STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1806

Timothy C. Emerson,
Relator,

vs.

Solid-Employees, LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed July 2, 2012
Affirmed
Kalitowski, Judge

Department of Employment and Economic Development
File No. 26987923-6

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Considered and decided by Kalitowski, Presiding Judge; Schellhas, Judge; and Chutich, Judge.

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

KALITOWSKI, Judge

Relator Timothy C. Emerson challenges the decision by the unemployment-law judge (ULJ) that he is ineligible for unemployment benefits because he quit his employment, arguing that (1) respondent Solid-Employees LLC's appeal from the determination of eligibility was untimely; (2) he did not quit his employment; (3) if he did quit, he is eligible for benefits under an exception to the rule of ineligibility; (4) respondent Minnesota Department of Employment and Economic Development (DEED) and the ULJ exceeded their statutory authority and violated Emerson's right to due process; and (5) policy weighs in favor of providing him benefits. We affirm.

D E C I S I O N

I.

Emerson first argues that the ULJ's decision must be reversed because Solid-Employees's appeal from the determination of eligibility by DEED was not timely, and the ULJ therefore lacked jurisdiction to hear the appeal. We disagree.

DEED contends that Emerson waived this argument by failing to raise it to the ULJ. But waiver does not apply to a jurisdictional question such as this. *Lolling v. Midwest Patrol*, 533 N.W.2d 632, 634 (Minn. App. 1995) ("[T]his court may consider a jurisdictional question even if it was not previously raised."), *reversed on other grounds*, 545 N.W.2d 372 (Minn. 1996); *see also King v. Univ. of Minn.*, 387 N.W.2d 675, 677 n.1 (Minn. App. 1986) (deciding jurisdictional question even though it was raised for the first time on appeal).

"A determination of eligibility or determination of ineligibility is final unless an appeal is filed by the applicant or notified employer within 20 calendar days after sending." Minn. Stat. § 268.101, subd. 2(f) (2008). An untimely appeal from a determination must be dismissed for lack of jurisdiction. *Kennedy v. Am. Paper Recycling Corp*., 714 N.W.2d 738, 740 (Minn. App. 2006). The statutory time period for appeal is "absolute and unambiguous," *Semanko v. Dep't of Emp't Servs.*, 309 Minn. 425, 430, 244 N.W.2d 663, 666 (1976), and there are no exceptions to the time limit. *Cole v. Holiday Inns, Inc.*, 347 N.W.2d 72, 73 (Minn. App. 1984).

DEED issued an initial determination that Emerson was eligible for benefits on February 18, 2011. The time for Solid-Employees to appeal from this determination would have expired on March 10, 2011. But five days after issuing the initial determination, on February 23, 2011, DEED issued an amended determination. Solid-Employees filed its appeal on March 15, 2011, the last day from which to appeal the amended determination.

Emerson contends that because the amended determination was inadvertently omitted from the exhibits entered into record at the appeal hearing, the record on appeal "doesn't support that the determination of eligibility was amended." Although he does not cite it, Emerson's argument appears to rely on the rule that the record on appeal consists of "[t]he papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any." Minn. R. Civ. App. P. 110.01. *See* Minn. R. Civ. App. P. 115.04, subd. 1 (applying rule 110.01 to DEED cases). Accordingly, Emerson argues that March 10, 2011, is the controlling appeal deadline. We disagree.

An administrative hearing "differs from a trial court in its degree of formal adherence to evidentiary rules." *Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 584 (Minn. 1977). Reversal and remand is not warranted when the failure to admit exhibits is harmless and would not change the result. *See id.* at 585 (affirming unemployment-benefits decision despite hearing officer's failure to accept certain documents because "any failure to formally admit them is harmless in this case"). Emerson does not dispute that DEED issued the amended determination and mailed it to the parties, and our review of the agency file confirms that DEED issued the amended determination on February 23, 2011. Therefore, we conclude that the oversight was harmless, and we decline to reverse or remand the ULJ's determination on this basis.

We also reject Emerson's contention that the ULJ's "failure to review" whether Solid-Employees's appeal was timely renders her decision arbitrary and capricious.

