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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-734**

Victoria Vang,
Relator,

vs.

Gopher Bearing Company Inc.,
Respondent,

Department of Employment
and Economic Development,
Respondent.

**Filed January 26, 2010
Reversed
Klaphake, Judge**

Department of Employment and Economic Development
File No. 21232865-3

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Economic Development)

Considered and decided by Bjorkman, Presiding Judge; Klaphake, Judge; and
Halbrooks, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Relator Victoria Vang challenges the decision of the unemployment law judge (ULJ) determining that she was ineligible to receive unemployment benefits because she had been discharged by her employer, respondent Gopher Bearing Company, Inc., for employment misconduct.

Because the ULJ's findings are not supported by substantial evidence in the record, we reverse.

DECISION

We may reverse or modify a ULJ's decision if it is unsupported by substantial evidence in the record. Minn. Stat. § 268.105, subd. 7(d) (2008). We review the ULJ's factual findings in the light most favorable to the decision. *Peterson v. Northwest Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). This court defers to the ULJ's credibility determinations, which are "the exclusive province of the ULJ and will not be disturbed on appeal." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006). Whether the employee's act constitutes misconduct is a question of law reviewed de novo by this court. *Peterson*, 753 N.W.2d at 774.

An employee who is discharged from employment because of misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). Misconduct includes "intentional, negligent, or indifferent conduct, on the job or off the job (1) that displays clearly a serious violation of the standards of behavior the employer

has the right to reasonably expect of the employee, or (2) that displays clearly a substantial lack of concern for the employment.” Minn. Stat. § 268.095, subd. 6(a) (2008). But it does not include

[i]nefficiency, inadvertence, simple unsatisfactory conduct, a single incident that does not have a significant adverse impact on the employer, conduct an average reasonable employee would have engaged in under the circumstances, poor performance because of inability or incapacity, good faith errors in judgment if judgment was required, or absence because of illness or injury with proper notice to the employer.

Id.

Despite the Minnesota Department of Employment and Economic Development’s claim that the ULJ explained why relator was not a credible witness, in fact, the ULJ made no credibility findings. “When the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of the decision, the unemployment law judge must set out the reason for crediting or discrediting that testimony.” Minn. Stat. § 268.105, subd. 1(c) (2008).

The ULJ’s ineligibility determination cites four areas of concern. First, the ULJ found that relator, who was employed as an accounts receivable clerk, failed to do bank reconciliations for April and May 2008. The ULJ stated that nothing supported relator’s claim that this was not one of her duties. But relator submitted a list of duties that had been transferred from relator to her supervisor, Michael Joshua, in February 2008. One of the duties transferred from relator to Joshua was bank reconciliations. Joshua testified that the company accountant had advised him not to do reconciliations because he was a

signatory on the bank account, but there is no evidence that Joshua informed relator of this. The ULJ found that Joshua mentioned in relator's performance review on July 16, 2008, that relator had failed to do the bank reconciliations, but this was not reflected in the July 16, 2008 written performance review, which was included in the record. Absent a determination by the ULJ that relator's testimony was not credible, there is not substantial evidence supporting this finding.

Second, the ULJ concluded that relator was "irresponsible in not forwarding the Winona payroll on June 27, 2008." The ULJ found that relator had been asked by Joshua, whose duty this was, to forward payroll checks to the Winona office, that relator never went to the receptionist to find the checks, and that the checks were not forwarded. According to the testimony, Joshua orally asked relator to perform this task. Relator testified that she had done it only once before and on that occasion, the receptionist handed her the checks. On this date, the receptionist put the checks on Joshua's desk and did not mention them to relator. Relator testified that she was busy that day, but she continued to wonder why the checks had not arrived. Again, the ULJ made no credibility determination. There is not substantial evidence in the record that this was a serious violation caused by relator's indifferent, negligent, or intentional conduct; this is, if anything, mere inadvertence or a good faith error in judgment. *See* Minn. Stat. § 268.095, subd. 6(a).

Third, the ULJ concluded that relator "also was not forthright about leaving early on July 3, 2008, and did not have permission." The ULJ found that (1) relator did not have pre-approval to leave early; (2) she left without telling chief operating officer

(COO) Joe Racine; (3) she told Paul Racine, who was not her supervisor, that she was leaving early; and (4) Joshua, her supervisor who was not at work that day, felt relator tried to hide her absence. Relator testified that she waited a half hour to talk to Joe Racine, who was on the telephone with customers, and finally told Paul Racine that she had worked overtime the two previous days and was going to leave. Joshua told her that she could leave early when she worked overtime because she was on salary; Joshua also told her that she had to have permission from her supervisor, but Joshua was gone that day. Paul Racine was not her supervisor, although he was also in a position of authority within the company as he was its purchasing manager. Paul Racine stated that he did not know why relator would tell him that she was leaving and that relator walked past Joe Racine's desk; he further testified that he said "Okay" and "kind of put my hands up in the air," as though to ask why she was telling him, but did not say anything else. Leadership of Gopher Bearing is dominated by the Racine family; Paul Racine is the son of COO Joe Racine and CEO Suzette Racine. The evidence does not support the ULJ's findings that relator tried to hide her absence, because she told Paul Racine that she was leaving. There was no testimony that relator had abused this practice; this was an isolated event without significant impact on the employer. *See* Minn. Stat. § 268.095, subd. 6(a).

Finally, the ULJ concluded that relator failed to inform Joshua that a state sales tax prepayment must be made and that this was a serious violation of the employer's reasonable standards. The ULJ found that relator "was aware of the prepayment requirement, but did not make the prepayment." According to the record, one of relator's

duties was to process the sales tax returns. The problem was not that the returns had not been processed but that no check was issued for prepayment. Joshua testified that he was unaware that a prepayment had to be made in June. Relator testified that she was not responsible for paying taxes, that she was an accounts receivable, not accounts payable, clerk, and that she believed the manager, Joshua, was responsible for paying the sales taxes. There is nothing in the record suggesting that relator had signing authority to issue a check. Again, the ULJ made no credibility findings. This incident had a significant impact on the employer because the employer incurred penalties for failure to timely pay the sales tax prepayment, but the record evidence does not substantially support a finding that relator was responsible for making the payment.

The ULJ chose to ignore certain pieces of evidence and to overlook testimony offered by relator. Had the ULJ made findings setting forth reasons for discrediting this evidence, we could defer to the ULJ's credibility determinations—no such findings were made. Based on the record before us, there is not substantial evidence supporting the ULJ's ineligibility determination.

Reversed.