

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0035**

Patricia A. Grindle-Benedict,
Relator,

vs.

Emmer and Associates, P.A.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed February 26, 2008
Affirmed
Klaphake, Judge**

Department of Employment and Economic Development
File No. 12276 06

Katherine L. MacKinnon, 3744 Huntington Avenue, St. Louis Park, MN 55416-4918 (for relator)

Michael D. O'Neill, Johnson, Provo-Petersen, O'Neill LLP, 332 Minnesota Street, Suite W-975, St. Paul, MN 55101 (for respondent Emmer and Associates)

Lee B. Nelson, Katrina I. Gulstad, Department of Employment and Economic Development, First National Bank Building, 332 Minnesota Street, Suite E200, St. Paul, MN 55101-1351 (for respondent Department of Employment and Economic Development)

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

UNPUBLISHED OPINION

KLAPHAKE, Judge

Relator Patricia A. Grindle-Benedict, n/k/a Patricia Thomson McElroy, challenges the decision of the Department of Employment and Economic Development unemployment law judge (ULJ) disqualifying her from receiving unemployment benefits because she was discharged by her employer, respondent Emmer and Associates, P.A., for misconduct. Relator argues that the use of telephone hearings is a violation of Minn. Stat. § 268.105 (2006), and of procedural due process and that the ULJ erred by refusing to accept her written response to the employer's appeal letter and by receiving evidence of alleged misconduct that the employer was unaware of at the time of termination.

Because we conclude that (1) the department has the discretion to determine the method by which evidentiary hearings are conducted; (2) the telephone hearings meet at least minimum due process standards; and (3) the ULJ did not err by refusing to accept relator's written response or by considering evidence of alleged misconduct occurring after termination, we affirm.

DECISION

This court can affirm the decision of the ULJ, remand a case for further proceedings, or reverse or modify the ULJ's decision if a party's substantial rights have been prejudiced because of violation of constitutional procedures, absence of statutory authority, unlawful procedure, error of law, lack of substantial evidence, or an arbitrary and capricious result. Minn. Stat. § 268.105, subd. 7(d) (2006).

Telephone Hearings: Fairness

The statutes and rules governing unemployment hearings do not specifically mention telephone hearings. Minn. Stat. § 268.105, subd. 1(b) (2006) states: “The department shall adopt rules on evidentiary hearings. The rules need not conform to common law or statutory rules of evidence and other technical rules of procedure. The department shall have discretion regarding the method by which the evidentiary hearing is conducted.” An evidentiary hearing is a fact-finding inquiry and not an adversarial proceeding. *Id.* The overriding concern is that the ULJ “exercise control over the hearing in a manner that protects the parties’ rights to a fair hearing.” Minn. R. 3310.2921 (2005). So long as the parties are afforded a fair hearing, we will not question the broad discretion accorded to the department as to the method or means used to achieve this goal.

Relator challenges the fairness of the telephone hearing on three grounds. First, she asserts that her heavy Scottish accent put her at a disadvantage over the telephone. Second, she argues that the telephone hearing was fundamentally unfair because the ULJ largely based his decision on credibility determinations, which can more readily and accurately be made in person. Third, she claims the ULJ erroneously denied her request for in-person reconsideration, after she requested that he consider her unsworn written answer to the employer’s appeal letter.

As to relator’s first contention, we have reviewed the transcript of the hearing and find no indication that relator had difficulty making herself understood or understanding others.

Second, the ULJ may make credibility determinations where they have a significant effect on the outcome, so long as findings explaining those conclusions are included in the record. Minn. Stat. § 268.105, subd. 1(c) (2006). Here, the ULJ noted inconsistencies in relator's testimony and found that she was vague in her assertions, while the employer, who was represented by Thomas Emmer, the principal of the law firm, was able to provide concrete examples. Relator argues that the ULJ cannot make an accurate assessment of credibility without observing witness demeanor. In *Ywswf v. Teleplan Wireless Servs. Inc.*, 726 N.W.2d 525, 532-33 (Minn. App. 2007), this court commented on the many factors that can be used for assessing credibility, drawing from the jury instruction guide, 4 *Minnesota Practice*, CIVJIG 12.15 (2006). These factors include the witness's gain or loss in the outcome, relationship to the parties, manner of learning the facts, memory, age, experience, and consistency with other evidence, all factors that do not rely solely on visual observation of a witness, as well as some that do, such as demeanor, and an assessment of honesty, sincerity, frankness, and directness. *Id.* In a law journal article discussing the use of telephone hearings in unemployment compensation cases, the authors discuss the potential loss of evidence through failure to observe witness demeanor but conclude that hearing officers still retain the ability to make accurate determinations about witness credibility. Allan A. Toubman, Tim McArdle, & Linda Rogers-Tomer, *Due Process Implications of Telephone Hearings: The Case for an Individualized Approach to Scheduling Telephone Hearings*, 29 U. Mich. J. L. Reform 407, 415-16 (Fall 1995/Winter 1996). We have consistently deferred to the department's assessment of credibility. *Skarhus v. Davanni's, Inc.*, 721 N.W.2d 340, 344

(Minn. App. 2006). Before the 2005 amendments to the law, we accepted the credibility determinations of the commissioner's representative and the senior unemployment law judge, despite the fact that they were based on a review of the findings of the actual fact-finder. *Tuff v. Knitcraft Corp.*, 526 N.W.2d 50, 51 (Minn. 1995); *Ywswf*, 726 N.W.2d at 531. Having long accepted this, we cannot conclude that the ULJ's credibility determinations carry no weight if made based on a telephone hearing.