Despite having the opportunity, Emerson offered no evidence and made no argument at the appeal hearing regarding timeliness. Because the issue was not raised, it was not arbitrary or capricious for the ULJ not to address it. *See* Minn. Stat. § 268.105, subd. 1(b) (2008) ("The unemployment[-]law judge must ensure that all *relevant* facts are clearly and fully developed." (emphasis added)).

II.

Emerson advances a number of arguments to support his claim that the ULJ erred by concluding that he is ineligible for benefits. When reviewing a ULJ's decision, this court may affirm, remand for further proceedings, or reverse or modify the 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," or "unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 268.105, subd. 7(d) (2008).

This court views the ULJ's factual findings in the light most favorable to the decision and defers 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 when they are supported by substantial evidence in the record. *Id.* Whether an employee is eligible for unemployment benefits under the facts as found by the ULJ, however, is a question of law that we review de novo. *Id.*

Quit vs. discharge

Emerson first argues that the record does not support the ULJ's finding that he quit and instead establishes that Solid-Employees discharged him because the company did not have enough in-state work available for him. An applicant who quits employment is ineligible for all unemployment benefits unless he or she falls under a statutory exception to ineligibility. Minn. Stat. § 268.095, subd. 1 (2008). A quit from employment occurs when the decision to end the employment was, at the time the employment ended, the employee's. *Id.*, subd. 2(a) (2008). A discharge from employment occurs when any words or actions by an employer would lead a reasonable employee to believe that the employer will no longer allow the employee to work for the employer in any capacity. *Id.*, subd. 5(a) (2008). "Whether an employee has been discharged or voluntarily quit is a question of fact." *Nichols v. Reliant Eng'g & Mfg., Inc.*, 720 N.W.2d 590, 594 (Minn. App. 2006) (quotation omitted).

The ULJ acknowledged that the testimony regarding the termination of Emerson's employment was conflicting. Her order stated, "Emerson testified he was laid off; the employer testified he quit to go to school." The ULJ resolved this conflict in the employer's favor because the employer's testimony "was consistent and detailed" and was therefore "more credible."

The ULJ's findings are supported by substantial evidence. Emerson's supervisor, Brad Liska, clearly recalled that Emerson approached him at a job site and told him he was quitting work to go to school. According to Liska, Emerson's crew was one of 22-24 crews working primarily in-state, and there was work available for these crews. Moreover, Liska testified that the company would have found in-state work for Emerson because he was a good foreman who could be trusted with large, high-end remodeling projects. In contrast, Emerson's testimony that Solid-Employees's managers had warned him about a lack of in-state work was vague and did not clearly establish that the company laid him off. Because the ULJ's findings are supported by the evidence, we defer to them. *Nichols*, 720 N.W.2d at 594 ("When witness credibility and conflicting evidence are at issue, we defer to the decision-maker's ability to weigh the evidence and make those determinations."). Therefore, we conclude that Emerson quit his employment.

Exceptions to ineligibility for quitting

Emerson next argues that even if he quit, a number of the exceptions to the general rule of ineligibility apply.

1. Good reason caused by employer

An employee who voluntarily quits employment may be eligible for unemployment benefits if "the applicant quit the employment because of a good reason caused by the employer." Minn. Stat. § 268.095, subd. 1(1) (2008). A good reason caused by the employer directly relates to the employment for which the employer is responsible, is adverse to the employee, and "would compel an average, reasonable worker to quit." *Id.*, subd. 3(a) (2008). The employee must "give the employer a reasonable opportunity to correct the adverse working conditions" before the conditions can be considered a good reason caused by the employer. *Id.*, subd. 3(c) (2008). "A good personal reason does not equate with good cause" to quit. *Kehoe v. Minn. Dep't of Econ. Sec.*, 568 N.W.2d 889, 891 (Minn. App. 1997).

