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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1084**

Warren Menk,
Relator,

vs.

C A B Construction Co.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed February 8, 2011
Affirmed
Shumaker, Judge**

Department of Employment and Economic Development
File No. 24512928-3

Warren L. Menk, Mankato, Minnesota (pro se relator)

C A B Construction Company, Mankato, Minnesota (respondent employer)

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

Considered and decided by Johnson, Chief Judge; Shumaker, Judge; and Harten,
Judge.*

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

UNPUBLISHED OPINION

SHUMAKER, Judge

Relator challenges the decision by the unemployment-law judge (ULJ) that he is ineligible for unemployment benefits because he quit employment without good reason attributable to his employer. He argues that (1) the proceedings were unfair; (2) he did not quit employment and instead the employer misunderstood what he meant; and (3) if he did quit, he had good reason to do so caused by the employer, which the ULJ should have addressed on reconsideration. We affirm.

FACTS

Relator Warren Menk began working as a welder for C A B Construction Co. on February 12, 2009. As Menk knew when he accepted the job, C A B required overtime, as necessary, to meet business needs. For some time, business was slow, and Menk was not required to work mandatory overtime. But business was then expected to pick up, and Doug Mulder, the production supervisor, told Menk that as of January 1, 2010, he would have to work mandatory overtime. On January 19, Menk asked to be excused from the overtime requirement, because it conflicted with another business that he operated. Mulder said he could not do so, and Menk said that he had no choice but to give his two weeks' notice. Mulder said he was sorry to see Menk go.

The next day, Menk's night supervisor was told that Menk had given notice, but he was also asked to tell Menk that if this was not what he meant, he should talk to Mulder to clear it up. When the night supervisor conveyed this to Menk, Menk denied that he had given notice, but he never contacted Mulder to let him know. Instead, after

one unsuccessful attempt to speak with Mulder, he incorrectly assumed without more that his night supervisor would convey the message to Mulder.

On February 2, 2010, when Menk arrived at work, Mulder told Menk it was his last day on the job because he had given his two weeks' notice. Menk said he did not intend to put in his two weeks' notice, but Mulder told him that his replacement had already been hired and trained in. Thus, February 2, 2010, was Menk's last day of work.

Menk applied for unemployment benefits but was deemed ineligible because he quit his job for a personal reason unrelated to his employment. He brought an administrative appeal. After an evidentiary hearing, the ULJ ruled that he was ineligible for unemployment benefits because he quit employment and no exception applied. The ULJ affirmed on reconsideration. Menk then brought this certiorari appeal.

D E C I S I O N

This court reviews the record to determine whether substantial rights of the relator have been prejudiced because the findings, inferences, conclusion, or decision of the ULJ are made on unlawful procedure, affected by error of law, not supported by substantial evidence in view of the entire record, or arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d) (2008). We will review the ULJ's findings of fact in the light most favorable to the decision, defer to the ULJ's credibility determinations, and uphold those findings if supported by substantial evidence in the record. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Legal issues will be reviewed de novo. *Id.*

I.

Menk first argues that the unemployment-hearing procedure was improper. To prevail on his claim of an unfair hearing, he must show that his substantial rights were prejudiced because the decision was made through unlawful procedure or was affected by error of law. *See* Minn. Stat. § 268.105, subd. 7(d); *see also Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 530 (Minn. App. 2007).

Menk first complains in effect that the Minnesota Department of Employment and Economic Development (DEED) failed to contact him to participate in an evidentiary hearing before issuing the determination of ineligibility, and that afterwards he was notified that he had not supplied certain information but was unable to find out what information was needed. DEED is not required to hold a hearing before making an initial determination of ineligibility. *See* Minn. Stat. § 268.101, subd. 2 (Supp. 2009) (addressing the determination of ineligibility). Instead, the “issue of ineligibility is determined based upon that information required of an applicant, any information that may be obtained from an applicant or employer, and information from any other source.” *Id.*, subd. 2(c). Menk brought an administrative appeal from the initial determination of ineligibility, and he had a fair opportunity to address any error that he believed had been made there.

Menk also complains that at his evidentiary hearing, the ULJ contacted the employer’s representative on the telephone first, before contacting him. An applicant is entitled to a “de novo due process evidentiary hearing.” Minn. Stat. § 268.105, subd. 1(a) (Supp. 2009). The ULJ “must exercise control over the hearing procedure in a manner

that protects the parties' rights to a fair hearing." Minn. R. 3310.2921 (2009). Menk did not raise this issue with the ULJ, and he has not shown that the order in which the ULJ contacted the parties deprived him of the opportunity to be heard fully on his claim. In any event, a review of the transcript shows that nothing of substance was discussed in the few moments that the ULJ spoke with Mulder before calling Menk.

II.

Next, Menk challenges the finding by the ULJ that he quit the employment. "A quit from employment occurs when the decision to end the employment was, at the time the employment ended, the employee's." Minn. Stat. § 268.095, subd. 2(a) (Supp. 2009). "A discharge from employment occurs when any words or actions by an employer would lead a reasonable employee to believe that the employer will no longer allow the employee to work for the employer in any capacity." Minn. Stat. § 268.095, subd. 5(a) (2008).

At the hearing, the ULJ heard conflicting evidence as to whether Menk had actually given his two weeks' notice on January 19, after Mulder, the plant supervisor, told Menk he would not be excused from mandatory overtime. "When 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) (Supp. 2009). The ULJ ruled that because Mulder's testimony was corroborated and described a more likely chain of events than Menk's testimony, Mulder was a more persuasive witness than Menk. The ULJ found that the preponderance of the evidence showed that Menk stated

clearly to Mulder that he was putting in his two weeks' notice, which showed his decision to quit.

The ULJ set out his reasons for crediting Mulder's testimony and discrediting Menk's testimony, and substantial evidence supports the ULJ's credibility determinations. We therefore defer to those determinations and affirm the ULJ's finding that Menk quit his employment.

III.

Finally, Menk argues that the ULJ should have considered his argument on reconsideration that if he did quit, he had good reason to do so because of harassment by co-workers, unfair treatment by the employer, and safety problems. *See* Minn. Stat. § 268.095, subd. 1(1) (Supp. 2009) (providing that one who quits employment may be eligible for unemployment benefits if the quit was based on a good reason caused by the employer). The ULJ affirmed his decision on reconsideration, ruling that his findings were based on evidence in the record and that the reasons for the credibility determinations were as set out in the initial order. The ULJ also declined to reopen the record because Menk had not previously raised the claim that he quit because of harassment.

The ULJ is prohibited from considering evidence submitted for the first time on reconsideration, except to decide whether to order an additional evidentiary hearing. Minn. Stat. § 268.105, subd. 2(c) (Supp. 2009). The ULJ may order the additional hearing and thus reopen the record only if, in relevant part, this evidence "would likely change the outcome of the decision and there was good cause for not having previously

submitted that evidence.” *Id.* At the hearing, it was undisputed that Menk quit, or threatened to quit in the future, because of his dissatisfaction with mandatory overtime, and he has not established good cause for failing to submit the new evidence at that hearing. Under these circumstances, we defer to the ULJ’s decision. *See Ywswf*, 726 N.W.2d at 533 (providing that “this court will defer to the ULJ’s decision not to hold an additional evidentiary hearing”).

We conclude that Menk was given a fair hearing; the ULJ’s finding that he quit employment was based on the ULJ’s credibility determinations that we have no reason to disturb and that are supported by substantial evidence in the record; and we defer to the ULJ’s decision not to reopen the record.

Affirmed.