

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2131**

LaKeya House,
Relator,

vs.

Accessible Space, Inc.,
Respondent,
Department of Employment and Economic Development,
Respondent.

**Filed August 13, 2012
Affirmed
Rodenberg, Judge**

Department of Employment and Economic Development
File No. 28439063-3

LaKeya House, White Bear Lake, Minnesota (pro se relator)

Accessible Space, Inc., St. Paul, Minnesota (respondent employer)

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

Considered and decided by Rodenberg, Presiding Judge; Cleary, Judge; and
Willis, Judge.*

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

UNPUBLISHED OPINION

RODENBERG, Judge

Relator challenges a determination by an unemployment-law judge (ULJ) that she was discharged from her employment as a resident assistant for misconduct, arguing that the ULJ (1) impermissibly prompted and permitted the employer to add an additional witness at the hearing; (2) erred in evaluating the credibility of the witnesses and the evidence did not support the ULJ's finding that the acts constituting misconduct had occurred; and (3) improperly relied on hearsay evidence. We affirm.

FACTS

Respondent-employer Accessible Space, Inc. provides housing and assisted-living services to vulnerable adults with significant physical disabilities and traumatic brain injuries. Relator LaKeya House worked for Accessible Space, Inc. as a part-time resident assistant from November 1, 2010, until August 18, 2011. She was discharged from employment by Accessible Space and applied for unemployment benefits.

In its response to a request for information from respondent Minnesota Department of Employment and Economic Development (DEED), Accessible Space, Inc. indicated that relator was discharged for misconduct. Based on this information, DEED determined that relator is ineligible for unemployment benefits. Relator appealed the determination to a ULJ.

At the hearing before the ULJ, Accessible Space, Inc.'s human-resources director initially indicated that she would be the only witness for the employer. However, at the

ULJ's prompting, the human-resources director also called the company's employment administrator as a witness.

Five reasons for relator's discharge were advanced at the hearing.

First, relator answered her cell phone on one occasion to inform her teenage daughter that relator would be late coming home because the coworker who was to relieve her had not arrived for the shift change. This was a violation of a company policy that prohibited employees from using their cell phones to make or receive personal calls while at work. At the hearing, relator admitted that this incident had occurred, but claimed that she had obtained permission from her shift supervisor prior to answering the phone.

Second, another employee was informed by a resident that relator admitted to leaving the office phone off the hook because relator did not want to answer service calls from the residents. Answering this phone is important because it is the means for the residents, who are vulnerable adults, to obtain assistance from the staff. At the hearing, relator denied this allegation.

Third, another employee reported an incident where a resident had ordered a pizza and provided that employee with money for the pizza and a tip. The pizza did not arrive in a timely manner, and relator made a comment to the employee about whether the tip should have been given to the driver after the delayed delivery. The other employee interpreted the comment to mean that relator would have kept the tip money for herself rather than returning it to the resident. At the hearing, relator explained that she had

intended to communicate that the resident should not have tipped the delivery person because of the delay, not that she would have kept the tip money herself.

Fourth, another employee reported having witnessed appellant take half of a steak belonging to a resident from a refrigerator in the resident's apartment. At the hearing, relator denied that this had happened.

Finally, Accessible Space, Inc.'s employment administrator testified that when relator had been suspended pending an investigation into the other incidents, the employment administrator expressly instructed relator not to discuss the situation with any other employees, but relator disobeyed this instruction and spoke to another employee. Relator denied this allegation.

Based on the evidence adduced at the hearing, the ULJ determined that all of the events complained of had occurred. The ULJ's findings were based on her determination that relator's testimony was not credible because it was internally inconsistent. The ULJ found that the testimony of the employment administrator was credible because, although hearsay, it was based on complaints from persons who had no motive to lie.

However, the ULJ also concluded that, of these incidents, only leaving the office phone off the hook and taking a resident's food constituted employment misconduct. The ULJ concluded that the cell-phone call, the pizza tip comment, and relator's communication with another employee during the investigation did not constitute employment misconduct.

The ULJ determined that relator was terminated for employment misconduct and is not eligible for unemployment benefits. The ULJ denied relator's subsequent request for reconsideration.

This appeal by writ of certiorari followed.

D E C I S I O N

I.