Emerson contends that Solid-Employees gave him good reason to quit because the company eliminated his benefits and reduced his pay. But the ULJ found that Emerson quit to attend school and that he did not quit because of a reduction in benefits or pay. It is undisputed that Solid-Employees cut health insurance and vacation benefits for its employees and changed its compensation structure from an hourly to a per-job basis in response to the economic downturn. The ULJ found that the elimination of health and vacation benefits occurred months before Emerson quit, and this finding is supported by the employer's testimony. Thus, the record supports the ULJ's finding that the timing of events indicates that the elimination of benefits is not why Emerson quit. The employer's testimony also supports the ULJ's finding that "while [Emerson's wages] varied when the employer went to a project[-]based pay, [the wages] were not reduced." Therefore, the

change in compensation structure was not adverse to Emerson and would not compel an average, reasonable employee to quit. Moreover, there is no evidence that Emerson brought his concerns regarding benefits to his employer's attention or gave his employer an opportunity to correct the adverse conditions.

Emerson also contends that he quit because he was required to work out of town and that when he did, Solid-Employees was slow to reimburse him for travel expenses. But the ULJ credited the employer's testimony that Emerson was merely offered out-of-town work and was not required to take it. And the record establishes that Emerson was reimbursed for expenses within a reasonable amount of time and that he never brought this concern to his employer's attention.

Therefore, we conclude that Emerson did not quit for good reason caused by his employer.

2. Quit within 30 days and unsuitable employment

An applicant who quits work may be eligible for benefits if "the applicant quit the employment within 30 calendar days of beginning the employment because the employment was unsuitable for the applicant." Minn. Stat. § 268.095, subd. 1(3) (2008). Emerson argues that his employment with Tappe Construction, the predecessor company to Solid-Employees, ended when Tappe ceased operations on July 24, 2009, and that his employment with Solid-Employees, which ended within 30 days of Tappe's termination, was unsuitable because his benefits were reduced or eliminated.

Emerson's argument fails for two reasons. First, as discussed above, Emerson quit to attend school full time, not because his employment was unsuitable. And second, even

if his work was unsuitable, the change of corporate identity from Tappe Construction to Solid-Employees is not a "beginning" of employment as the statute contemplates. The employer testified that after the transition from Tappe to Solid-Employees, "[t]he benefits changed, but as far as the scope of work, the wages, they all remained fairly constant." Therefore, Emerson's employment was continuous and the change in corporate identity had no legal effect on Emerson's employment status for unemployment-benefits purposes. *See Muyres v. Schmid*, 270 Minn. 440, 441-42, 134 N.W.2d 319, 320-21 (1965) (holding that the transition in corporate structure from a partnership to a corporation, following which "all employees of the former partnership were continued in employment by the corporation with the same duties and at the same rates of pay . . . had no legal effect upon [the employee's] employment since there was only one employing unit").

Moreover, the 30-days unsuitable-work exception generally applies in the context of an applicant who is currently receiving unemployment benefits and takes a job outside his or her usual line of work, then quits because the employment is not suitable. *See Valenty v. Med. Concepts Dev., Inc.*, 503 N.W.2d 131, 134 (Minn. 1993) (holding that a person receiving unemployment benefits who accepts an unsuitable job will not be disqualified from receiving benefits, if the person quits within a reasonable time). This rule encourages those who are unemployed to try new lines of work to become reemployed. *Id.* The rule does not apply to Emerson because he continued working in the same field, performing the same job, for essentially the same employer.

3. Part-time & full-time

An exception to the ineligibility rule also applies when "the employment was part time and the applicant also had full-time employment in the base period" from which the applicant is eligible for benefits. Minn. Stat. § 268.095, subd. 1(5) (2008).

Emerson argues that he was employed full time with Tappe and that he subsequently worked "less than forty (40) hours per week" for Solid-Employees and therefore "it is highly probable that [he] was working part time." But for purposes of this exception, "an employee who performs 32 or more hours of service a week is presumptively employed full time." *Lamah v. Doherty Emp't Grp., Inc.*, 737 N.W.2d 595, 600 (Minn. App. 2007). Emerson points to some evidence in the record that he worked sporadic hours between April 2009 and July 2009. This is a time period during which he worked for Tappe, not Solid-Employees. There is no evidence in the record that Emerson worked less than 32 hours per week for Solid-Employees. Emerson's argument also fails because his employment was continuous from Tappe to Solid-Employees and he would not have been eligible for benefits as a result of the change in corporate identity. *See Muyres*, 270 Minn. at 442, 134 N.W.2d at 321.

