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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0419**

Brie Nodgaard,
Relator,

vs.

Zapf Enterprises Limited - J Cousineau's,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed December 17, 2012
Affirmed in part, reversed in part, and remanded
Connolly, Judge**

Department of Employment and Economic Development
File No. 28708792-5

Brie Nodgaard, Osseo, Minnesota (pro se relator)

Zapf Enterprises, Ltd. – J. Cousineau's, Maple Grove, Minnesota (respondent)

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

Considered and decided by Rodenberg, Presiding Judge; Connolly, Judge; and
Hooten, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Relator challenges the decision of the unemployment-law judge (ULJ) that relator was ineligible for unemployment benefits because she quit employment and no exception to ineligibility applied. We affirm the ULJ's decision that relator is not eligible under the exception for an applicant who quits based on medical necessity. We also decline to accept relator's argument and the Minnesota Department of Employment and Economic Development (DEED)'s concession that relator is eligible for benefits pursuant to an exception for one who gives notice of quitting an unsuitable job within 30 days of starting it, which the ULJ did not reach. But because, as DEED correctly concedes, relator is eligible for benefits pursuant to an exception applicable to one who quits a part-time job under certain circumstances, which the ULJ also did not reach, we reverse in part and remand for an additional evidentiary hearing.

FACTS

Respondent Zapf Enterprises Limited employed relator Brie Nodgaard as a part-time server one or two days a week at its bar/restaurant from December 6, 2010 until January 16, 2011, when she quit. Nodgaard applied for unemployment benefits and DEED issued a determination of ineligibility. Nodgaard appealed, and, after a hearing, the ULJ ruled that Nodgaard was ineligible for benefits. She requested reconsideration and the ULJ then ordered another hearing to take additional evidence. The ULJ issued a second decision ruling that Nodgaard was ineligible for benefits and affirmed on reconsideration. This certiorari appeal followed.

Nodgaard testified at both hearings that she had difficulty working at a bar because of her dependency on alcohol and that she was also suffering from depression and anxiety. At the first hearing, she testified that because her difficulty with alcohol was such a personal issue, she did not tell Zapf's owner that it was her reason for quitting. In the first decision, the ULJ ruled that Nodgaard quit employment and, in relevant part, that the medical-necessity exception did not apply.

At the second hearing, Nodgaard testified that she told Zapf's owner she was quitting because she could no longer work around alcohol, that she was going to seek treatment for her alcohol dependency, that the owner personally knew about her struggles with alcohol, and that she had asked him if there were any other positions, but that he could not accommodate her. The ULJ repeatedly questioned Nodgaard for an explanation of why her testimony changed so dramatically from the first hearing. She said that at the first hearing, she had difficulty remembering the details because it had been held nearly a year after she quit and she had been employed at her part-time job for such a short period of time, about a month and a half. Nodgaard also cited a letter from Zapf's owner, dated several days after the ULJ's first decision and submitted with her first request for reconsideration, stating that he had personal knowledge of her struggles with alcohol and that he was unable to accommodate her employment in any capacity. Finally, Nodgaard explained that it was her struggles with depression and anxiety, not alcohol, that she had felt were too personal to reveal to Zapf's owner when she quit. In the second decision following the second hearing, the ULJ also ruled that the medical-necessity exception did not apply and explained why she did not credit Nodgaard's

testimony at the second hearing that would have supported the applicability of the medical-necessity exception. Nodgaard requested reconsideration, and the ULJ affirmed. This certiorari appeal followed.

DECISION

When reviewing the decision of a ULJ, this court may affirm, remand for further proceedings, or reverse or modify if the substantial rights of relator may have been prejudiced because the decision was affected by errors of law or “unsupported by substantial evidence in view of the entire record as submitted.” Minn. Stat. § 268.105, subd. 7(d)(4), (5) (2010). “This court views the ULJ’s factual findings in the light most favorable to the decision,” defers to the ULJ’s credibility determinations, and “will not disturb the ULJ’s factual findings when the evidence substantially sustains them.” *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). This court will conduct a de novo review of whether an applicant who quit employment is ineligible for benefits. *Grunow v. Walser Auto. Grp. LLC*, 779 N.W.2d 577, 579 (Minn. App. 2010).

I.

We first address Nodgaard’s challenge to the ULJ’s ruling that the exception to ineligibility for one who quits based on medical necessity does not apply. An employee who quits employment is ineligible for unemployment benefits unless an exception applies. Minn. Stat. § 268.095, subd. 1 (2010). The exception at issue here provides that an applicant who quits “because the applicant’s serious illness or injury made it medically necessary that the applicant quit” may be eligible for benefits. Minn. Stat.

§ 268.095, subd. 1(7)(i). “This exception only applies if the applicant informs the employer of the medical problem and requests accommodation and no reasonable accommodation is made available.” *Id.*, subd. 1(7).

The ULJ’s decision following the second hearing that Nodgaard was ineligible for benefits because the medical-necessity exception did not apply rested on the ULJ’s decision not to credit Nodgaard’s testimony at the second hearing as to what she told Zapf’s owner when she quit. “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). We review the ULJ’s findings in the light most favorable to the decision, defer to the ULJ’s credibility determinations, and “will not disturb the ULJ’s factual findings when the evidence substantially sustains them.” *Peterson*, 753 N.W.2d at 774.