As to relator's third contention, when a party requests reconsideration of a determination, no more evidence may be submitted unless it is necessary to decide whether there should be an additional evidentiary hearing. Minn. Stat. § 268.105, subd. 2(c) (2006). The ULJ must order an additional evidentiary hearing if the applicant produces evidence that would likely change the outcome of the decision. *Id.* Here, relator asked the ULJ to consider the exhibit she had prepared that had not been accepted at the telephone hearing. The exhibit is an unsworn letter from relator answering the points of employer's appeal letter. The ULJ originally urged relator to testify as to the matters in the letter. After receiving relator's request for reconsideration, the ULJ found that consideration of this exhibit would not affect the outcome. Absent an abuse of discretion, a reviewing court defers to the ULJ's decision not to hold an additional evidentiary hearing. *Skarhus*, 721 N.W.2d at 345.

Telephone Hearings: Procedural Due Process

Relator challenges the use of telephone hearings as a denial of her constitutional right to due process. Constitutional challenges are questions of law reviewed de novo by this court. *Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999).

Unemployment proceedings must afford procedural due process to an applicant. *Schulte v. Transp. Unlimited, Inc.*, 354 N.W.2d 830, 832 (Minn. 1984). In the unemployment context, due process requires an “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 party may have.” *Juster Bros., Inc. v. Christgau*, 214 Minn. 108, 119, 7 N.W.2d 501, 507 (1943); *see also Ywswf*, 726 N.W.2d at 529-30 (concluding that evidentiary unemployment hearing, which had been conducted by telephone, was fair).

The hearing conducted here met the basic standards for procedural due process: relator was present, albeit by telephone, had a copy of the evidence submitted to the ULJ, and was given an opportunity to testify, question, and make a closing argument. Although we question whether a telephone hearing is equivalent in quality to an in-person hearing, we conclude that this method provides minimum procedural due process, and we therefore defer to the department’s decision to conduct hearings by telephone.

Refusal to Accept Evidence

The ULJ may exclude evidence that is irrelevant, immaterial, unreliable, or unduly repetitious. Minn. R. 3310.2922 (2005). Because it had not been served or filed in a timely manner, the ULJ excluded relator’s exhibit responding to the employer’s appeal letter, but kept it in his file in case of further proceedings. The ULJ told relator that the unsworn statement added nothing to her oral testimony and encouraged her to testify at the hearing, rather than rely on the written submission. Although relator argues that the refusal to accept her letter placed her at a disadvantage, she did have a copy of the letter

and could use it to organize and supplement her testimony. The ULJ has broad discretion in conducting hearings; we conclude that the ULJ's refusal to accept the statement was not an abuse of discretion.

Relator also argues that it was unfair to accept the employer's appeal letter, while rejecting her response letter. The appeal letter is the introductory means by which the appeal of the nondisqualification is made. Minn. Stat. § 268.103, subd. 2(b) (2006). No special format is required; the written statement must merely reasonably inform the department and the parties that there is a disagreement. *Id.* There is no complementary procedure for a reply letter. Under these circumstances, the ULJ's treatment of the two documents was not unfair.

Post-Discharge Evidence

Relator asserts that the ULJ abused his discretion by accepting post-discharge documentation that suggested that relator had improperly used employer funds. Generally, the reason for termination is determined at the time of discharge. *Hansen v. C.W. Mears, Inc.*, 486 N.W.2d 776, 780 (Minn. App. 1992), *review denied* (Minn. July 16, 1992). Conduct occurring after discharge cannot be the basis for disqualification. *Id.*

Although the ULJ accepted the proffered documentation, his disqualification determination is based on other specific instances of conduct predating discharge, including relator's failure to renew her employer's attorney license, allowing a copier lease to lapse, paying bills late, failure to send out billings, and a final argument in which relator accused Emmer of being a liar. The ULJ does cite the \$1,700 check found on

relator's desk after discharge, but this tends to confirm employer's testimony that relator was not keeping current on financial matters. In his order of affirmation issued after relator's request for reconsideration, the ULJ reiterated that he relied on evidence of relator's failure to perform job duties before the date of discharge, not on the evidence of the \$1,700 check. The ULJ also stated that although he received evidence that tended to show misuse of funds, that was not the basis for disqualification.

Given the broad discretion conferred on the ULJ and relaxed evidentiary standards in unemployment hearings, the receipt of this evidence was not an abuse of discretion.

Affirmed.