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CASE NO. A111-0153

STATE OF MINNESOTA
IN COURT OF APPEALS

JAMES J. CUNNINGHAM,

Relator,

v.

WAL-MART ASSOCIATES, INC.,

Respondent Employer,

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

Respondent Department.

RELATOR'S BRIEF AND ADDENDUM

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE ISSUES

- I. Did the Unemployment Law Judge commit an error of law when he found that Mr. Cunningham committed employment misconduct?

Decision Below:

After an evidentiary hearing, the Unemployment Law Judge determined Mr. Cunningham's decision not to return to work constituted employee misconduct and affirmed this ruling when the issue was raised on reconsideration.

Apposite Authorities:

Minn. Stat. § 268.095 subd. 4(1)

Minn. Stat § 268.095 subd. 6(a)

Minn. Stat § 268.095 subd. 6(b)(1)

Minn. Stat § 268.095 subd. 6(b)(4)

- II. Did the ULJ adequately recognize the claims of a pro se party, adequately assist a pro se party to develop the record with relevant facts, or abuse his discretion by denying Mr. Cunningham's request for reconsideration?

Decision Below:

The Unemployment Law Judge did not address this issue at the hearing, and later denied the request for reconsideration.

Apposite Authorities:

Loewen v. Lakeland Mental Health Ctr., 532 N.W.2d 270 (Minn.App. 1995)

Miller v. Int'l Express Corp., 495 N.W.2d 616 (Minn.App.1993)

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STATEMENT OF THE CASE

Relator James Cunningham (“Mr. Cunningham”) worked for Wal-Mart Associates, Inc. (“Wal-Mart”) as an overnight stocker at Sam’s Club in Fridley, MN.¹ (Decision of the Unemployment Law Judge, hereinafter “Decision,” 2, Add. 5 and Transcript, hereinafter “T.,” 5, 16) Wal-Mart terminated Mr. Cunningham’s employment on September 14, 2010, when he did not return to work after being told to prepare an action plan to correct performance problems Mr. Cunningham did not believe he could correct. (Decision, 3, Add. 6 and T. 22, 23) Following his termination, Mr. Cunningham applied for unemployment benefits with the Department of Employment and Economic Development (“DEED”). (T., 29) DEED found Mr. Cunningham to be eligible for benefits on October 5, 2010 and Wal-Mart subsequently appealed this determination. (Notice of Appeal, 1, Add. 3)

On November 10, 2010, an appeal hearing was held pursuant to Minn. Stat. § 268.105 subd. 1 with Unemployment Law Judge Scott Reeves (ULJ). (Decision, 2, Add. 5) Both Mr. Cunningham and Julie Scott, who was the overnight assistant manager for Wal-Mart during the time period of Mr. Cunningham’s employment, testified at this hearing. (Decision, 2, Add. 5) On November 15, 2010, the ULJ ruled that Mr. Cunningham was ineligible for payment of unemployment benefits because he was discharged for employment misconduct. (Decision, 4, Add. 7)

¹ Although Mr. Cunningham worked at Sam’s Club, hereinafter his employer shall be referred to only as Wal-Mart because Wal-Mart Associates, Inc. is the parent company of Sam’s Club and is the named party in this case.

Mr. Cunningham filed a Request for Reconsideration on December 6, 2010. (Request for Reconsideration, 1, Add. 9) On January 4, 2011, the ULJ affirmed his earlier ruling and denied Mr. Cunningham's request for reconsideration. (Order Denying Reconsideration, hereinafter "Order," 3, Add. 21) Mr. Cunningham filed an appeal to this court on January 26, 2011. (Petition for Certiorari, Add. 23)

STATEMENT OF THE FACTS

Mr. Cunningham's Strokes

Throughout the time he worked at Wal-Mart, Mr. Cunningham had memory and concentration problems which stemmed from a series of TIAs, also known as "mini-strokes," which he suffered in 2008. (Decision, 3, Add. 6) Specifically, in November, 2008, Mr. Cunningham had four TIAs, in a span of only five days. (T., 30) Mr. Cunningham was paralyzed on his left side and needed to have an angioplasty to remove blockage from an artery in the back of his head as a result of these TIAs. (T., 31) Following this procedure, Mr. Cunningham underwent months of occupational, physical, and speech therapy. (T., 30)

