STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1325

Charles Asong-Morfaw,
Relator,

vs.

Minnesota Department of Human Services,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed April 9, 2012
Affirmed
Schellhas, Judge

Department of Employment and Economic Development
File No. 27585267-3

Charles Asong-Morfaw, Champlin, Minnesota (pro se relator)

Minnesota Department of Human Services, St. Paul, Minnesota (respondent)

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

Considered and decided by Schellhas, Presiding Judge; Bjorkman, Judge; and Randall, Judge.*

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

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Relator challenges the ULJ's decision that he is ineligible for unemployment benefits because he was discharged for employment misconduct, arguing that (1) relator's absenteeism was not employment misconduct because he satisfied the illness-or-injury exception in Minn. Stat. § 268.095, subd. 6(b)(7) (2010); (2) this court should not defer to the ULJ's credibility determination that respondent's testimony was more credible than relator's testimony; and (3) relator's hearing was unfair. We affirm.

FACTS

Relator Charles Asong-Morfaw was on medical leave from December 13 to December 21, 2010, due to a calf injury he sustained while working for respondent Minnesota Department of Human Services (MDHS). By letter, dated December 20, 2010, MDHS informed relator that to accommodate his injury MDHS would give him clerical work and not require him to work weekends. Relator then worked for MDHS for approximately three months with light-duty restrictions. On March 10, 2011, relator and an MDHS disability case manager met with relator's doctor, who told them that relator could continue working with the same restrictions and gave relator a note. In the note, the doctor wrote that relator should "cont same limitations x 1 ½ months" but also checked a box that indicated that relator should not work for "6–8 additional weeks." Upon receipt of the doctor's note, relator refused to return to work.

MDHS asked relator to return to work three times. First, on March 11, 2011, MDHS's workers' compensation coordinator, Barb Nordstrom, spoke with relator by

phone and told him that he needed to work because the doctor had made a mistake in checking the box that indicated he should not work. Second, on March 16, after MDHS received a corrected note from the doctor, stating that relator should have returned to work on March 10, Nordstrom left relator a recorded telephone message in which she stated that relator needed to return to work because MDHS had the corrected note. And, third, on March 24, MDHS mailed relator a copy of the corrected note with a letter requiring him to return to work by March 30. Relator responded by writing a letter to MDHS on March 25, acknowledging his receipt of the corrected note and letter and stating that he would not return to work because of the original note and because his doctor had not directly contacted him about the correction. MDHS therefore notified relator on March 31 that he would be terminated on April 7 because he was absent from work from March 17 to March 30 and did "not provide[] documentation to substantiate [his] absence[s]."

MDHS terminated relator's employment, and he applied for unemployment benefits. The Minnesota Department of Employment and Economic Development determined that relator was ineligible for unemployment benefits because he quit. Relator appealed the determination. An unemployment-law judge (ULJ) decided that relator was ineligible for benefits because MDHS terminated him for employment misconduct, concluding that his "absences between March 17, 2011, and March 30, 2011, are employee misconduct" and that he did not satisfy the illness-or-injury exception under Minn. Stat. § 268.095, subd. 6(b)(7). Relator requested reconsideration, and the ULJ affirmed her decision.

This certiorari appeal follows.

D E C I S I O N

In reviewing a decision of a ULJ, this court may reverse or modify a decision if the substantial rights of the relator may have been prejudiced because the findings, inferences, or decision are, among other things, affected by an error of law, unsupported by substantial evidence, or arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d) (2010). "Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law." *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted). "[W]hether a particular act constitutes disqualifying misconduct is a question of law that we review de novo." *Id.* "Whether the employee committed a particular act is a question of fact." *Brisson v. City of Hewitt*, 789 N.W.2d 694, 696 (Minn. App. 2010) (quotation omitted). This court reviews "the ULJ's factual findings in the light most favorable to the decision." *Stagg*, 796 N.W.2d at 315 (quotation omitted). We "will not disturb those findings if the evidence substantially sustains them." *Vasseei v. Schmitty & Sons Sch. Buses Inc.*, 793 N.W.2d 747, 749 (Minn. App. 2010). "Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Bangtson v. Allina Med. Grp.*, 766 N.W.2d 328, 332 (Minn. App. 2009) (quotation omitted). "[T]he issue is not whether the employer can choose to terminate the employment relationship, but rather whether, now that the employee has been terminated, there should be unemployment compensation, a determination which focuses on the willfulness of the employee's

behavior." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 806 (Minn. 2002) (quotation omitted).

Employment Misconduct

Relator argues that the ULJ erroneously concluded that his absenteeism from March 17 to March 30 was employment misconduct. We disagree. An employee is ineligible for unemployment benefits if he is discharged for employment misconduct. Minn. Stat. § 268.095, subd. 4(1) (2010). Employment misconduct includes "any 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." *Id.*, subd. 6(a)(1) (2010). The supreme court held in *Stagg* that the relator's absenteeism on five occasions was "a serious violation of the standards of behavior [his] employer has the right to reasonably expect of [him]" because "[the relator] was aware [of his employer's absenteeism policy] and . . . [he] was aware that he was expected to follow that policy." *Stagg*, 796 N.W.2d at 317. We therefore conclude that Asong-Morfaw's absenteeism was a serious violation of the standards of behavior MDHS had a right to reasonably expect of him because he was absent from March 17 to March 30, despite MDHS's three requests that he return to work.

