STATE OF MINNESOTA
IN COURT OF APPEALS
A10-456

Mohamed Ibrow,
Relator,

vs.

Doherty Staffing Solutions, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed December 21, 2010
Affirmed
Bjorkman, Judge

Department of Employment and Economic Development
File No. 23741622-3

Matthew B. Novak, Charles H. Thomas, Law Offices of Southern Minnesota Regional Legal Services, Inc., Mankato, Minnesota (for relator)

Doherty Staffing Solutions, Inc., Edina, Minnesota (respondent)

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

Considered and decided by Toussaint, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Relator challenges the unemployment-law judge's (ULJ) determination that he is ineligible for unemployment benefits, arguing that (1) his employer failed to provide notice of the statutory constructive-quit provision and (2) the ULJ erred by determining that he constructively quit his employment without good cause. We affirm.

FACTS

Relator Mohamed Ibrow worked for respondent Doherty Staffing Solutions (Doherty), a staffing service, for approximately nine months in 2007. On or around May 27, 2009, he applied to return to Doherty. On May 27, he signed a document that advised him that if he failed without good cause to affirmatively request an additional job assignment from Doherty within five calendar days after completing a temporary job, or refused without good cause an additional suitable job assignment, he would be considered to have quit his employment with Doherty. He was further advised that such a quit may affect his unemployment benefits.

Starting on July 15, 2009, Doherty assigned Ibrow to work as a framer for a company called Viracon. In October 2009, Viracon informed Doherty that it no longer required the three shifts of temporary employees Doherty assigned to work there. On October 30, Doherty staffing specialist Andrea Kvalsten delivered a scripted statement during a meeting with these employees, informing them that their assignment at Viracon had ended. Approximately one-half of the 68 employees on the Viracon assignment

contacted Doherty for an additional assignment within five days after the meeting. Ibrow did not.

Ibrow applied for unemployment benefits. An adjudicator from respondent Minnesota Department of Employment and Economic Development (DEED) determined that Ibrow was ineligible for benefits because he constructively quit his employment by failing to request an additional assignment within five days as required by Minn. Stat. § 268.095, subd. 2(d) (Supp. 2009). Ibrow appealed. At the hearing, Ibrow argued that he had good cause not to contact Doherty earlier[1] because Doherty representatives told him on October 30 that there was no more work at Viracon and they would contact him when an assignment was available. Kvalsten testified that she specifically avoided telling the employees that Doherty would contact them. The ULJ found that Ibrow constructively quit his employment by failing without good cause to timely request an additional assignment. Ibrow sought reconsideration, and the ULJ affirmed. This appeal follows.

D E C I S I O N

We review a ULJ's decision to determine whether 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.

[1] The record reflects that Ibrow contacted Doherty for an additional assignment on November 23, 2009, after the ineligibility determination and after a DEED employee advised him to do so.

§ 268.105, subd. 7(d) (2008). We review a ULJ's findings of fact in the light most favorable to the decision and defer to the ULJ's credibility determinations. *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). But we review de novo issues of law, including questions of statutory interpretation and the ultimate determination as to an employee's eligibility for unemployment benefits. *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 375, 377 (Minn. 1996).

Generally, an employee who quits employment is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 1 (Supp. 2009). In the unique context of staffing-service employers, an employee "is considered to have quit employment with the staffing service" if, within five calendar days after completion of a suitable job assignment, the employee "fails without good cause to affirmatively request an additional job assignment." *Id.*, subd. 2(d). Good cause, as used in this provision, means "a reason that is significant and would compel an average, reasonable worker, who would otherwise want an additional suitable job assignment with the staffing service . . . to fail to contact the staffing service." *Id.* The constructive-quit provision applies "only if, at the time of beginning of employment with the staffing service, the applicant signed and was provided a copy of a separate document written in clear and concise language that informed the applicant of this paragraph and that unemployment benefits may be affected." *Id.*

I. Doherty provided Ibrow proper notice of Minn. Stat. § 268.095, subd. 2(d).

Ibrow argues that Doherty failed to comply with the statutory notice requirement. On May 27, 2009, Doherty provided Ibrow a document that read:

> According to Minnesota statutes, section 268.095, subdivision 2, paragraph d, an applicant who, within five calendar days after completion of a suitable temporary job assignment from a staffing service employer, (1) fails without good cause to affirmatively request an additional job assignment, or (2) refuses without good cause an additional suitable job assignment offered, is considered to have quit employment.
>
> It is your responsibility to contact Doherty . . . for additional assignments. If you fail to do so, it may affect your unemployment benefits.
>
> I understand by signing this form that I am responsible to contact Doherty within 5 calendar days once an assignment ends. I also acknowledge that I have received a copy of this form.

Ibrow signed the document and initialed it to indicate that he received a copy. This document informed Ibrow of the constructive-quit provision and that failure to contact Doherty may affect his unemployment benefits. It did not omit information required by the statute or include additional language that obscured the critical information. Accordingly, we conclude that the May 27, 2009 document provided the notice required to invoke the constructive-quit provision of Minn. Stat. § 268.095, subd. 2(d).

