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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1872**

Leigh Peterson,
Relator,

vs.

Tamarisk, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed July 30, 2012
Affirmed
Schellhas, Judge**

Department of Employment and Economic Development
File No. 27923662-3

Leigh Peterson, Fridley, Minnesota (pro se relator)

Tamarisk, Inc., Andover, Minnesota (respondent)

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

Considered and decided by Schellhas, Presiding Judge; Kalitowski, Judge; and
Chutich, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

In this certiorari appeal relator challenges an unemployment-law judge's decision that she is ineligible to receive unemployment benefits, arguing that (1) the employer did not properly appeal the initial determination of eligibility; (2) the unemployment-law judge denied her a fair evidentiary hearing; (3) the unemployment-law judge erred by determining that she engaged in employment misconduct; and (4) the unemployment-law judge erred by not holding an additional hearing. We affirm.

FACTS

Appellant Leigh Peterson worked for respondent Tamarisk Inc. from October 2010 through June 1, 2011, in a part-time position as development director. Tamarisk relies on fundraising and grants to provide hospice care.

At an evidentiary hearing before an unemployment-law judge (ULJ), testimony established the following: Peterson's experience in fundraising and creating successful fundraising events were significant factors in Tamarisk's decision to hire her; Peterson's primary responsibility at Tamarisk was to organize fundraisers; fundraising was a "major" part of her position; Peterson's job description included this duty, and she was aware of the responsibilities contained in her job description; Peterson agreed that fundraising was a primary reason she was hired; entering into agreements for venues and vendors is part of planning and holding a fundraising event; late in 2010, Peterson developed, and Tamarisk's board of directors approved, a strategic plan that included

several fundraising events during 2011; and the plan included one event in the spring that did not take place.

Testimony at the evidentiary hearing also established that, in January 2011, Peterson began to look for full-time employment elsewhere; Peterson believed that she would leave her position at any time and did not want Tamarisk to be financially obligated to hold a fundraising event if she were not there to oversee the event. Peterson believed that Tamarisk could not manage an event initiated by her after she left, and she therefore did not schedule any fundraising events during her tenure as development director. But, from January to late May 2011, Peterson purportedly updated the board of directors at monthly board meetings and purportedly updated her supervisor, Dennis Eichinger, twice a month. She continuously informed the board that she was organizing and planning fundraising events. At one point, she told Eichinger that the spring event was pushed back because the newsletter was mailed late. Peterson never told Eichinger that she was not scheduling or fully organizing fundraising events.

In early May, the board asked Peterson for specific dates for the fundraising events, and she said she would provide the dates at the June board meeting. On May 27, Peterson told Eichinger that she had not scheduled any fundraisers because she was looking for other employment and did not anticipate being in her position at Tamarisk much longer. She explained that she was avoiding scheduling events and financially obligating Tamarisk because she believed that she would not be working for the organization to oversee the events.

On June 1, Peterson told the board of directors that she had not scheduled any fundraising events, and the board terminated her employment for failing to complete her job duties and misrepresenting her progress concerning the fundraising planning. As a result of Peterson's conduct, Tamarisk raised no funds from fundraising events in the first six months of 2011, and offered testimony that of the four fundraising events it intended to hold in 2011, it might hold only one.

Peterson applied for unemployment benefits, and the Minnesota Department of Employment and Economic Development (DEED) determined that she was eligible because she was terminated from her position for unsatisfactory work performance. Tamarisk appealed the determination.

The ULJ found that Tamarisk discharged Peterson for failing to fully complete her job duties related to fundraising by failing to plan and organize events and for misrepresenting her progress concerning the planning of the events. The ULJ concluded that Peterson "knowingly failed to complete essential duties" of her position; that "[h]er intentional conduct was clearly a serious violation of the standards of behavior that Tamarisk had a right to reasonably expect of her"; and that "[s]he showed a substantial lack of concern for the employment and ultimately placed the organization in an unfortunate set of circumstances." The ULJ concluded that a preponderance of the evidence does not support Peterson's contention "that she was honest and upfront with the employer," and that the "evidence supports that [Peterson] never intended to hold an event after she decided to take full-time employment [elsewhere] if offered to her. . . .

The employer's contention that she was dishonest with the employer is supported by the undisputed facts."

Upon Peterson's request for reconsideration, the ULJ affirmed the decision without holding an additional hearing. This appeal by writ of certiorari follows.