Relator argues that the ULJ erroneously concluded that he engaged in employment misconduct merely because of his "choos[ing] not to go to work." But we agree with the ULJ's conclusion. "[C]hoos[ing] not to go to work" is absenteeism, which is employment misconduct when no employment-misconduct exception applies. *See id.* (concluding relator's absenteeism was employment misconduct). Relator argues that the ULJ

erroneously concluded that MDHS did not know "whether or when [relator] was going to return to work," even though his March 25 letter showed his intent to return. We disagree. His March 25 letter merely promises to "update [MDHS] following . . . [his doctor's] appointment on April 7th, 2011." Relator argues that the ULJ failed to acknowledge that MDHS's December 20, 2010 letter rendered his absences from March 26 to March 30 not misconduct. Relator's argument is unpersuasive. The December 20 letter merely stated that relator did not need to work on weekends, and March 28, 2011, to March 30, 2011, are weekdays from which the letter did not exempt him from working.

Relator argues that his absenteeism was not employment misconduct because he had a "credible fear" of further pain or injury and MDHS had proper notice from both the March 10 doctor's note and his March 25 letter to MDHS. We disagree. "[A]bsence because of illness or injury of the applicant, with proper notice to the employer" is not employment misconduct. Minn. Stat. § 268.095, subd. 6(b)(7). But relator fails to establish that his absenteeism was "because of" his injury. Rather, he testified that his doctor told him at the March 10 appointment that he could continue working. Moreover, Nordstrom notified relator in the March 16 recorded telephone message that the doctor provided a corrected note and MDHS included a copy of the corrected note with its March 24 letter to relator. We conclude therefore that relator's absenteeism from March 17 to March 30 was employment misconduct and not justified by the illness-or-injury exception. *C.f. Fresonke v. St. Mary's Hosp.*, 363 N.W.2d 328, 328–30 (Minn. App. 1985) (holding under the common-law definition of employment misconduct that

relator's failure to return to work after his medical leave expired was employment misconduct, even though he claimed to be still suffering from his ailment and believed he was following doctor's orders to not return to work, because his employer had instructed him to return to work and his failure to seek additional medical leave "demonstrated a lack of concern . . . for retaining his job").

Relator argues that the ULJ erroneously found that Nordstrom left the March 16 voicemail and that the corrected doctor's note replaced the original doctor's note. His argument is unpersuasive. We review "the ULJ's factual findings in the light most favorable to the decision," *Stagg*, 796 N.W.2d at 315 (quotation omitted), and "will not disturb those findings if the evidence substantially sustains them," *Vasseei*, 793 N.W.2d at 749. Nordstrom testified:

> [W]e had to wait until [relator's doctor] provided us with a new [note]. They did fax one to us on [March] 16. I called [relator] . . . I left a message stating we had received the corrected [note] dated March 10 and that there was . . . nothing excusing him from work and that the doctor was very clear that his restrictions were to remain the same.

The corrected doctor's note was produced at the hearing. Because this evidence substantially sustains the ULJ's factual findings, we will not disturb them.[1]

[1] Relator also asserts that the ULJ erred by failing to provide a legal basis to explain why MDHS was entitled to obtain the corrected doctor's note without relator's presence. But relator does not provide us with any legal authority requiring a patient's presence when an employer receives a corrected doctor's note. Therefore, he waives this argument. *See Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519–20, 187 N.W.2d 133, 135 (1971) ("An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection.").

Credibility Findings

Relator argues that the ULJ erroneously determined that MDHS's testimony was more credible than relator's testimony. His argument is unpersuasive. "Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Bangtson*, 766 N.W.2d at 332. "When the credibility of an involved party or witness testifying in 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) (2010). The ULJ did so, stating, "[MDHS's] testimony was more credible because it was clear, direct, and provided a more plausible sequence of events. [Relator's] testimony was generally less credible because it was rambling and at times illogical." We therefore will not disturb the ULJ's credibility determination.

Fair Hearing Requirements

Relator argues that the ULJ was prejudiced against him and expressed partiality toward MDHS by ignoring facts surrounding his absences and misquoting one of his arguments in her reconsideration decision. His argument is unpersuasive. In a fair hearing, the ULJ fully develops the record, assists unrepresented parties in presenting a case, and explains the procedure and the terms used throughout the hearing. Minn. Stat. § 268.105, subd. 1(b) (2010); Minn. R. 3310.2921 (2011). A hearing may be considered fair if both parties are afforded the opportunity to give statements, cross-examine witnesses, and offer and object to exhibits. *See Ywswf v. Teleplan Wireless Servs. Inc.*, 726 N.W.2d 525, 529–30 (Minn. App. 2007). Relator has not successfully alleged any

instances where the ULJ was deficient in any of those respects. Although the ULJ mistakenly wrote in her reconsideration decision that relator argued that MDHS, not relator's doctor, gave relator the original doctor's note, this is not material to either the outcome of the case or the fairness of the hearing. *See* Minn. Stat. § 268.105, subd. 7(d) (stating that this court may only reverse if an error affected the relator's substantial rights). We therefore are not persuaded that relator's hearing was unfair.

Affirmed.