Nodgaard’s arguments on appeal challenging the credibility determination mirror her explanations to the ULJ as to why her testimony changed. She also emphasizes that she had been struggling with alcoholism and had been suffering from depression and anxiety while working at Zapf’s. The ULJ specifically found that Nodgaard’s testimony at the second hearing was not credible because she did not testify to these important details in her first hearing, despite the ULJ’s direct questions to her regarding her conversation with Zapf’s owner when she quit. Further, the ULJ found that her testimony changed specifically to address the reasons that the original decision had ruled that she was ineligible for benefits. These findings are supported by substantial evidence in the

record and we defer to the ULJ's credibility determinations. Based on these findings, the ULJ correctly ruled that the medical-necessity exception did not apply.

Nodgaard also challenges several rulings in the ULJ's decision on reconsideration affirming the ULJ's second decision that she was ineligible for benefits. In Nodgaard's second request for reconsideration, she stated that she accepted the credibility determination of the ULJ's findings but argued that those findings were irrelevant because Zapf's owner had actual knowledge of her condition and accommodation was impossible because the bar/restaurant was so small. The ULJ acknowledged her concession but ruled that even if her employer "guessed" at the nature of her "personal problems," Nodgaard still failed to meet the requirements of the exception because she did not disclose her illness or ask for any accommodation prior to quitting. On appeal, Nodgaard disavows the concession, contending it was merely language provided to her by a volunteer attorney, but her disavowal does not change our decision above affirming the ULJ's credibility determinations. As to the merits, we affirm the ULJ's decision as a matter of law.

II.

Next, we address DEED's concession that Nodgaard is eligible for unemployment benefits based on an exception that the ULJ did not consider, which is applicable to one who quits a part-time job under certain circumstances. Minn. Stat. § 268.095, subd. 1(5) (2010). An applicant who quits part-time employment, but had full-time employment in the relevant base period, from which the applicant "separated because of reasons for which the applicant was held not to be ineligible," may be eligible for benefits, regardless

of the reason for quitting the part-time employment. *Id.*; see *Lamah v. Doherty Emp't Grp., Inc.*, 737 N.W.2d 595, 599 (Minn. App. 2007) (addressing this statutory exception). The applicant, however, must have earned sufficient wages from the full-time employment to establish a benefit account. Minn. Stat. § 268.095, subd. 1(5).

DEED advises that although the ULJ did not notice it, this exception applies to Nodgaard. DEED asserts that Nodgaard “is not ineligible” for benefits after quitting part-time employment under Minn. Stat. § 268.095, subd. 1(5). The ULJ “must ensure that all relevant facts are clearly and fully developed.” Minn. Stat. § 268.105, subd. 1(b) (2010). The ULJ is to “assist unrepresented parties in the presentation of evidence” and “exercise control over the hearing procedure in a manner that protects the parties’ rights to a fair hearing.” Minn. R. 3310.2921 (2011). We agree that the ULJ should have addressed this issue.

DEED asks this court to reverse the ULJ and find Nodgaard eligible for benefits on this basis or, in the alternative, to remand the matter to the ULJ for an additional evidentiary hearing to consider documents showing that she worked in full-time employment during her base period. None of the records that DEED cites are in the agency record sent to this court and even if they were, this court cannot determine Nodgaard’s eligibility on a new basis for the first time on appeal. See *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). Consequently, we reverse and remand for an additional evidentiary hearing.

III.

We next address whether Nodgaard's eligibility might rest on another exception to ineligibility that the ULJ also did not address. This exception applies when "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). Nodgaard and DEED agree that the job with Zapf's, which required Nodgaard to be around alcohol, was unsuitable. DEED concedes that because "Nodgaard gave her notice of quitting within 30 days of starting her employment at Zapf Enterprises, and worked through a two-week notice period at Zapf's request," she met the requirement of quitting an unsuitable job within 30 days of starting employment.

DEED's concession, however, is based on Nodgaard's testimony at the first hearing that, on January 2, 2011, after discussing the matter with her family, she told Zapf she was quitting but agreed to give two weeks' notice, and that her last day of work was January 16. But at the second hearing, Nodgaard testified that, while she had discussed the matter with her family on January 2, she did not tell Zapf she was quitting until January 16. She testified that she did not give him two weeks' notice. Although the ULJ discredited much of the new testimony Nodgaard gave at the second hearing, the ULJ did credit Nodgaard's testimony that she told Zapf she was quitting on January 16. Consequently, despite DEED's concession, Nodgaard does not meet the requirements for eligibility based on a quit of an unsuitable job within 30 days of starting employment because she told Zapf she was quitting more than 30 days after starting employment.

IV.

Finally, Nodgaard contends that the reason for her separation from her employment with Zapf's arose only because DEED's on-line system erroneously required her to open a benefit account for a new benefit year. Further, she contends that she was erroneously cut off from receiving federal extended unemployment benefits for the same reason. These issues were not addressed at either hearing or by the ULJ and do not arise out of DEED's determination of ineligibility appealed by Nodgaard, and thus we cannot address them. *See Thiele*, 425 N.W.2d at 582-83.

Affirmed in part, reversed in part, and remanded.