Although, as Mr. Cunningham testified, his "physical stuff was starting to come back" when he began work at Wal-Mart, the mental effects such as "memory and concentration problems" continued to linger. (Decision, 3, Add. 6 and T., 31) Some of the other lasting effects of the TIAs included numbness in Mr. Cunningham's fingers, trouble with multitasking and comprehension, and a leg drop. (Letter from Mike Cunningham, Add. 16 and T., 31)

Mr. Cunningham's Employment at Wal-Mart

On April 1, 2009, Mr. Cunningham began work as an overnight stocker for Wal-Mart. (Decision, 2, Add. 5 and T., 16) At the hearing, Mr. Cunningham testified, and Julie Scott confirmed, that he was considered a part-time associate, which meant that he was typically scheduled less than 34 hours per week (T., 16).² Mr. Cunningham's principal job duty involved stocking an area in the food section of the store. (Decision., 2, Add. 5) As an overnight stocker, Mr. Cunningham not only stocked product, but also had various other job duties which included sweeping the floor, aligning the pallets in the area, straightening all the signs in the area, making sure no signs were missing, and straightening the products. (T., 38) To accomplish some of these tasks, Mr. Cunningham used such tools as a pallet jack and a forklift. (T., 21)

Sometime after Mr. Cunningham began to work at Wal-Mart, "B.J.", who is identified in the record only by these initials, became the store manager. B.J. began to change the procedure for how the store was run. (T., 32, 35) This included changes such as increasing the areas for which Mr. Cunningham was responsible while reducing the workforce on the night crew from eleven people to six people and increasing the job duties of the night stockers. (T., 30, 35) For example, according to Ms. Scott, duties such as straightening pallets were "fairly new for us" during the time Mr. Cunningham worked at Wal-Mart. (T., 20) Mr. Cunningham started working in the gum area, then Wal-Mart expanded his area to include the freezers, and then the cooler, and then the area with

² Both Julie Scott and Mr. Cunningham testified that Mr. Cunningham was a part-time worker, but in spite of this the ULJ found that Mr. Cunningham was a full-time employee of Wal-Mart. (Decision, 2, Add. 5).

water and soft drinks. (T., 35) Occasionally, Mr. Cunningham would have to help with other areas, such as the meat department, in addition to tending to his own areas. (T., 35)

Eventually, Mr. Cunningham reached a point where he believed he was unable to keep up with the work he had been assigned unless he worked overtime, an option generally not available to him. (T., 38) This led Mr. Cunningham to express to his supervisor, Julie Scott (“Ms. Scott”), that it was “difficult for him to meet [his employer’s] expectations,” (T., 20) and it specifically was “difficult for him as far as the attention to detail.” (T., 21) Mr. Cunningham testified that he felt “the workload just got crazy” because of the increasing amount of work required of him. (T., 39) Because he was a part time employee he was unable to put in extra time to complete all his work as he could not exceed forty hours of work each week. (T., 25, 30, 35)

On June 27, 2010, Mr. Cunningham received a verbal coaching for unsatisfactory job performance from Ms. Scott. (Decision, 2, Add. 5 and T., 17) Mr. Cunningham received this reprimand because, across three shifts in June 2010, he left out a trash bin and had missing and crooked product signs in his areas. (Decision, 2, Add. 5 and T., 19,) A few weeks after the verbal coaching, B.J., the new store manager, returned from his vacation. (T., 32) Shortly thereafter, in July 2010, Mr. Cunningham met with B.J. and Ms. Scott to discuss the contents of a letter Mr. Cunningham wrote to B.J. (T., 32, 41)

The letter that Mr. Cunningham wrote and gave to his supervisors stated that his performance problems and unsatisfactory performance were related to his TIAs and the continuing mental impairment which stemmed from the TIAs. (Decision, 3, Add. 6 and T., 32, 41) The contents of the letter prompted a conversation between Mr. Cunningham

and his supervisors that apparently touched on workplace accommodations. (T., 32, 33) In this conversation, B.J. told Mr. Cunningham that “there was an extreme amount of paperwork” involved in formally requesting a workplace accommodation, and he “didn’t think [Mr. Cunningham] wanted to go through that.” (T., 33) Though the letter Mr. Cunningham wrote was never made part of the record, the ULJ found that Mr. Cunningham did not request any specific accommodations. (Decision., 3, Add. 6) Mr. Cunningham instead informed the store manager that he would do the best job he could going forward. (T., 33)