The pro se relator's first argument appears to be that it was inappropriate for the ULJ to prompt the human-resources director to call the employment administrator as a witness. Relator cites no authority for this proposition. DEED disputes relator's assertion that the ULJ's conduct was inappropriate, but likewise cites no authority.

DEED is accorded substantial latitude in establishing the rules and procedures for conducting evidentiary hearings for unemployment appeals. *See* Minn. Stat. § 268.105, subd. 1(b) (2010) (authorizing the department to adopt rules for evidentiary hearings that "need not conform to common law or statutory rules of evidence and other technical rules of procedure"). The rules adopted by DEED encourage ULJs to "assist unrepresented parties in the presentation of evidence" and require them to "ensure that relevant facts are clearly and fully developed." Minn. R. 3310.2921 (2011). The ULJ in this case fulfilled both of the mandates in Minn. R. 3310.2921 by prompting the human-resources director to call the person who had conducted the investigation into relator's misconduct as an additional witness. It is evident from our careful review of the record that the ULJ was acting in the interest of ensuring that the decision was made on a full and clearly developed record. The record does not reveal any partiality.

The ULJ's action was not an abuse of the discretionary authority conferred by Minn. R. 3310.2921.

II.

Relator next appears to argue that there was insufficient evidence to support the ULJ's finding that appellant took the phone off the hook or stole food from a resident.¹ Relator appears to base this argument on her claim that the ULJ should not have credited the evidence presented by the employer, but should instead have believed relator's testimony.

This court may reverse or modify the ULJ's factual findings if they are "unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 268.105, subd. 7(d)(5) (2010). "Substantial evidence" is defined as "1. Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; 2. More than a scintilla of evidence; 3. More than some evidence; 4. More than any evidence; and 5. Evidence considered in its entirety." *Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship*, 356 N.W.2d 658, 668 (Minn. 1984) (addressing the standard of review for administrative agency actions); *see also* Minn. Stat. § 14.69 (2010) (establishing the standards of review for administrative agency actions, and containing language that is virtually identical to that in § 268.105, subd. 7(d)); Minn. Stat. § 645.17(4) (2010) ("[W]hen a court of last resort has construed the language of a law,

¹ Relator does not dispute that these incidents would constitute misconduct, and in fact concedes that taking the phone off the hook could have had serious consequences including injury or death of a resident.

the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language.”).

“Whether the employee committed a particular act is a question of fact.” *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008).

In addition, this court must defer to the ULJ’s credibility determinations if they are supported by substantial evidence. *Compare Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006) (stating that credibility determinations are “the exclusive province of the ULJ and will not be disturbed on appeal”), *with Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 29 (Minn. App. 2007) (stating that the ULJ’s credibility determination must also be supported by substantial evidence) (citing *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 532–33 (Minn. App. 2007) (upholding a ULJ’s credibility determination after subjecting it to substantial-evidence review)).

In this case, the ULJ’s credibility determination was supported by substantial evidence. The ULJ determined that the resident who complained about relator taking the phone off the hook and the staff member who witnessed relator steal food had no reason to fabricate their stories.

The ULJ also determined that relator’s testimony was not credible because of internal inconsistencies, and this finding is also supported by substantial evidence. For example, while relator testified that she always worked alone, she also testified to conversations she had with coworkers. In addition, while relator testified that she had used her cell phone only once, with permission from her supervisor, in order to answer a

phone call from her daughter, this assertion was directly contradicted by relator's statement that her daughter was *returning* a phone call relator had initially made to the daughter.

As the ULJ's credibility determinations are supported by substantial evidence, this court defers to them. Because this court accepts the ULJ's credibility determinations, the ULJ's factual findings are also supported by substantial evidence, including statements made to the employer by residents and staff members that the ULJ found credible.

III.

Finally, relator appears to argue that the ULJ erred by relying on hearsay evidence. The rules adopted by DEED permit ULJs to receive credible hearsay evidence. Minn. R. 3310.2922 (2011); *see also* Minn. Stat. § 268.105, subd. 1(b) (authorizing the department to adopt rules that "need not conform to . . . rules of evidence"). The ULJ found that the hearsay evidence was credible because the resident and staff member who made the complaints did not have a motive to fabricate their stories. The ULJ did not err by receiving and considering the hearsay evidence.

The ULJ's factual and credibility determinations were supported by substantial evidence, and the ULJ properly conducted the hearing pursuant to the procedural rules prescribed by DEED.

Affirmed.