D E C I S I O N

We review a ULJ's decision on unemployment benefits to determine whether substantial rights were prejudiced because the findings, inferences, conclusion, or decision are affected by error of law, unsupported by substantial evidence in view of the entire record, or arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d) (2010). Based on that review, we may affirm, reverse, or modify the ULJ's decision, or remand the case for further proceedings. *Id.* "Questions of law are reviewed de novo, while findings that are supported by substantial evidence will not be disturbed." *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007).

Tamarisk's Appeal from Determination of Eligibility

Peterson asserts that Tamarisk did not properly appeal DEED's eligibility determination because its July 12, 2011 letter of appeal from DEED's June 28, 2011 determination of eligibility did not satisfy the statutory requirement in Minn. Stat. § 268.101, subd. 2(b) (2010). Subdivision 2(b) provides the following:

A communication from an employer must specifically set out why the applicant should be determined ineligible for unemployment benefits for that communication to be considered to have raised an issue of ineligibility for purposes of this section. A statement of "protest" or a similar term without more information does not constitute raising an issue of ineligibility for purposes of this section.

Minn. Stat. § 268.101, subd. 2(b). Peterson asserts that the employer’s appeal should not have been considered, arguing that the appeal letter did not satisfy the specificity requirement because the letter “contained no new evidence to justify an appeal other than that they ‘strongly disagreed’ with the initial determination.” Peterson’s argument is misplaced because Minn. Stat. § 268.101, subd. 2(b), is not applicable. Section 268.101 addresses DEED’s initial determination of an applicant’s eligibility for unemployment benefits, and the quoted portion of subdivision 2(b) informs the employer that if it wishes to assert to DEED reasons that it believes the applicant should be determined ineligible, it must be specific in its comments. In the challenged July 12, 2011 letter of appeal, Tamarisk did not raise an issue of eligibility for DEED to consider in making the initial determination, but, rather, *appealed* the determination of eligibility. *See* Minn. Stat. §§ 268.105, subd. 2(f) (providing that eligibility determination is final unless appeal is filed), .103 (addressing manner and format of appeals) (2010).

Because Tamarisk properly appealed the determination of eligibility, DEED did not err by proceeding with the appeal and scheduling an evidentiary hearing. *See* Minn. Stat. § 268.105, subd. 1(a) (2010) (stating that upon timely appeal, DEED “must set a time and place for a de novo due process evidentiary hearing” and provide notice to involved parties).

Fairness of Evidentiary Hearing

Peterson argues that the ULJ disproportionately “interrupted, dismissed or cut off [her] testimony This alone definitively shows an imbalance and possible prejudice on the part of the ULJ.”

An evidentiary hearing by a ULJ is “a de novo due process evidentiary hearing.” Minn. Stat. § 268.105, subd. 1(a). In a fair hearing, a ULJ fully develops the record, reasonably assists an unrepresented applicant in presenting a case, and explains the procedure of and the terms used throughout the hearing. *Id.*, subd. 1(b) (2010); Minn. R. 3310.2921 (2011). Generally, a hearing is considered fair if the parties are afforded an opportunity to give statements, cross-examine witnesses, and offer and object to evidence. *See Ywswf*, 726 N.W.2d at 529–30 (considering identified factors in determining relator had fair hearing). A ULJ must give “both parties ample opportunity to offer testimony.” *Lawrence v. Ratzlaff Motor Express Inc.*, 785 N.W.2d 819, 824 (Minn. App. 2010), *review denied* (Minn. Sept. 29, 2010).

Peterson’s complaints about the evidentiary hearing are unpersuasive. A thorough review of the hearing transcript reveals that the ULJ actively engaged in assisting Peterson during her testimony so that it would accurately reflect her understanding of the events. At times, the ULJ asked questions and directed Peterson to clarify her testimony and to develop the record concerning her job duties, her job performance, the reason she did not schedule fundraising events, and what she told her employer about her efforts in planning fundraisers. The ULJ provided Peterson an opportunity to ask questions of the employer’s representative and to submit evidence and testimony. We conclude that Peterson received a fair evidentiary hearing.

Peterson’s Employment Misconduct

An applicant discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). Employment

misconduct is “any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly: (1) a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee; or (2) a substantial lack of concern for the employment.” *Id.*, subd. 6(a) (2010).