Decision Day and Action Plan

Unfortunately, Mr. Cunningham’s best efforts fell short of Wal-Mart’s expectations. Mr. Cunningham received a written coaching on August 7, 2010, for previous absences which were defined as “unexcused” by the Employee Handbook. (Decision, 2, Add. 5) On August 30, 2010, Ms. Scott and [REDACTED] the overnight supervisor, met with Mr. Cunningham to give him a final “Decision Day” warning, and require him to prepare a written “action plan” detailing how he would remedy his performance problems. (T., 18) Wal-Mart did not give Mr. Cunningham any written instructions about this process or how to complete an action plan. (T., 18) Ms. Scott expected Mr. Cunningham would come back with an action plan which stated something “along the lines of double checking his area, or having a supervisor walk his area off with him,” but, as she testified, consistent with Wal-Mart practice, she did not tell him of these expectations. (T., 24, 41) The ULJ found that, at the conclusion of this meeting, Ms.

Scott told Mr. Cunningham “to return on his next scheduled shift with an action plan to address his performance problems.” (Decision, 2, Add. 5 and T., 19)

Ms. Scott admitted that during the meeting, Mr. Cunningham told her that he “couldn’t think of anything he could put in an action plan that...he could do differently to fix [the situation].” (T., 40) The ULJ questioned Ms. Scott as to what exactly she said during the Decision Day meeting, and she did not recall:

Question [ULJ] In the meeting you had with, on the decision day with [REDACTED] and him, Mr. Cunningham did the subject come up of him saying I’m not gonna do this action plan, I can’t do it. Do you Recall that.

Answer [Ms. Scott] He never said he wasn’t going to do it. He said he couldn’t think of anything he could put in an action plan that would be able, that he could do differently to fix it.

Q And what was your response to that.

A I honestly don’t recall exactly what I said. I would guess it would be something along the lines of well you’re getting sent home today, you have today basically off with pay to think of it and come up with something. But again I don’t recall exactly what was said.

Q Well did you say if you don’t you know don’t bother to come back unless you do an action plan, unless you have an action plan.

A No, I never told Jim not to come in for his next scheduled shift. I emphasized that he needed to come in his next scheduled shift. I did say with an action plan but at no point did I say not to come in.

Q Did you ever say that a condition of him coming in and reporting was to have an action plan.

A Not that I’m aware of. Not that I recall anyway.

Q Okay.

A Come in on your next scheduled shift with your action plan. So he may have taken it that way but I never said not to come in if he didn't have one.

(emphasis added) (T.40) Mr. Cunningham did, in fact, "take it that way" and he testified that he believed that Ms. Scott had told him "don't come back to work unless you [have] an action plan." (T., 25, 26, 28, 29, 36, 37)

Mr. Cunningham's Termination

Following his Decision Day meeting, Mr. Cunningham did not return to work. (Decision, 3, Add. 6 and T., 23) The ULJ found that Mr. Cunningham failed to return to work "because he did not want to prepare an action plan or continue to work subject to more intensive supervision." (Decision, 3, Add. 6) During the time these missed shifts were scheduled, Mr. Cunningham did not call Wal-Mart and Wal-Mart did not call him. (Decision, 3, Add. 6 and T., 23, 28) On September 14, 2010, Wal-Mart discharged Mr. Cunningham. (Decision, 3, Add. 6 and T., 23). Mr. Cunningham then applied for unemployment benefits. (Determination of Eligibility, 1, Add. 1)

Appeal Hearing and Reconsideration

After DEED initially found Mr. Cunningham eligible for unemployment compensation, Wal-Mart appealed. (Determination of Eligibility, 1, Add. 1 and Notice of Appeal, 1, Add. 3) At the appeal hearing, both Mr. Cunningham and Ms. Scott testified. (Decision, 2, Add. 5) Mr. Cunningham was not represented by counsel, presented no evidence other than his testimony, and served as his only witness. (Decision, 2, Add. 5 and T.1-43,) During the hearing, Wal-Mart did not produce the letter which Mr. Cunningham gave to B.J that prompted the discussion about workplace accommodations.

On November 15, 2010, the ULJ ruled that Mr. Cunningham's failure to report to work and failure to call his employer during this same time period constituted employment misconduct. (Decision, 3, Add. 6) Mr. Cunningham was therefore not eligible to receive unemployment benefits. (Decision, 4, Add. 7) The ULJ also found that "Cunningham's separation came close to the line between a quit and a discharge." (Decision, 3, Add. 6).

