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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1988**

Larry Fritze,
Relator,

vs.

Home Depot USA, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed May 28, 2013
Affirmed
Kirk, Judge**

Department of Employment and Economic Development
File No. 29644320-3

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Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Kirk,
Judge.

UNPUBLISHED OPINION

KIRK, Judge

Relator Larry Fritze challenges the conclusion of an unemployment-law judge (ULJ) that his actions amounted to employment misconduct that disqualifies him for unemployment benefits. He also challenges the ULJ's refusal to accept additional posthearing evidence. We affirm.

FACTS

Fritze was discharged from his position as a master trade specialist at respondent Home Depot USA, Inc. Home Depot concluded that Fritze had solicited personal business from a Home Depot customer in the store, on the clock, while wearing a Home Depot apron, in violation of the company's conflict-of-interest policy.

Fritze began working in the plumbing department at Home Depot in April 2008 after spending 28 years as a self-employed plumbing contractor. When he started work at Home Depot, Fritze signed an acknowledgment of his training on store policies, which included a discussion of Home Depot's policy against conflicts of interest.

In late-March 2012, a Home Depot customer came to the store to return a number of plumbing parts she bought. When explaining to a store employee why she was returning the items, the customer disclosed that Fritze had offered to come to the customer's home and provide an estimate for completing the plumbing project for her. Home Depot offers plumbing installation and repair services. Fritze did not do plumbing installation and repair for the company. Later that day, the store manager spoke with the

customer, who revealed that Fritze had in fact visited her home with the intention of providing a bid for his own personal plumbing services.

After conducting an investigation, Home Depot discharged Fritze for violating Home Depot's policy against soliciting personal business in the store. Fritze applied for unemployment benefits and respondent Minnesota Department of Employment and Economic Development issued a determination of eligibility. Home Depot appealed, and the ULJ held a hearing.

At the hearing, Fritze denied that he was soliciting personal business and he claimed that his former manager had sanctioned his home visits to customers in the past. The ULJ concluded that, because of potential liability risks, it was illogical and implausible that Fritze's former manager would permit him to visit customers' homes to advise them on plumbing solutions. The ULJ instead credited Home Depot's witnesses' testimony that Fritze was not authorized to solicit customers or to visit their homes on his spare time to advise them on their plumbing projects. She concluded that Fritze took plumbing work from a Home Depot customer, and that this action amounted to employment misconduct rendering him ineligible for benefits.

Fritze sought reconsideration, arguing in part that the ULJ should hold an additional evidentiary hearing to collect more evidence. The ULJ affirmed. Pursuant to Minn. Stat. § 268.105, subd. 7(a) (2012), this court granted Fritze's petition for a writ of certiorari.

DECISION

I. The ULJ's decision is supported by substantial evidence.

Fritze argues that the ULJ's determination of ineligibility lacked evidentiary support because no one saw firsthand whether he solicited a customer and because the testimony of the store manager was contradictory.

Under Minn. Stat. § 268.105, subd. 7(d)(5) (2012), this court may reverse or modify the ULJ's findings or inferences if they are "unsupported by substantial evidence in view of the entire record as submitted." "This court views the ULJ's factual findings in the light most favorable to the decision. This court also gives deference to the credibility determinations made by the ULJ. As a result, this court 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) (citations omitted), *review denied* (Minn. Oct. 1, 2008); *see also McNeilly v. Dep't of Emp't & Econ. Dev.*, 778 N.W.2d 707, 711-12 (Minn. App. 2010) (applying substantial-evidence test); *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (same).

Fritze's argument that, because no one saw him actually solicit a customer, the record lacks evidentiary support for the ULJ's conclusions is unjustified. The ULJ is permitted to rely on "[a]ll competent, relevant, and material evidence" and to "receive any evidence that possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." Minn. R. 3310.2922 (2011).

During the hearing, the store manager conceded that neither she nor Home Depot's other witnesses personally saw Fritze solicit the customer. However, both the store manager and the special services supervisor spoke with the customer about her interactions with Fritze. The special services supervisor testified that the customer reported to her that Fritze had "offered to come out and give her an estimate or help her out with [her plumbing project] on his own." The store manager testified that the customer told her that Fritze "volunteered to come out to her home and give her a quote for the services, his own personal business." When the store manager was asked by the ULJ whether she believed the customer was being truthful, she replied, "I have no reason to think that she would be lying. I don't know what she could stand to gain by not being truthful. . . . I don't even think she realized that in sharing that information with me that perhaps she would be causing issues for [Fritze]."

Moreover, Fritze admitted to visiting the customer's home, although he recasts the purpose of the visit as an effort to "look at it and help her move forward with the project" without charge and during his free time. At the hearing, Fritze claimed that he has let his plumbing license expire, that he does not carry business insurance, and that he is no longer bonded. However, an assistant store manager testified that he observed Home Depot's predischarge investigation and interview of Fritze, where Fritze admitted to continuing to run a plumbing business on the side. Taken cumulatively, the ULJ had substantial evidence to support her conclusion that Fritze sought to solicit plumbing projects from the customer for his own personal gain.

