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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1672**

Danica D. Coons,
Relator,

vs.

Department of Employment and Economic Development,
Respondent.

**Filed April 21, 2014
Reversed
Kirk, Judge**

Department of Employment and Economic Development
File Nos. 31188075-3, 31230810-3

Robert D. Richman, St. Louis Park, Minnesota (for relator)

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

Considered and decided by Kirk, Presiding Judge; Worke, Judge; and Klaphake,
Judge.*

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

UNPUBLISHED OPINION

KIRK, Judge

On appeal from the determination of an unemployment-law judge (ULJ) that she was ineligible for unemployment benefits because she was not unemployed, relator argues that (1) the ULJ's ineligibility determination is not supported by substantial evidence, and (2) the ULJ erred by failing to fully develop the record. Because we conclude that the ULJ's ineligibility determination is not supported by substantial evidence, we reverse.

FACTS

Relator Danica D. Coons worked for First Clearing LLC, a division of Wells Fargo Advisors, from 2007 until she was laid off in June 2012. To assist the employees who were being laid off, Wells Fargo brought in representatives from the Minnesota Department of Employment and Economic Development (DEED) to answer questions. Coons spoke to the representatives about the possibility of starting a business and they advised her that she could collect unemployment while self-employed as long as she was available for other employment and she did not work over 32 hours per week.

After she was laid off, Coons and her friend Sandra Haub, who had also been laid off by Wells Fargo, bought a liquor store for \$150,000. Coons and Haub each paid 50% of the purchase price, wiping out their retirement accounts to do so. The store opened on October 8, 2012, and is open six days a week from 10:00 a.m. until 10:00 p.m.

Coons applied for unemployment benefits in November after her five-month severance package ran out; she began receiving benefits in December. From December 2012 through May 5, 2013, Coons reported to DEED that she had worked 30 hours each

week and earned \$0. In May, a DEED clerk determined that Coons was ineligible for unemployment benefits because she had worked 32 or more hours every week since October 8, 2012, and that she committed overpayment fraud because she failed to disclose her total hours worked. The clerk notified Coons of an overpayment of benefits in the amount of \$12,540 and imposed a \$5,016 fraud penalty. Coons appealed.

At a telephonic evidentiary hearing before a ULJ, Coons testified that she and Haub each schedule themselves to work in the liquor store for 30 hours per week. Coons testified that the store can easily be operated by one person, and several friends and family members work the rest of the hours that the store is open. Coons submitted affidavits from five friends and family members in support of her testimony. Coons also submitted a summary of the hours she worked at the store, which she acknowledged she created in preparation for the hearing because she had not previously kept track of the specific hours she worked, other than making a weekly report to DEED.

Following the hearing, the ULJ determined that Coons was ineligible for unemployment benefits. Coons requested reconsideration, and the ULJ affirmed his decision. This certiorari appeal follows.

D E C I S I O N

The purpose of the Minnesota Unemployment Insurance Program is to assist those who are unemployed through no fault of their own. Minn. Stat. § 268.03, subd. 1 (2012). Chapter 268 is remedial in nature and must be applied in favor of awarding benefits. Minn. Stat. § 268.031, subd. 2 (2012). Any provision precluding receipt of benefits must be narrowly construed. *Id.* There is no burden of proof in unemployment-insurance

proceedings and there is no equitable denial or allowance of benefits. Minn. Stat. § 268.069, subds. 2, 3 (2012).

When reviewing a ULJ's eligibility decision, this court may affirm, remand for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced because the findings, inferences, conclusion, or decision are affected by an error of law or are unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2012). Substantial evidence is "(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; or (5) the evidence considered in its entirety." *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002). We review the ULJ's factual findings in the light most favorable to the decision and defer to the ULJ's credibility determinations. *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). "[T]his court will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Id.*

An applicant for unemployment benefits may be eligible to receive benefits if he or she is unemployed. Minn. Stat. § 268.085, subd. 1(3) (2012). The statutory definition of "unemployed" includes an applicant who performs less than 32 hours of self-employment per week. Minn. Stat. § 268.035, subd. 26 (2012). Chapter 268 further provides that an applicant is ineligible for benefits for any week that he or she "is performing services 32 hours or more, in . . . self-employment regardless of the amount of any earnings." Minn. Stat. § 268.085, subd. 2(6) (2012).

The ULJ found that Coons was ineligible for unemployment benefits because she worked at least 32 hours during each week she received benefits. The ULJ found that part of Coons's testimony was credible, but in general her testimony was not credible. The ULJ found that Coons's claim that volunteer workers filled in the gaps in the liquor store's business hours was "completely unbelievable" and that her assertion that she limited her work to 30 hours per week "defies credulity." Although the ULJ acknowledged that "there is no evidence of exactly how much Coons worked each week," he found that it was impossible for her to have completed her work tasks within a 30-hour per week schedule and that it was "more likely to be true that Coons worked at least 32 hours every week."