Following the ULJ's ruling that Mr. Cunningham was ineligible for unemployment benefits, Mr. Cunningham obtained counsel and filed a Request for Reconsideration on December 6, 2010. (Request for Reconsideration, Add. 9 and Letter from SMRLS, Add. 11) In support of his request for reconsideration, Mr. Cunningham proffered additional evidence of his mental impairment, including numerous medical records, and a letter from one of his treating physicians, Dr. Adnan Qureshi. The ULJ affirmed his earlier ruling and denied Mr. Cunningham's request for reconsideration, stating that Mr. Cunningham "did not identify any evidence not submitted in the hearing which would be likely to change the outcome of the appeal." (Order, 3, Add. 21) Mr. Cunningham then filed an appeal to this court. (Petition for Certiorari, Add. 23)

STANDARD OF REVIEW

The determination of whether an employee engaged in employment misconduct is a mixed question of fact and law. *See Jenkins v. Am. Express Fin.*, 721 N.W.2d 286, 289 (Minn. 2006) (citing *Schmidgall v. Filmtec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002)). As such, two standards of review are used in an unemployment benefit appeal of a finding of misconduct. The ULJ's conclusions of fact are reviewed to determine whether they are reasonably supported by the record. *Risk v. Eastside Beverage*, 664 N.W.2d 16,

19 (Minn. Ct. App. 2003). Whether or not an employee's actions rise to the level of misconduct is a question of law which the court reviews de novo; the court is not bound by the ULJ's conclusions of law and is free to exercise its independent judgment. *Jenkins* (citing *Ress v. Abbott Nw. Hosp., Inc.*, 448 N.W.2d 519, 523 (Minn. 1989)).

The Court of Appeals may also remand a case for further proceedings, or it may reverse or modify the ULJ's decision "if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are made upon unlawful procedure, affected by other error of law, unsupported by substantial evidence in view of the entire record as submitted, or arbitrary or capricious." Minn. Stat. § 268.105 subd. 7. *See, Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 27 (Minn. Ct. App. 2007).

When a reviewing court examines a ULJ's denial of a request for reconsideration, it "accords deference to a ULJ's decision not to hold an additional hearing and will reverse that decision only for an abuse of discretion." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 345 (Minn.App.2006). Whether a ULJ failed to make a statutorily required credibility determination is a question of law with respect to an error of procedure subject to a de novo review. *See, Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 27 (Minn. Ct. App. 2007).

ARGUMENT

I. MR. CUNNINGHAM DID NOT COMMIT MISCONDUCT BECAUSE HIS ACTIONS WERE THE CONSEQUENCE OF HIS MENTAL IMPAIRMENT AND WAS THE SAME CONDUCT AN AVERAGE REASONABLE EMPLOYEE WOULD ENGAGE IN UNDER THE CIRCUMSTANCES.

In Minnesota, an employee is not eligible to receive unemployment benefits if the employee was discharged because of employment misconduct. Minn. Stat. § 268.095 subd. 4(1). Employment misconduct is defined as “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.” Minn. Stat. § 268.095 subd. 6(a). The definition provided by statute is exclusive and no other definition of the term applies. Minn. Stat. § 268.095 subd. 6(e).

There are, however, exceptions to what constitutes employment misconduct. Specifically, “conduct that was a consequence of the applicant's mental illness or impairment,” Minn Stat. § 268.095 subd. 6(b)(1) and “conduct an average reasonable employee would have engaged in under the circumstances” Minn. Stat. § 268.095 subd. 6(b)(4) are not considered misconduct. These exceptions exist because unemployment compensation laws are humanitarian and remedial in nature and are to be liberally construed in favor of awarding benefits to persons who are unemployed through no fault of their own *McGowan v. Executive Express Transportation Enterprises*, 420 N.W.2d 592, 595 (Minn.1988).

Having exceptions such as these provides specific guidance to the court about situations in which it is essential to recognize the remedial nature of these laws. In contrast to the broad application of the remedial provisions of unemployment compensation laws, the court also construes the disqualification provisions of these laws very narrowly. *Id.* Mr. Cunningham should be given the remedial protections of these laws based on a broad interpretation of two relevant statutory exceptions.

A. The actions which the ULJ found constituted misconduct were the product of Mr. Cunningham's mental impairment.

Mr. Cunningham's actions in this case were "conduct that was a consequence of the applicant's mental illness or impairment," Minn. Stat. 268.095 subd. 6(b)(1) and as such cannot be considered employment misconduct. The TIAs which Mr. Cunningham suffered had long-lasting repercussions, most notably in the form of an impairment of Mr. Cunningham's mental faculties; the ULJ himself found that Mr. Cunningham suffers from memory and concentration problems, and during the appeal hearing Mr. Cunningham listed other side effects of his TIAs such as increased stress levels, trouble with comprehension, and trouble with multitasking. (Decision, 3, Add. 6 and T., 25, 30) In this case, both Mr. Cunningham's inability to police his area to Wal-Mart's satisfaction and his belief that he was not supposed to return to work unless he could formulate an action plan to correct those problems were the product of his mental impairment. His conduct was affected by, and a consequence of, his mental impairment.