Fritze also claims that the ULJ erred in crediting testimony of the store manager that employees are not permitted to go to customer's homes over Fritze's testimony to the contrary. "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) (2012). This court will affirm if "[t]he ULJ's findings are supported by substantial evidence and provide the statutorily required reason for her credibility determination." *Ywsyf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 533 (Minn. App. 2007) (setting out factors to consider in making credibility determinations).

The ULJ plainly explained her reason for crediting the store manager's testimony over Fritze's when she explained that Fritze's "testimony was less credible because it was not plausible and less logical. . . . Given the potential liability risk, this practice of home visits is implausible." The heightened logical plausibility of the store manager's testimony was bolstered by her testimony that she had spoken with a former store manager, who recalled having a number of conversations with Fritze about Home Depot's policy of avoiding anything that could be construed as or would be a conflict of interest. The ULJ's conclusion that the store manager's testimony was more credible than Fritze's is supported by substantial evidence.

II. Fritze engaged in employment misconduct.

Fritze next argues that, even when taken as true, the evidence contained in the record does not document an act of employment misconduct. He argues that the record

only supports the conclusion that he was going to the customer's home for the purpose of advising her on her plumbing project at no cost, and that even if that action constituted a violation of Home Depot's policies, it was a good-faith error in judgment that does not disqualify him for benefits.

Someone who is discharged because of employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4 (2012). Employment conduct is defined as "any intentional negligent or indifferent conduct" that constitutes a serious violation of the standards of behavior that an employer has a right to expect, or a "substantial lack of concern for the employment." *Id.*, subd. 6 (2012). "[G]ood faith errors in judgment if judgment [is] required" do not constitute employment misconduct. *Id.*, subd. 6(b)(6). "Whether an employee has engaged in conduct that disqualifies him from unemployment benefits is a mixed question of fact and law." *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006). "Whether a particular act constitutes disqualifying misconduct is a question of law, which this court reviews de novo." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

Fritze's argument that it was not misconduct merely to go to the customer's home to look at her plumbing project overlooks the ULJ's factual conclusion that Fritze's actions were part of an effort to solicit plumbing business from the customer. This factual conclusion is given substantial deference by this court, and the act of soliciting private business from Home Depot's customer is plainly employment misconduct. "[C]aselaw has established that employees owe a duty of loyalty to their employers," a

breach of which constitutes employment misconduct. *Marn v. Fairview Pharmacy Servs. LLC*, 756 N.W.2d 117, 121-22 (Minn. App. 2008), *review denied* (Minn. Dec. 16, 2008).

The record establishes that Home Depot provides plumbing installation and repair services and that its sales associates are instructed to refer customers to these services when customers cannot complete plumbing projects on their own. Fritze's effort to solicit business comes in direct conflict with Home Depot's services. Home Depot can reasonably expect that its own employees do not compete with Home Depot's services, and a violation of this reasonable expectation is employment misconduct.

Also, even if it were true that Fritze was only visiting the customer to advise her on how to repair the plumbing on her own, the act of going to a customer's home without permission amounts to employment misconduct—a point that Fritze conceded during oral argument. The store manager stated that a store employee who, while wearing a Home Depot apron, agrees to go to a customer's home and perform services leaves open the possibility that “there could be an inference that you are an employee of the Home Depot, and if something were to go seriously wrong with the plumbing job you're liable. So there's some liability issues there.” Moreover, the store manager explained that the company's policy contained in the employee handbook prohibits even the appearance of a conflict of interest and states that a conflict can occur even unintentionally. The former store manager had previously discussed with Fritze the possible conflict of interest arising as a result of his ongoing plumbing work. The record discloses that Fritze was given repeated warnings of Home Depot's reasonable expectation that he avoid even the appearance of mixing his personal plumbing pursuits with his obligations as a store

employee. Nor can Fritze's conduct constitute a good-faith error in judgment given the repeated instructions he received about avoiding even the appearance of bringing his personal business in conflict with the interests of Home Depot. The ULJ correctly concluded that Fritze's actions were employment misconduct.

III. The ULJ committed no error in refusing to accept additional evidence.

Fritze argues that the ULJ erred when she denied his request for an additional evidentiary hearing to accept additional evidence. Fritze offered signed statements of three parties: (1) the customer whom he is accused of soliciting; (2) his brother-in-law, a master plumber employed at another Home Depot store; and (3) a former assistant manager.