4. Loss of child care

Finally, an applicant may be eligible for benefits if "the applicant's loss of child care for the applicant's minor child caused the applicant to quit the employment, provided the applicant made reasonable effort to obtain other child care and requested time off or other accommodation from the employer and no reasonable accommodation is available." Minn. Stat. § 268.095, subd. 1(8) (2008).

Emerson contends that he was forced to take out-of-town work and that a "lack of child care" required him to make "complex arrangements" with family members to ensure his children were cared for. He asserts that this resulted in an "undue burden" on his family and left no reasonable alternative but to quit.

But the evidence supports the ULJ's finding that Solid-Employees had work available in-state and did not require Emerson to take out-of-town work. Instead, the evidence demonstrates that Emerson quit work to attend school.

Because we conclude that Emerson quit his employment and that no exception to the general rule of ineligibility applies, the ULJ did not err by concluding that Emerson is not entitled to benefits.

III.

Emerson next asks us to reverse the ULJ's decision because he contends that DEED and the ULJ exceeded their statutory authority and violated his right to due process. We disagree.

Emerson claims that DEED exceeded its authority when it failed "to identify what source or what information it used to review Emerson's eligibility for unemployment benefits." The unemployment-benefits statute states that "[u]nless an appeal has been filed, the commissioner, on the commissioner's own motion, may reconsider a determination of eligibility or determination of ineligibility that has not become final and issue an amended determination." Minn. Stat. § 268.101, subd. 4 (2008). The statute makes clear to applicants that "[a]n issue of ineligibility is determined *based upon that information required of an applicant, any information that may be obtained from an*

applicant or employer, and information from any other source." Minn. Stat. § 268.101, subd. 2(c) (2008) (emphasis added). Emerson cites no provision, and we can find none, requiring the commissioner to specifically identify the source of information it used in reaching its amended determination.

Nor was Emerson "prevented . . . from adequately addressing this issue during his unemployment appeal hearing." Under the statute, when an appeal is filed, DEED must send notice of an appeal to "all involved parties" explaining that an evidentiary hearing will be held. Minn. Stat. § 268.105, subd. 1(a) (2008). The notice sets out the parties' "rights and responsibilities regarding the hearing" and explains that a de novo due-process hearing will occur before a ULJ. *Id.*

Here, DEED sent Emerson notice that Solid-Employees had appealed from the amended determination of eligibility and the notice informed Emerson that an appeal hearing would be held to determine "[t]he reason Timothy C Emerson separated from SOLID-EMPLOYEES LLC Quit." Emerson was provided copies of the exhibits the parties intended to introduce at the hearing, including the questionnaires completed by Emerson and Solid-Employees on which DEED relied in making its eligibility determination. At the hearing, Emerson was permitted to testify, call and cross-examine witnesses, and offer and object to exhibits. Because he was provided notice and an opportunity to be heard, Emerson's due-process rights were not violated. *See Seemann v. Little Crow Trucking*, 412 N.W.2d 422, 425-26 (Minn. App. 1987) (holding that relator's due-process rights were not violated because relator had sufficient notice of the issues to be addressed).

IV.

Finally, Emerson contends that it is unfair to require him to repay two years' worth of benefits when he "became unemployed through no fault of his own." We disagree.

Minnesota unemployment law expressly prohibits equitable relief. Minn. Stat. § 268.069, subd. 3 (2008) ("There is no equitable or common law denial or allowance of unemployment benefits."). And "[a]ny applicant who . . . because of an appeal decision or order under section 268.105, has received any unemployment benefits that the applicant was held not entitled to, must promptly repay the unemployment benefits to the trust fund." Minn. Stat. § 268.18, subd. 1(a) (2008). Emerson failed to establish that he satisfies the statutory requirements for eligibility, therefore he can claim no equitable basis for keeping unemployment benefits to which he was not entitled.

Affirmed.