The effects of Mr. Cunningham's mental impairment, both seen and unseen are always present and affect every aspect of Mr. Cunningham's life. He cannot simply "turn

off' the side effects of his prior TIAs. As such, every decision that Mr. Cunningham makes is made by someone whose mind is impaired. During the events relevant to this case, Mr. Cunningham's mental impairment specifically affected decisions such as whether or not he was able to complete an action plan, and how to interpret and respond to instructions his supervisor gave him based on his own perception of the instructions.

First, Mr. Cunningham's mental impairment affected his belief in his ability to create an action plan. Wal-Mart knew that Mr. Cunningham's medical history had a negative impact on his ability to do his job. Mr. Cunningham told his supervisors exactly that well before he was given the Decision Day ultimatum. (T., 32, 33) Additionally, at the Decision Day discussion, Mr. Cunningham "specifically said [to his supervisors] that due to my strokes I did not think that I could in good conscience tell them a plan of action that would be able to fix something that I knew in fact I could not fix." (T. 25)

Mr. Cunningham testified that he "knew there was no real action plan that [he] could write that could fix [his] mental problems," which were the source of his performance problems at work. (T., 28) Ms. Scott admitted that Mr. Cunningham gave Wal-Mart notice of his belief that he "couldn't think of anything he could put in an action plan that...he could do differently to fix [the situation]." (T., 40) Mr. Cunningham's belief as to the lack of any viable action plan was confirmed at the hearing by the ULJ when he paraphrased Mr. Cunningham's testimony as "you told them that due to your strokes you didn't think you could do a plan of action to fix what essentially you didn't think could be fixed." (T., 25)

Second, Mr. Cunningham's impairment also affected his interpretation of Ms. Scott's instructions and his subsequent actions. The ULJ found that Mr. Cunningham committed misconduct when he "refused to report [to work] for several consecutive shifts and failed to call in." (Decision, 3, Add. 6) However, the ULJ also found that Mr. Cunningham "did not report because he did not believe there were any reasonable steps he could take to correct his performance problems." (Decision, 3, Add. 6)

As a result of his mental impairment, Mr. Cunningham was confused as to what his instructions were and what he was actually supposed to do. Mr. Cunningham clearly believed that he had been told not to come to work without an action plan, and Ms. Scott admitted that Mr. Cunningham may "have taken [her instructions] that way." (T., 40) Mr. Cunningham also thought that he could not come up with an action plan. (T., 25, 26, 28, 29, 36, 37) Both beliefs, and all of Mr. Cunningham's actions while employed at Wal-Mart, were the product of Mr. Cunningham's mental condition. Mr. Cunningham thus engaged in "conduct that was a consequence of the applicant's mental illness or impairment" when he based his subsequent actions on this confused interpretation of the situation. *See*, Minn. Stat. § 268.095 subd. 6(b)(1) As such, Mr. Cunningham did not commit employment misconduct and the decision of the ULJ must be reversed.

B. Regardless of his mental impairment, Mr. Cunningham acted how an average, reasonable employee would under the circumstances.

In unemployment benefits cases, "conduct an average reasonable employee would have engaged in under the circumstances...is not employment misconduct." Minn. Stat. § 268.095 subd. 6(b)(4) The circumstances here involve an employee who believed he

could not fix the performance problem his employer complained of, because the problem stemmed from his physical and mental impairments, and who nonetheless tried his best to follow what he believed were his instructions. A reasonable employee who was given an impossible task, informed his or her employer of the impossibility of the task, and was then told to accomplish that very task before coming to work for his or her next shift would likely do just what Mr. Cunningham did. The reasonable employee would not come to work until he or she received further instruction from his or her employer as to how to fix the problem by other than impossible means.