Ibrow argues that Doherty's conduct rendered the notice ineffective in three ways. First, Ibrow asserts that the document did not inform him of the constructive-quit provision in "clear and concise language" because Doherty gave it to him "among a host of paperwork." But he presents no authority to support the proposition that requiring an

employee to review and sign other employment-related forms at the same time as the constructive-quit notice undermines the clarity of the language used in that notice. Second, Ibrow argues that Doherty rendered the notice ineffective by not reminding employees of the constructive-quit provision at the end of the Viracon assignment. We disagree. The statute does not require staffing-service employers to remind employees to request an additional assignment at the end of each assignment, and we cannot read such a requirement into the statute. *See Bukkuri v. Dep't of Emp't & Econ. Dev.*, 729 N.W.2d 20, 23 (Minn. App. 2007) (stating that this court lacks the authority to supply exceptions or requirements omitted from unemployment statutes).

Finally, Ibrow argues that because Doherty provided the document in May 2009, rather than in July 2009 when he began work on the Viracon assignment, the notice was not provided "at the time of beginning of employment with the staffing service." *See* Minn. Stat. § 268.095, subd. 2(d). Ibrow did not make this argument to the ULJ. Accordingly, the ULJ did not make findings as to when Ibrow began employment with Doherty or the timeliness of Doherty's notice. Our review is limited to those issues actually considered by the ULJ. *See* Minn. Stat. § 268.105, subd. 7 (stating that this court reviews "the unemployment law judge's decision"); *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) (stating that appellate review is limited to issues raised and addressed below); *see also Big Lake Ass'n v. St. Louis Cnty. Planning Comm'n*, 761 N.W.2d 487, 491 (Minn. 2009) (stating that an argument is waived in an administrative appeal when not sufficiently raised in administrative proceeding). Because Ibrow did not

challenge the timing of the statutory notice before the ULJ, we consider this argument waived.

II. The ULJ's determination that Ibrow quit his employment without good cause is supported by substantial evidence and is not legally erroneous.

Ibrow also contests the ULJ's good-cause determination, arguing that an average, reasonable employee would have understood from Kvalsten's October 30 communications that he should not contact Doherty for an additional assignment. He also challenges the adequacy of the ULJ's credibility findings. These arguments are unavailing.

Ibrow first asserts that he had good cause not to timely request an additional assignment because Kvalsten's presentation to the employees on the Viracon assignment was intended to "carefully discourage employees from asking for more work." But he concedes that Kvalsten never actually told employees not to contact Doherty. Rather, the record reflects that she read a prepared statement to all three shifts of employees, telling them that "due to the reduced orders of production at Viracon, there was no longer work available for them at that time." Although Kvalsten did not remind the employees of their obligation to request an additional assignment or the consequences of failing to do so, she specifically avoided saying that Doherty would contact them.

Ibrow points to Kvalsten's testimony that only 10 of the 68 employees who worked at Viracon had requested an additional assignment by the Monday following the Friday presentation as indicative of how an average, reasonable employee understood Doherty's scripted communication. But Kvalsten also testified that approximately one-

half of the employees on the assignment contacted Doherty within five days. And even if only a fraction of the employees timely requested additional assignments, the record contains no explanation of why those employees failed to do so. The ULJ properly focused her analysis on the substance of Kvalsten's presentation to the employees. We conclude that the ULJ did not err by determining that Kvalsten's presentation did not compel an average, reasonable employee interested in working not to request an additional assignment.

Ibrow also cites his one-on-one discussion with Kvalsten following the group presentation as evidence of good cause for his failure to timely request an additional assignment. Specifically, Ibrow asserts that he asked to keep his Viracon badge in case any additional work became available and that he interpreted Kvalsten's denial of that request as an indication that it was unnecessary for him to contact Doherty for additional work. In essence, Ibrow asks us to apply a subjective analysis to the issue of good cause, contrary to the express statutory language. *See* Minn. Stat. § 268.095, subd. 2(d) (defining good cause with respect to "an average, reasonable worker"). We decline to do so. The average, reasonable employee would not interpret the denial of a request to keep an assignment-specific badge as an indication that no other assignments were available. We also note that the constructive-quit provision does not, by its terms, relieve an employee of the obligation to request an additional assignment if the employee believes that such a request will be fruitless. Therefore, we conclude that the ULJ did not err by determining that Kvalsten's individual communication with Ibrow did not establish good cause.

Finally, Ibrow argues that the ULJ's good-cause determination rests on inadequate credibility findings. But because there is no dispute as to what Kvalsten actually said to Ibrow, individually and during the group presentation, the ULJ's credibility findings do not bear on any factual dispute that has a significant effect on the issue of good cause. *See* Minn. Stat. § 268.105, subd. 1(c) (Supp. 2009) (requiring the ULJ to "set out the reason for crediting or discrediting" testimony that has a "significant effect on the outcome of a decision"). Regardless, the ULJ made and adequately explained multiple credibility findings, which have substantial support in the record.

Affirmed.