

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0761**

Robyn Jancik,
Relator,

vs.

Subway of Buffalo, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed January 14, 2013
Affirmed
Kirk, Judge**

Department of Employment and Economic Development
File No. 29025894-3

Robyn Jancik, Buffalo, Minnesota (pro se relator)

Subway of Buffalo, Inc., Blaine, Minnesota (respondent)

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

Considered and decided by Kirk, Presiding Judge; Ross, Judge; and Schellhas,
Judge.

UNPUBLISHED OPINION

KIRK, Judge

Relator Robyn Jancik challenges an unemployment law judge's (ULJ) decision that she was discharged for employment misconduct. She argues that respondent Subway of Buffalo, Inc. failed to meet statutory deadlines and is therefore barred from appealing the determination of eligibility of respondent Department of Employment and Economic Development. Jancik further maintains that the ULJ erred in his credibility determinations, factual findings, and conclusions of law. We affirm.

FACTS

Jancik was employed as a sandwich artist at Subway of Buffalo from September 22 to November 8, 2011. Over time, the restaurant owner noticed Jancik engaged in certain acts of misconduct, and he also received reports of her misconduct from other employees. Jancik's misconduct included taking too many breaks, talking on her cell phone, smoking cigarettes on the premises, and failing to get along with her coworkers. The owner warned Jancik about her misconduct on multiple occasions. On November 8, the owner discharged Jancik.

Jancik applied for unemployment benefits from the department. On December 5, the department issued a determination of eligibility, advising Jancik that she was eligible for unemployment benefits subject to an appeal period. The department later nullified this decision after it initially and erroneously identified Stadium Village Subway, Inc. as Jancik's former employer. Then, on January 4, 2012, the department reinstated the decision, this time naming the correct employer. On January 18, Subway of Buffalo

appealed the department's determination. Following an evidentiary hearing, the ULJ issued a decision determining that Jancik was discharged for employment misconduct and was ineligible for unemployment benefits. Jancik requested reconsideration, contending that the ULJ erred in his credibility and factual determinations. The ULJ affirmed his earlier decision.

Pursuant to Minn. Stat. § 268.105, subd. 7(a) (2010), this court granted Jancik's petition for a writ of certiorari.

D E C I S I O N

I. Subway of Buffalo timely responded to the department's requests for information.

This court may reverse or modify the ULJ's decision if it is affected by an error of law. Minn. Stat. § 268.105, subd. 7(d)(4) (2010). When addressing a question of law, the appellate court is "free to exercise [] independent judgment." *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006).

Jancik's first contention is that Subway of Buffalo failed to timely appeal the determination of eligibility. Her argument appears to arise from confusion as to the roles of the sister entities Subway of Buffalo and Stadium Village Subway.

It appears that Jancik is contending that a request for information was not timely returned to the department, thereby barring Subway of Buffalo's later appeal. The request, which was not sent to Jancik's employer but to Stadium Village Subway, was originally due back to the department on November 25, 2011. Whether that request was returned by the due date is not relevant because the request was not made to Jancik's

employer but to a different corporate entity, which was under no obligation to return the document. When Subway of Buffalo was eventually correctly identified as Jancik's employer and the determination of eligibility was sent to it, it appealed the determination of eligibility within 20 days of receiving the notice, as is required under Minn. Stat. § 268.101, subd. 2(f) (2010). Its appeal was timely.

II. The ULJ did not err in his credibility determination, factual findings, and conclusions of law.

Jancik next attacks the ineligibility decision of the ULJ, contending that his credibility determinations, factual findings, and conclusions of law were flawed. We address these contentions in turn.

A. Credibility determinations of the ULJ.

Jancik contends that the ULJ erred in crediting the testimony of the owner and a coworker of Jancik's who testified at the evidentiary hearing. She further contends that it was error on the ULJ's part to assign lower credibility to Jancik's own testimony.

This court may reverse or modify the decision of the ULJ if, among other reasons, the ULJ rendered a decision unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(5) (2010); *see Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 29 (Minn. App. 2007) (stating that this court will uphold a ULJ's credibility findings if they are supported by substantial evidence). Where, as here, the ULJ's misconduct determination rests on evidence that Jancik disputes and credibility is central to the ULJ's decision, the ULJ is required to "make credibility findings and to 'set out the reason for crediting or discrediting' the contested testimony." *Wichmann*, 729 N.W.2d at 29

(quoting Minn. Stat. § 268.105, subd. 1(c) (Supp. 2005)). “Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal.” *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006).

The ULJ plainly set out his reasons for crediting and discrediting the testimony of the witnesses. He explained that “Subways’ witnesses[’] testimony was more credible because it was more plausible. Jancik claimed that she took several breaks to avoid [her coworker’s] inappropriate conduct. This testimony is not credible because she never complained to [the owner] about threatening or harmful conduct by [her coworker].”¹

Among the factors that the ULJ may consider in making a credibility determination is whether the witness’s testimony is reasonable when compared with other evidence. *Ywsfw v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 533 (Minn. App. 2007). Besides the credibility ramifications of Jancik’s failure to notify the owner about the threats she allegedly felt from her coworker, the owner was able either to provide or identify documentary evidence to support his contentions about Jancik’s misconduct, including a petition complaining about Jancik that was prepared and signed by her coworkers, the owner’s personal observations, and his personal review of the store’s security cameras to monitor the location and behavior of Jancik when she should be working.