For Mr. Cunningham, coming up with an action plan was an impossible task. The ULJ found that Mr. Cunningham “refused to report...and failed to call in, because he did not want to prepare an action plan or continue to work subject to more intensive supervision,” (Decision, 3, Add. 6) (emphasis added). There is, however, no support in the record for the proposition that Mr. Cunningham did not want to prepare an action plan. The reality of the situation was that Mr. Cunningham’s preferences had nothing to do with the situation; Mr. Cunningham could not prepare an action plan, he did not avoid making one simply because he did not want to. Mr. Cunningham continually maintained that he “couldn’t think of anything he could put in an action plan that...he could do differently to fix [the situation.]” Despite being aware of this, Ms. Scott expected Mr. Cunningham would come back with an action plan “along the lines of double checking his area, or having a supervisor walk his area off with him,” although she could not and did not tell him of these expectations (T., 24, 41) Without guidance from his supervisor, Mr. Cunningham’s task seemed all the more impossible.

In this case, just how impossible the task seemed also turns on what instructions Mr. Cunningham received from Ms. Scott. Mr. Cunningham and Ms. Scott each told differing versions of what was said in the Decision Day meeting, making the credibility of the parties an important factor in the ULJ's decision. If the credibility of a party at an evidentiary hearing "has a significant effect on the outcome of a decision, the unemployment law judge must set out the reason for crediting or discrediting that testimony." Minn. Stat. § 268.105 subd. 1(c) Ms. Scott admitted she did not recall exactly what she told Mr. Cunningham, but testified that she told him to "come up with a plan of action and when he comes in on his next scheduled shift he needs to bring that with him." (T., 19, 40) Mr. Cunningham, however, believed that Ms. Scott said "don't come back to work unless you [have] an action plan" and Ms. Scott admitted that Mr. Cunningham may "have taken it that way." (T., 25, 26, 28, 29, 36, 37, 40).

The ULJ eventually decided that Ms. Scott's version was the more accurate of the two. (Decision, 2, Add. 5) However, the ULJ never set out any reason for either crediting Ms. Scott's vacillating version of the conversation or discrediting Mr. Cunningham's consistent retelling of the events, as the statute requires a ULJ to do. *See*, Minn. Stat. § 268.105 subd. 1(c) and *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28-29 (Minn. Ct. App. 2007)

A reasonable employee in Mr. Cunningham's circumstances, faced with a seemingly impossible task, would follow the same course of action as Mr. Cunningham and attempt to nonetheless follow his or her interpretation of the employer's instructions as best he or she knew how. Here, Mr. Cunningham understood that to mean not coming to work

without an action plan, since the action plan and coming to work were repeatedly mentioned together and appeared to be co-requisites of one another. Since Mr. Cunningham believed he could not complete the action plan, a reasonable inference was that he should not go to work either, since he believed he was not to return to work until he had completed an action plan. Much as Mr. Cunningham did not create an action plan because he could not fix his performance problems, he did not return to work because he could not create an action plan. Because Mr. Cunningham did what a reasonable person in his circumstances would do when faced with a seemingly impossible task, he did not commit employment misconduct and the judgment of the ULJ must be reversed. See Minn. Stat. § 268.095 subd. 6(b)(4).

II. AT BOTH THE HEARING AND RECONSIDERATION STAGES OF THIS CASE, THE ULJ FAILED TO FOLLOW APPROPRIATE PROCEDURE.

A. The ULJ had a duty to assist a pro se party in presenting evidence and developing the record with all the relevant facts.

The ULJ has a duty to assist a pro se party in presenting evidence and developing the record with all the relevant facts. *Thompson v. County of Hennepin*, 660 N.W.2d 157, 161 (Minn.App.2003). The ULJ also has an obligation to recognize and interpret a party's claim, especially when the party is pro se. *Miller v. Int'l Express Corp.*, 495 N.W.2d 616, 618 (Minn.App.1993). Additionally, one of the most important responsibilities of the ULJ is his or her overall duty to "exercise control over the hearing procedure in a manner that protects the parties' rights to a fair hearing...[and] ensure that relevant facts are clearly and fully developed." Minn. R. 3310.2921 (emphasis added)

These duties exist because the unemployment compensation laws are humanitarian and remedial in nature, *McGowan v. Executive Express Transportation Enterprises*, 420 N.W.2d 592, 595 (Minn.1988) and the ULJ's participation is designed to ensure that these humanitarian purposes are advanced by providing a fair hearing to pro se parties. In this case, the ULJ's duty to develop the record and recognize claims was even more important than usual, since Mr. Cunningham's mental condition made it difficult for him to develop the record himself.

