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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1832**

Kolo Howard,
Relator,

vs.

Select Senior Living,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed June 16, 2014
Reversed and remanded
Kirk, Judge**

Department of Employment and Economic Development
File No. 31331302-3

Kolo Howard, Brooklyn Park, Minnesota (pro se relator)

Select Senior Living, Coon Rapids, Minnesota (respondent)

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

Considered and decided by Hooten, Presiding Judge; Kirk, Judge; and Reyes,
Judge.

UNPUBLISHED OPINION

KIRK, Judge

In this certiorari appeal from the decision of the unemployment-law judge (ULJ) that relator, a health aide at a senior living facility, is ineligible for unemployment benefits because she was discharged for employment misconduct after failing to timely respond to residents' requests for medical assistance, relator argues that (1) the ULJ failed to provide her with a fair hearing; (2) her employer fabricated claims that she failed to perform her job duties; and (3) the residents rejected her care because of her ethnicity. Because the ULJ failed to assist relator, a pro se party, in obtaining material evidence allegedly favorable to her, we reverse and remand.

FACTS

On February 4, 2013, respondent Select Senior Living hired relator Kolo Howard as a health aide at an assisted-living facility in Coon Rapids. On June 11, Select Senior Living ended Howard's employment due to her poor performance. Howard applied for unemployment benefits, and on June 28, the Minnesota Department of Employment and Economic Development (DEED) determined that she was eligible for unemployment benefits. On July 8, Select Senior Living appealed DEED's determination of eligibility.

A ULJ held a telephonic evidentiary hearing on July 24. Howard appeared pro se, and Diana Delgado, the residence director, and Briana Sheehy, the director of nursing, testified on behalf of Select Senior Living. Delgado and Sheehy testified about three incidents where Howard failed to provide prompt assistance to the facility's residents.

Delgado testified that one of Howard's responsibilities as a health aide was to respond to the residents' pendant calls within five minutes of receiving the call. Residents push their pendant to alert staff when they need immediate assistance. Delgado testified that on May 11, a number of residents and their family members complained to her about the late response to pendant calls that day. Howard was on duty and was responsible for answering the pendant calls. When Delgado questioned Howard about the late responses, Howard admitted that it sometimes took her 10 minutes to respond to each pendant call.

Sheehy testified that on May 21, a resident pressed a pendant to request assistance with changing a colostomy bag. Howard responded to the call and when the resident informed her that she needed help changing the bag, Howard left the room without assisting her. Sheehy also testified that on May 29, another resident pressed his pendant because he needed help changing his ileostomy bag. Howard responded to the call, but quickly left the room without assisting the resident.

Delgado testified that she and Sheehy separately investigated the residents' claims about the May 21 and 29 incidents, and "realized that the [residents'] stories did match." They relayed the information to Select Senior Living's corporate office, and it determined that Howard should be fired. Delgado and Sheehy submitted into evidence their written summaries of the complaints and investigation of Howard's work performance.

Howard testified on her own behalf and denied that she refused to assist the residents on May 21 and 29. Howard testified that she documented her response to every

pendant call in her daily assignment sheet, including the response time and care provided. Howard insisted that the assignment sheets would prove that she properly answered every pendant call. Prior to the evidentiary hearing, Howard requested a subpoena of her assignment sheets and pendant call logs.

Delgado testified that she was paging through Howard's assignment sheets during the hearing, and could see that Howard had not properly logged her responses to the pendant calls. Delgado testified that Howard should have filled out a pendant call log to document her response to the pendant calls, but instead had jotted down this information on the back of her assignment sheets. Delgado testified that Howard's assignment sheets were vague because they "[did not] specify what was going on" and so "we had to go on [] what the [resident] said."

The ULJ asked Delgado if there was any relevant information on Howard's assignment sheets regarding the incidents on May 21 and 29, and Delgado responded that she was "looking at the one from [May] 21, [and] there's nothing noted." Sheehy testified that she would have to go downstairs to get a copy of Howard's May 29 assignment sheet, and the ULJ told her to not to do that. The ULJ told Delgado not to send her a copy of Howard's assignment sheets and pendant call logs because she believed that she had all of the information she needed through testimony. At the conclusion of the hearing, the ULJ denied Howard's subpoena request for the documents, stating, "I don't feel that they will help me in making my decision."

On July 26, the ULJ found by a preponderance of the evidence that Howard committed employment misconduct, primarily based on her failure on May 21 and 29 to

assist the two residents in changing their colostomy and ileostomy bags. While the ULJ found that Howard's failure to answer a pendant call within five minutes was not employment misconduct, she characterized Howard's failure to assist as "negligent, intentional, or indifferent conduct that displays clearly a serious violation of the standards of behavior Select Senior Living had a right to reasonably expect." The ULJ found Sheehy and Delgado's testimony to be more credible than Howard's because their written documentation supported their claims.

Howard filed a request for reconsideration. Howard denied that she failed to assist the residents on May 21 and 29, and again requested all written documentation, including her assignment sheets and pendant call logs to show that she did not commit misconduct. The ULJ affirmed her findings, again finding that Delgado and Sheehy provided a more plausible and credible version of events than Howard. The ULJ noted that she reviewed the record and did not find a need to subpoena additional documents regarding the discharge because the records "either do not exist or would not change the outcome of the decision."