Whether an employee performed the act alleged to be employment misconduct is a question of fact. *Risk v. Eastside Beverage*, 664 N.W.2d 16, 19–20 (Minn. App. 2003). Factual findings are reviewed in the light most favorable to the decision and sustained if substantial evidence supports the decision. Minn. Stat. § 268.105, subd. 7(d); *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). Whether an act amounts to employment misconduct is a question of law, which we review de novo. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011).

The ULJ’s finding that Tamarisk terminated Peterson for failing to complete her duties and misrepresenting her progress regarding fundraising planning is supported by substantial evidence in the record. Although Peterson disputes the timing of when she began intentionally not scheduling fundraising events, in her appellate brief, she admits that after May 4, 2011, she purposefully delayed scheduling fundraising events and was not doing what the board expected of her. The record evidence substantially supports the ULJ’s finding that Peterson failed to complete her duties and misrepresented her progress regarding fundraising planning.

We conclude that the ULJ did not err by concluding that Peterson was discharged for engaging in employment misconduct and therefore deciding that she is ineligible to

receive unemployment benefits. Peterson's conduct constitutes employment misconduct. "Dishonesty that is connected with employment may constitute misconduct." *Baron v. Lens Crafters, Inc.*, 514 N.W.2d 305, 307–08 (Minn. App. 1994). In *Baron*, the employee was discharged for failing to train managers in a particular process and for falsely stating that he had. *Id.* at 306. This court concluded that the employee's failure to perform his duties and his dishonesty about it were misconduct. *Id.* at 308.

Denial of Additional Evidentiary Hearing

Peterson argues that the additional evidence she submitted on reconsideration would prove that Tamarisk falsely stated that planning fundraising events was a primary duty and that she misled Tamarisk beginning in January 2011. She submitted evidence of a timeline of events, Tamarisk's newsletter, and her job description, which she purports prove that she fulfilled her essential job duties and that planning fundraising events were not a primary function of her position. She also submitted medical records showing that she was released from the hospital shortly before the evidentiary hearing, purportedly proving that she was mentally impaired at the time of the evidentiary hearing. The ULJ did not hold an additional hearing and therefore did not admit the new evidence because he concluded that Peterson failed to show good cause for not submitting the new evidence at the evidentiary hearing. The ULJ also concluded that Peterson's new "evidence only supports that there is disagreement between the parties rather than supporting that evidence provided by the employer at the hearing was likely false."

Peterson argues that the ULJ erred by not holding an additional evidentiary hearing. We disagree. When deciding a request for reconsideration, the ULJ may not

consider evidence that was not submitted at the evidentiary hearing except to determine whether to order an additional evidentiary hearing. Minn. Stat. § 268.105, subd. 2(c) (2010). A ULJ must order an additional evidentiary hearing if a party shows (1) that new evidence would likely change the outcome of the decision and good cause for not previously submitting the evidence or (2) that the evidence previously submitted was likely false and had an effect on the decision. *Id.* “We defer to a ULJ’s decision to grant or deny an evidentiary hearing and will reverse only for an abuse of discretion.” *Vasseei v. Schmitt & Sons Sch. Buses Inc.*, 793 N.W.2d 747, 750 (Minn. App. 2010).

Here, Peterson asserted that she did not offer the additional evidence at the evidentiary hearing because she did not understand the scope of the hearing. The notice of appeal informed Peterson that the issue to be considered at the hearing was the reason for her discharge; at the beginning of the hearing, the ULJ reiterated the issue to be addressed; and, Tamarisk’s notice-of-termination letter, which Peterson signed, states the reason for her discharge, providing Peterson with an indication of what the employer’s position would be at the hearing. And, as noted by the ULJ, Peterson did not request to reschedule the hearing, “actively participated and answered questions in a complete and articulate manner,” and did not appear to have an impairment that hindered her from effectively participating.

We conclude that the ULJ did not err by deciding that Peterson did not show good cause for not submitting her additional evidence at the evidentiary hearing, and, based on our review of the hearing transcript, we agree with the ULJ that nothing in the record suggests that Peterson had cognitive challenges that impeded her participation in the

hearing. Because Peterson did not satisfy either of the statutory requirements that would have entitled her to offer new evidence at an additional hearing, the ULJ appropriately denied her request for an additional hearing on reconsideration.

Affirmed.