In the present case, the ULJ failed to adequately develop the record in order to accurately determine whether or not Mr. Cunningham's mental impairment helped create the confusion and misunderstanding that prompted Mr. Cunningham to believe he was not supposed to come back to work if he could not create an action plan. The manner in which Mr. Cunningham followed Ms. Scott's instructions was ruled to be misconduct, so having an adequate record in regard to those actions was an absolute necessity.

Although the ULJ did ask about Mr. Cunningham's mental condition and how it affected his ability to do his job and formulate an action plan, the ULJ never asked questions or asked for evidence which would help him determine how the impairment affected Mr. Cunningham's interpretation of Ms. Scott's instructions and his subsequent actions. Specifically, although the ULJ asked what Mr. Cunningham thought Ms. Scott told him, he did not ask any questions to determine why Mr. Cunningham interpreted the instructions that way. Ms. Scott, who knew of Mr. Cunningham's impairment, admitted that Mr. Cunningham "may have taken [her instructions] that way," but despite this admission the ULJ did not develop the record as to whether Mr. Cunningham's

impairment affected his interpretation of Ms. Scott's instructions or his subsequent reactions to these instructions. (T., 40) The failure to fully address this topic shows that the ULJ did not recognize Mr. Cunningham's claim of "conduct as a consequence of mental impairment" as he was required to do, because he did not ask questions which would be pertinent to establishing such a claim.

The ULJ also failed to determine the full contents of the letter which Mr. Cunningham wrote to let his supervisors know his performance problems were the result of his memory and concentration problems. The ULJ found that "[Mr.] Cunningham's separation came close to the line between a quit and a discharge," and also found that even if Mr. Cunningham had voluntarily discontinued employment, "the applicant did not request reasonable accommodations before he quit." (Decision, 3, Add. 6) However, the ULJ never asked anyone to produce the letter Mr. Cunningham wrote to Wal-Mart concerning the impact of his medical impairment on his ability to do his job. Without this letter, the ULJ could not determine whether Mr. Cunningham had in fact requested a change in his job duties.³ That fact was particularly significant in light of Ms. Scott's admission that she could not have changed Mr. Cunningham's job "without putting an undue burden on someone else." (T. 42)

A similar situation involving a failure of the ULJ to develop the record and recognize claims existed in *Loewen v. Lakeland Mental Health Ctr.*, 532 N.W.2d 270

³ Although Mr. Cunningham asserted that he did not request an accommodation, there is no indication of what exactly the letter contained; Mr. Cunningham may have made a proper request in the letter, but without using the legal phrasing of "request for a reasonable accommodation." Wal-Mart is in sole possession of this letter and did not introduce it at the hearing, so the full and exact contents of the letter remain unknown.

(Minn. App. 1995). There, an employee argued that her “mental state impaired her reasoning when she decided to refuse [her employer’s] request.” *Id.* at 275. The ULJ in that case found that a valid concern existed regarding the employee’s mental condition, but did not address several issues such as “whether Loewen’s mental state affected her capacity to evaluate her ability to function [at her job]...and how, or if, Loewen’s mental state affected her ability to understand or make a rational decision regarding [her employer’s] request.” *Id.* (emphasis added). Because the ULJ did not adequately determine Loewen’s mental status, the Court of Appeals reversed and remanded for “examination, evaluation, and findings on Loewen’s mental state and on how her mental state affected her ability to evaluate and respond to her [her employer’s] request.” *Id.* Here, the court should follow the approach in *Loewen* and remand this case so that Mr. Cunningham’s claim can be properly evaluated in light of his mental impairment.

B. The ULJ abused his discretion when he denied Mr. Cunningham’s request for reconsideration.

When deciding a request for reconsideration, a ULJ “must order an additional evidentiary hearing if an involved party shows that evidence which was not submitted at the evidentiary hearing: would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence...” Minn. Stat. § 268.105 subd. 2(c). In his request for reconsideration, Mr. Cunningham proffered additional evidence including records of the various therapies he underwent, a letter from Dr. Adnan Qureshi, and a plethora of medical records, all of which showed how extensive the effects of Mr. Cunningham’s TIAs actually were.

In this case, Mr. Cunningham had good cause for failing to present all the relevant evidence of his mental impairment at the initial hearing; his condition itself made it difficult for him to know exactly what to present, and the ULJ did not fulfill his duty to develop an adequate record and recognize the claims of a pro se party.