“In deciding a request for reconsideration, the unemployment law judge must not, except for purposes of determining whether to order an additional evidentiary hearing, consider any evidence that was not submitted at the [original] evidentiary hearing.” Minn. Stat. § 268.105, subd. 2(c) (2012). The ULJ must order an additional evidentiary hearing if Fritze shows that evidence not adduced at the original evidentiary hearing “(1) would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence; or (2) would show that the evidence that was submitted at the evidentiary hearing was likely false and that the likely false evidence had an effect on the outcome of the decision.” *Id.* “A reviewing court 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*, 721 N.W.2d at 345, *accord Vassei v. Schmitt & Sons Sch. Buses Inc.*, 793 N.W.2d 747, 750 (Minn. App. 2010).

Fritze brings two arguments in support of his contention that the ULJ erred. First, he claims that the customer's written statement would likely change the outcome of the decision and that he had good cause for not presenting the evidence at the original hearing. Second, he contends that all three statements show that evidence submitted at the original hearing was likely false and that the likely false evidence affected the ULJ's decision.

A. Good cause for not bringing the customer's statement.

Fritze offers a written statement of the customer he is accused of soliciting where she explains that Fritze did not seek to persuade her to buy his personal plumbing services, but merely advised her on her project. The ULJ did not address whether the customer's statement would have affected the outcome of her decision, but instead found that Fritze had failed to provide a good reason for not presenting the evidence at the evidentiary hearing. Fritze claims that he had good cause not to present the evidence because, at the time of the hearing, he did not know the identity of the customer and Home Depot refused to identify the customer.

Fritze is correct that Home Depot refused to identify the customer, and the ULJ warned Home Depot that failure to identify the customer could result in a negative inference. Nonetheless, Fritze indicated at the hearing that he had a strong suspicion as to whom the customer was, described with particularity his visit to her home, and also indicated that he has since visited the customer to buy chicken eggs from her.

In his request for reconsideration, Fritze wrote that he "never bothered to gather evidence for the [hearing], because I merely didn't feel it would be necessary." While it

may be true that Fritze harbored some doubt about the identity of the customer at the time of the hearing, he had the means of contacting the customer and could have asked her to provide a statement. Fritze has not shown that he had good cause for not presenting her evidence at the hearing.

B. Showing of a likelihood of falsity and effect on outcome of all proffered statements.

Fritze also argues that each of the written statements show that evidence offered at the hearing was likely false, and that the likely false evidence affected the ULJ's decision. The ULJ concluded that none of the written statements show that the evidence provided at the hearing was likely false.

Fritze contends that the customer's statement shows that the testimony of Home Depot's witnesses was likely false because the customer explained that Fritze made no effort to solicit her to provide private plumbing services. We agree with the ULJ that the customer's statements are not likely to prove evidence presented at the hearing false, and also not likely to have affected the ULJ's decision. At best, the customer's statement challenges the conclusion of the store manager that Fritze visited the customer to provide a bid. However, both the store manager and the special services supervisor testified to having conversations with the customer where she explicitly stated that Fritze planned to provide her with a bid on her project. Those conversations occurred almost contemporaneously with the visits by Fritze, whereas her written statement was prepared at Fritze's request after he was discharged. It was within the ULJ's discretion to

conclude that the customer's written statement was less reliable than the statements she made to Home Depot's employees and unlikely to disprove Home Depot's evidence.

Fritze also asked to introduce the statement of his brother-in-law, a master plumber trade specialist at a different Home Depot. Fritze's brother-in-law reports in his statement that he was asked by Fritze's store manager to install a water softener in her home as a side project. Fritze claimed at the hearing that he was also approached by the store manager with the same request.

It was within the ULJ's discretion to conclude that the statement of Fritze's brother-in-law was unlikely to prove that the store manager's denial of the incidents was false, particularly in light of the familial relationship between the two men. Moreover, even if accepted, the statement is unlikely on its own to have affected the ULJ's decision. The statement suggests that the store manager is misrepresenting Home Depot's policy about employees taking on side jobs. However, the store manager was able to describe in considerable detail the contours of the store's policy and present documentary evidence that Home Depot had a conflict-of-interest policy in place.

Finally, Fritze sought admission of the statement of a former Home Depot assistant manager who supervised Fritze for a year. The assistant manager explained that he and other members of management had frequently asked Fritze to visit customers' homes to "analyze, troubleshoot, make a small repair, delivery, etc." Presumably, Fritze views this statement as another vehicle for demonstrating the falsity of Home Depot's assertion that Fritze violated store policy. However, the assistant manager's statement only addresses instances in which Fritze was explicitly asked by store management to

visit a customer home, and this does little to disprove Home Depot's contention that Fritze's misconduct was related to the *unauthorized* visit to a customer's home with the purpose of seeking to bid a project for his side business. Indeed, the store manager indicated that Home Depot had a procedure for when associates did work for a customer, and this included notifying management before engaging in the work. The assistant manager's statement does not disprove evidence presented by Home Depot. Therefore, the ULJ committed no abuse of her discretion when she declined to hold an additional evidentiary hearing.

Affirmed.