In her brief requesting the ULJ to reconsider his determination of ineligibility, Jancik provided additional evidence aimed at attacking the credibility of the testimony of

¹ Jancik claims that she took frequent breaks because she felt threatened by her coworker and was seeking to avoid his temper.

the owner and her coworker. A ULJ faced with a request for reconsideration may not consider any evidence not presented at the initial evidentiary hearing “except for purposes of determining whether to order an additional evidentiary hearing.” Minn. Stat. § 268.105, subd. 2(c) (2010). In his decision following Jancik’s request for reconsideration, the ULJ concluded that the new information provided by Jancik did not meet the statutory threshold for a new hearing because it was not relevant to the factual bases for Jancik’s misconduct.

The ULJ has wide latitude to determine the overall credibility of the witnesses. *Skarhus*, 721 N.W.2d at 345. Because key portions of the owner’s testimony at the evidentiary hearing have a foundation in documentary evidence, the ULJ’s credibility determination was supported by the requisite “substantial evidence.” *Wichmann*, 729 N.W.2d at 29. Jancik’s contention that the ULJ erred in his credibility determinations is unjustified.

B. Factual determinations of the ULJ.

Jancik next raises numerous arguments attacking the specific factual findings of the ULJ. “This court views the ULJ’s factual findings in the light most favorable to the decision. This court also gives deference to the credibility determinations made by the ULJ. As a result, this court will not disturb the ULJ’s factual findings when the evidence substantially sustains them.” *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008) (citations omitted), *review denied* (Minn. Oct. 1, 2008); *see also McNeilly v. Dep’t of Emp’t & Econ. Dev.*, 778 N.W.2d 707, 711-12 (Minn. App. 2010) (applying substantial-evidence test); *Skarhus*, 721 N.W.2d at 344 (same).

Most of Jancik's contentions are disposed of by the credibility determination of the ULJ, which gave more credit to the owner's testimony than to Jancik's. Given the ULJ's credibility determination, the testimony of the owner, and the documentary evidence before the ULJ, the record contains substantial evidence to support the ULJ's factual determinations of Jancik's misconduct. The ULJ's factual determinations are supported by substantial evidence.

C. The ULJ's conclusions of law.

Jancik contends that Subway of Buffalo did not have policies in place that addressed the behavior she was alleged to be engaging in, and she complains that the company did not follow its written warning procedures. "An appellate court will exercise its own independent judgment in analyzing whether an applicant is entitled to unemployment benefits as a matter of law." *Irvine v. St. John's Lutheran Church of Mound*, 779 N.W.2d 101, 103 (Minn. App. 2010). "We review de novo a ULJ's determination that an applicant is ineligible for unemployment benefits." *Stassen v. Lone Mountain Truck Leasing, LLC*, 814 N.W.2d 25, 30 (Minn. App. 2012).

Jancik's complaint that Subway of Buffalo did not follow its written disciplinary procedures, even if true, does not affect whether Jancik qualifies for unemployment benefits. "Whether an employee handbook constitutes a contract between employer and employee, and whether the employer breached that contract by failing to act in accordance with the terms of the employee handbook, are relevant facts to claims for breach of contract made directly between employer and employee." *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 316 (Minn. 2011). In contrast, the dispute here focuses on

“whether the employee qualifies for benefits under the terms of the applicable statute.”
Id. at 317.

As to Jancik’s contention that Subway of Buffalo did not have policies in place prohibiting her conduct, the ULJ credited the owner’s testimony that he warned Jancik that her breaks were excessive, smoking was prohibited, and that she was under an obligation to develop good relationships with her coworkers.

The question then becomes whether Jancik’s misconduct arose to the level that would disqualify her for unemployment benefits under Minn. Stat. § 268.095, subd. 4(1) (2010). Employment misconduct is defined, in part, as “intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly . . . a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee; or . . . a substantial lack of concern for the employment.” *Id.*, subd. 6(a) (2010). “[A]n employee’s decision to violate knowingly a reasonable policy of the employer is misconduct.” *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 806 (Minn. 2002). What constitutes a reasonable policy will vary by the circumstances of each case. *Sandstrom v. Douglas Mach. Corp.*, 372 N.W.2d 89, 91 (Minn. App. 1985). A “pattern of failing to follow policies and procedures and ignoring directions and requests” of an employer is the type of misconduct that disqualifies an employee from receiving unemployment benefits. *Gilkeson v. Indus. Parts & Serv., Inc.*, 383 N.W.2d 448, 452 (Minn. App. 1986).

The ULJ determined that Jancik’s discharge arose from taking excessive breaks, talking on her cell phone, smoking on the employer’s premises, and failing to work well

with her coworkers. A fast food restaurant relies on its employees to be available to handle customer orders promptly and reliably, and to serve food that is not affected by an employee's smoking habits. It is reasonable for Subway of Buffalo to expect its employees to be on the job and prepared to accept customer orders instead of taking excessive breaks, talking on a cell phone, or smoking a cigarette. It is also reasonable for Subway of Buffalo to ban smoking on its premises in order to ensure that its food is not contaminated by tobacco smells. Finally, it is reasonable for Subway of Buffalo to expect its employees to work cooperatively in the performance of their job duties in order to ensure that customer needs are being fulfilled. None of these reasonable expectations of Subway of Buffalo imposed an unreasonable burden on Jancik. *See Sandstrom*, 372 N.W.2d at 91. Jancik engaged in the types of employment misconduct that disqualify her for unemployment benefits.

Affirmed.