In *Bruner v. Wal-Mart Associates, Inc.*, 2007 WL 2034379 (Minn. App.) (unpub.) (Add. 25), the court found, in a situation closely analogous to that of the present case, the ULJ abused his discretion and the relator had good cause for failing to introduce evidence about her depression at the evidentiary hearing. The ULJ in that case determined that the relator, a Wal-Mart greeter fired for leaning on a trashcan as customers walked past her, committed employment misconduct. *Id.* at *1 (Add. 25) At the evidentiary hearing, “the ULJ did not follow up or question relator about what, if any, effect the condition had on her work performance.” *Id.* at *2 (Add. 26) The relator requested reconsideration, “arguing that the ULJ failed to consider her mental condition...” *Id.* at *1(Add. 25) With her request, evidence was submitted by the relator which detailed how her mental condition affected her work. *Id.* (Add. 25) Despite this, the ULJ denied the relator’s request for reconsideration. The court found that “[b]ased on relator's condition, the undeveloped record concurring that condition, and the ULJ's failure to assist relator in developing the record, we conclude that the ULJ abused her discretion and that relator had good cause for failing to introduce such evidence.” *Id.* at *2 (Add. 26)

Here, an additional evidentiary hearing should have been held, as newly presented evidence would likely have altered the ultimate result of this case. The numerous pieces of medical history and opinion that would have been introduced would have helped the

ULJ accurately assess Mr. Cunningham's impairment and its impact on his job performance; they also would have established that Mr. Cunningham's conduct fell within the exception for conduct that is a consequence of mental impairment because Mr. Cunningham's mental condition was compromised and thus affected the decisions and actions which the ULJ determined were misconduct. As just one example, the medical records would outline the full extent of damage caused by the TIAs. This would thus allow the ULJ to make an accurate assessment of Mr. Cunningham's mental condition based on more than Mr. Cunningham's own broad statements, which were themselves influenced by Mr. Cunningham's mental impairment, about the full range effects Mr. Cunningham suffered following his TIAs.

Presentation of additional evidence would also have clarified whether or not Mr. Cunningham's conduct was, in fact, a voluntary separation falling within the exception for a "medically necessary" quit set forth in Minn. Stat. § 268.095 subd. 1(7)(i). For example, if the letter that Mr. Cunningham gave to B.J., were subpoenaed, it could also lead to a substantial change in outcome, especially since this case was "close to the line between a discharge and a quit." (Decision, 2, Add. 5)

This court should follow the course of action in *Loewen* and remand this case in order to develop the record and properly determine how Mr. Cunningham's mental state affected all of his actions, and thus allow Mr. Cunningham a chance to pursue the claim of mental impairment that the ULJ failed to "recognize and interpret." *See also, Thompson v. County of Hennepin*, 660 N.W.2d 157, 160-61 (Minn.App.2003) (remand for

additional evidence needed to develop a complete record where relator was “not accorded an opportunity to present evidence in her favor”).

CONCLUSION

Mr. Cunningham did not commit employment misconduct because his actions were all influenced by the side effects of his four TIAs. Thus, his conduct fell squarely under the exceptions for “conduct that was a consequence of the applicant’s mental illness or impairment of” Minn. Stat. 268.095 subd. 6(b)(1). His actions also fall under the “conduct an average reasonable employee would have engaged in under the circumstances” Minn. Stat. 268.095 subd. 6(b)(4) exception, as a reasonable employee faced with one impossible task and a closely associated second task would infer that failure to complete one of the actions would make the second task impossible or futile as well. As such, the decision of the ULJ is in error and must be reversed.

The process afforded to Mr. Cunningham in this case was inadequate at both the hearing and reconsideration stages. The ULJ failed to assist a pro se party and develop an adequate record, especially in regard to facts and opinion surrounding Mr. Cunningham’s mental condition. The ULJ also failed to recognize Mr. Cunningham’s claims related to the mental impairment exception or a medically necessary quit. Finally, the ULJ abused his discretion when he denied Mr. Cunningham’s request for reconsideration. If this court does not reverse the finding of misconduct, it should remand this case so that the procedural defects of this case may be remedied.

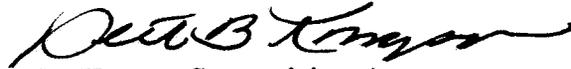
Respectfully submitted,

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STATE OF MINNESOTA
IN COURT OF APPEALS

James J. Cunningham,

Relator,

v.

Wal-Mart Associates, Inc.,

Respondent-Employer,

Certificate of Brief Length

and

Minnesota Department of Employment and
Economic Development,

Respondent-Department.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and 3, for a brief produced with a proportional font. The length of this brief is 7039 words. This brief was prepared using Microsoft Word 2007.

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