In his order denying Coons's motion for reconsideration, the ULJ expanded on his previous findings. The ULJ rejected the evidence that Coons submitted, concluding that it was "self-serving" and "compiled to paint a misleading picture." The ULJ was particularly troubled by Coons's submission of her schedule, which he interpreted as "assert[ing] that every week, for six months, Coons worked exactly 108,000 seconds (30 hours) and not a single second more." Because the ULJ found that Coons's evidence was not credible, he stated that he "had no choice but to make findings based on the most plausible sequence of events." The ULJ stated that "[s]upplying evidence that could not possibly be true is the equivalent of failing to answer a question, and thus an invitation to take an adverse inference."

Coons argues that the ULJ incorrectly based his decision on his own speculation rather than on the preponderance of the evidence. *See* Minn. Stat. § 268.031, subd. 1 (2012) ("All issues of fact under the Minnesota Unemployment Insurance Law are determined by a

preponderance of the evidence.”). She contends that there is no evidence in the record supporting the ULJ’s determination that Coons worked 32 hours or more each week. We agree. As the ULJ acknowledges, he based his decision on his finding that Coons was not credible, not on the evidence in the record. Although this court defers to the ULJ’s credibility determinations, the findings upon which those determinations are based must be supported by substantial evidence. *See Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 533 (Minn. App. 2007). Our close review of the evidence in the record establishes that the ULJ’s findings are not supported by substantial evidence.

The ULJ dismissed Coons’s testimony that her friends and family members volunteered to fill in gaps in hours at the liquor store because he found that the arrangement was not believable. However, the ULJ’s only basis for this finding was his subjective determination that the situation was not believable. The ULJ failed to acknowledge the evidence in the record, including the five affidavits that Coons submitted in support of her testimony. *See* Minn. Stat. § 268.105, subd. 1(b) (2012) (“An affidavit or written statement based on personal knowledge and signed under penalty of perjury is competent evidence of the facts contained in it”). Those affidavits are signed by friends and family members who swear that they volunteer an average of 6 to 20 hours per week at the store. When the hours the volunteers assert they work are added together, they total approximately 62 hours per week, which is more than enough to cover the business hours that Coons and Haub did not work. The ULJ also found that the volunteers were “family, friends, former owners and complete strangers” without acknowledging Coons’s testimony about the specific relationships that the volunteers have with her and Haub. We understand why the ULJ was

skeptical of the tenuous relationships some of the volunteers had with Coons and Haub. But, according to the evidence in the record, none of the volunteers are strangers. And the volunteer who the ULJ found was the former owner never owned the store; the store was owned by that volunteer's extended family.

Further, Coons never testified that she worked exactly 30 hours per week "and not a single second more." Instead, Coons testified that she scheduled herself for 30 hours per week, giving herself a two-hour buffer for any extra issues that arose. She acknowledged that she did not keep track of all of the hours she worked and that she estimated a schedule of the hours she had worked in preparation for the hearing. The only evidence submitted regarding the number of hours Coons worked was her testimony that she worked less than 32 hours per week and the schedule she submitted that supported her testimony. The hours Coons submitted to DEED on a weekly basis also provide a contemporaneous record that supports her testimony. There is no evidence in the record that Coons worked over 32 hours per week. Although the ULJ could find that Coons's testimony regarding the amount of hours she worked was not credible, there is no evidence in the record supporting his determination that Coons actually worked 32 hours per week or more.

The ULJ also incorrectly drew an adverse inference from his finding that Coons was not credible. A ULJ "may draw adverse inferences from the refusal of a party or witness to testify on the basis of any privilege." Minn. R. 3310.2922. But Coons did not refuse to testify. She provided extensive testimony, answered all of the ULJ's questions, and submitted additional documentation when the ULJ asked her to do so. The ULJ is not

permitted to draw an adverse inference from his finding that Coons is not credible, and the ULJ erred by doing so in this case.

Finally, we note that Coons's pre-layoff discussion with DEED representatives about the possibility of starting a business while receiving unemployment benefits and her subsequent actions indicate that she was aware of the statutory requirements and tried to comply with them. The statute itself creates the potential for a case like this where it is difficult for DEED to establish that a self-employed individual worked over 32 hours per week. While this situation may legitimately create concerns for DEED and this court, it is up to the legislature to strengthen, if appropriate, the requirements for the self-employed. As the statute is currently constructed, it is difficult to scrutinize an individual's claim that she worked less than 32 hours per week in self-employment in a process where, to do so, DEED must introduce evidence that contradicts the evidence presented by the individual.

Therefore, we conclude that the ULJ's finding that Coons worked 32 hours or more is not supported by substantial evidence and reverse the ineligibility determination. Because we reach this conclusion, we need not address Coons's second argument.

Reversed.