224 (Minn. App. 1985), the ULJ's errors affected Chege's substantial rights. Accordingly, we reverse and remand for further proceedings in accordance with this decision.

Reversed and remanded.