This certiorari appeal follows.

DECISION

This court reviews a ULJ's decision to determine whether a party's substantial rights were prejudiced because the findings, inferences, conclusion or decision are unsupported by substantial evidence in view of the record as a whole or affected by an error of law. Minn. Stat. § 268.105, subd. 7(d) (2012). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a

conclusion.” *Minneapolis Van & Warehouse Co. v. St. Paul Terminal Warehouse Co.*, 288 Minn. 294, 299, 180 N.W.2d 175, 178 (1970) (quotation omitted).

Whether Howard engaged in conduct that disqualifies her from receiving unemployment benefits is a mixed question of fact and law. Whether a particular act constitutes employment misconduct is a question of law that this court reviews de novo. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). Whether the employee committed a particular act is a question of fact for the ULJ to determine. *Id.* In reviewing the ULJ’s decision, “[w]e view the ULJ’s factual findings in the light most favorable to the decision,” and defer to the ULJ’s credibility determinations. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We will not disturb the ULJ’s factual findings if they are supported by substantial evidence. *Id.*

“A reviewing court accords deference to a ULJ’s decision not to hold an additional evidentiary hearing and will reverse that decision only for an abuse of discretion.” *Id.* at 345 (referring to request for an additional evidentiary hearing when relator shows good cause for failing to participate in initial hearing). “But the ULJ’s discretion is not absolute” and must be exercised within the bounds of statutory authority. *Vasseei v. Schmitty & Sons Sch. Buses Inc.*, 793 N.W.2d 747, 750 (Minn. App. 2010).

Howard argues that she did not receive a fair hearing because (1) the ULJ exhibited impatience and hostility towards her during the hearing and objected to her questions; (2) the ULJ ignored her request to confront the alleged witnesses and did not inform her of her right to present rebuttal witnesses; and (3) the ULJ did not request corroborating information and ignored her request for discovery.

Our review of the hearing transcript demonstrates that the ULJ was not hostile and impatient with Howard during the hearing, did not unduly object to Howard's questions, and did not ignore Howard's request to confront witnesses or present rebuttal witnesses.

But the record shows that the ULJ failed to assist Howard in obtaining material evidence about the events on May 21 and 29. A hearing to determine whether a relator qualifies for unemployment benefits is an evidence-gathering inquiry. Minn. Stat. § 268.105, subd. 1(b) (2012). The ULJ "should assist unrepresented parties in the presentation of evidence." Minn. R. 3310.2921 (2013). "All competent, relevant, and material evidence, including records and documents in the possession of the parties that are offered into evidence, are part of the hearing record." Minn. R. 3310.2922 (2013).

At the evidentiary hearing, Delgado testified that Howard's assignment sheets and pendant call logs failed to show whether Howard provided medical assistance to the residents on May 21 and 29. But only Delgado possessed a copy of these documents, and they were never submitted into evidence. The ULJ accepted Delgado's testimony without receiving or reviewing documents that could have supported Howard's testimony that she did not commit employment misconduct. Because this case boils down to a credibility determination regarding Howard's conduct on May 21 and 29, and Howard requested a subpoena of the assignment sheets and pendant call logs, the ULJ had a duty to subpoena the documents in order to "reasonably assist pro se parties with the presentation of the evidence and the proper development of the record." *Thompson v. Cnty. of Hennepin*, 660 N.W.2d 157, 161 (Minn. App. 2003).

After the ULJ received Howard's request for reconsideration where Howard again asked for a copy of the assignment sheets and pendant call logs to be submitted into evidence, the ULJ was required to decide whether to modify the decision, set aside the decision and direct that an additional evidentiary hearing be conducted, or affirm the decision. Minn. Stat. § 268.105, subd. 2(a) (2012). The ULJ reiterated that she did not see a need to subpoena additional documents regarding Howard's discharge because the documents either did not exist or would not change the outcome of the decision. But Minn. Stat. § 268.105, subd. 2(c) (2012), states that a ULJ *must* order an additional hearing if a party shows good cause for not submitting evidence and the new evidence would change the outcome. Here, there was good cause why the assignment sheets were not submitted into evidence because the ULJ failed to assist in helping Howard develop the record as an unassisted party. *See* Minn. R. 3310.2921.

The ULJ abused her discretion when she failed to assist Howard in obtaining copies of her assignment sheets and pendant call logs and should have granted Howard a new evidentiary hearing to consider those documents. The ULJ's conduct constitutes a significant procedural defect in the hearing process. *See Vasseei*, 793 N.W.2d at 751 (holding that ULJ acted properly under Minn. R. 3310.2921 when he ordered an additional evidentiary hearing after he failed to assist an unrepresented party in securing a subpoena of relevant and potentially important evidence); *Thompson*, 660 N.W.2d at 160-61 (remanding because the failure of an allegedly subpoenaed witness to appear at the evidentiary hearing constituted a significant procedural defect). We conclude that it is appropriate to reverse and remand for an additional evidentiary hearing to provide

Howard with a full and fair hearing and to develop a complete record, including the assignment sheets and pendant call logs.

In light of our holding, we do not reach Howard's additional arguments that the claims against her were fabricated and that the residents rejected her care because of her ethnicity.

Reversed and remanded.