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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1610**

Don Modeen,
Relator,

vs.

Meribel Enterprises, LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed June 17, 2019
Reversed and remanded
Klaphake, Judge***

Department of Employment and Economic Development
File No. 36037822-5

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Considered and decided by Ross, Presiding Judge; Bratvold, Judge; and Klaphake,
Judge.

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

UNPUBLISHED OPINION

KLAPHAKE, Judge

Relator Don Modeen challenges the decisions of an unemployment-law judge (ULJ) determining that he is ineligible for unemployment benefits because he (1) quit employment and no statutory exceptions to ineligibility apply and (2) is not available for suitable employment. Because there is not substantial evidence in the record supporting the ULJ's finding that relator quit employment, we reverse the ULJ's determination of ineligibility based on that finding. And because the ULJ failed to make findings regarding relator's labor market area, we remand the issue of relator's availability for suitable employment to the ULJ for additional findings.

DECISION

Modeen argues that (1) he was discharged from respondent Meribel Enterprises LLC; (2) if he quit employment, he quit for a good reason caused by the employer; (3) if he quit employment, he quit in order to provide necessary care for K.M., his wife; and (4) he was available for suitable employment. Review of a ULJ's eligibility determination is governed by Minn. Stat. § 268.105, subd. 7(d) (2018), which provides that this court may “affirm the decision of the unemployment law judge,” “remand the case 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 . . . unsupported by substantial evidence in view of the entire record as submitted.”

I.

Modeen contends that the ULJ erred by finding that he quit employment and was not discharged by Meribel.

“Whether [a relator] was properly disqualified from receiving unemployment compensation is a mixed question of law and fact.” *Posey v. Securitas Sec. Servs. USA, Inc.*, 879 N.W.2d 662, 664 (Minn. App. 2016) (quotation omitted). The question whether an employee was discharged or voluntarily quit is a question of fact. *Stassen v. Lone Mountain Truck Leasing, LLC*, 814 N.W.2d 25, 31 (Minn. App. 2012). This court views the ULJ’s factual findings in the light most favorable to the decision and will not disturb those findings when the evidence substantially sustains them. *Wiley v. Robert Half Int’l*, 834 N.W.2d 567, 569 (Minn. App. 2013). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Minneapolis Van & Warehouse Co. v. St. Paul Terminal Warehouse Co.*, 180 N.W.2d 175, 178 (Minn. 1970) (quotation omitted). “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). “The determination that an applicant is ineligible for unemployment benefits based on the facts of the case is reviewed de novo.” *Posey*, 879 N.W.2d at 664.

“A quit from employment occurs when the decision to end the employment was, at the time the employment ended, the employee’s.” Minn. Stat. § 268.095, subd. 2(a) (2018). An employee who quit employment is ineligible for unemployment benefits unless a statutory exception applies. *Id.*, subd. 1 (2018). “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) (2018). An employee who was discharged from employment is generally eligible for unemployment benefits unless the employee was discharged because of employment misconduct. *Id.*, subd. 4 (2018).

The ULJ found that Modeen quit his employment when he submitted his resignation on November 13, 2017. The ULJ reasoned that although Modeen stated that he would like to work through January 2018, his six-week notice “included the desire to continue working on second shift,” “Meribel no longer had a position on second shift,” and “Modeen declined Meribel’s offer of employment on first shift.” The ULJ reasoned that because “Modeen wanted to continue working in a position that no longer existed and was unwilling to accept the continuing work that Meribel had available on first shift,” it was “Modeen’s decision to quit.”

Modeen argues that on “November 15, [he] and Meribel agreed that [he] could continue working in the second shift until the new year.” Modeen argues that “Meribel got angry” after he used vacation days on November 15 and 16 and “decided it would discharge [him] instead of holding true to its bargain.”

On November 1, 2017, Meribel sent Modeen a letter notifying him that “effective November 17th there will no longer be a [Welder A] position on 2nd shift available” and that he needed to decide whether to “exercise [his] seniority rights” before November 16.¹

¹ Although the ULJ found that Modeen’s second-shift welder position would be transferred to first shift effective November 14, that appears to be a typographical error. There is no

Modeen submitted his resignation on November 13, 2017, and told Meribel that he wanted to continue to work as a welder on the second shift through January 2018. As Modeen notes, he essentially made a “counter offer to continue working on the second shift until the new year,” instead of Meribel moving his welder position to first shift on November 17.

Although the ULJ did not find that Meribel agreed to allow Modeen to work in his second-shift position through January 2018, Shelly Paulsrud, Meribel’s human resources manager, testified that Meribel initially agreed to that arrangement. Paulsrud testified that Modeen “mentioned that he would be willing to work through the 1st of the year,” that she talked about that possibility with Modeen, and that Modeen’s supervisor, Jim Kendall “had originally told him, yeah, that would be great.” Paulsrud also testified that on November 15, Modeen “turned in a vacation slip for both the 15th and the 16th, when the 16th was supposed to be his last day and [Meribel] had a lot of work [for Modeen] to do.” Paulsrud further testified that Modeen was at Meribel on November 15 and 16, that Kendall asked Modeen while he was there if he would be willing to work instead of using vacation, and that Modeen replied that he would not and was there to clean out his toolbox. Paulsrud testified that those events “gave [Meribel] the sour note and that’s when [Meribel] decided when [it] had the change of heart.” Paulsrud testified that Kendall called Modeen back on November 17 and said “the company’s had a change of heart, we do not want you to work throughout the rest of the year” and “[t]hank you for the option, but we’re declining.”

evidence in the record that the change was effective at a date earlier than November 17, 2017.

Respondent Minnesota Department of Employment and Economic Development (DEED) notes that the ULJ found that “[c]ontinuing work was available for Modeen on first [shift] as a welder and on second shift as a Machine Operator.” DEED argues that “Modeen admits in his testimony that he understood there was work available for him on the first shift” and that “[b]ecause Modeen knew that he could continue working on first shift, even on November 17, Modeen was not discharged.”

The relevant exchange between the ULJ and Modeen is as follows:

Q: . . . I think you told me . . . that, um, Ms. [Paulsrud] and Mr. Briggs had told you that there was a position available on 1st shift and that you should apply for that position. Am I remembering correctly?

A: You are correct, yes.

Q: Okay. So, you understood that there was work available for you on 1st shift?

A: Yes.

It is not clear what the ULJ meant when she asked Modeen whether he “understood that there was work available for [him] on 1st shift,” but given the context, it appears that Modeen only admitted that continuing work was available before he entered into the agreement with Meribel to work the second shift until January 1. Modeen did not testify that he believed continuing work was available when Kendall told him not to work throughout the rest of the year on November 17, nor did Kendall or Paulsrud testify that continuing work was available for Modeen after that date. Moreover, to the extent that the ULJ found that continuing work was available “on second shift as a Machine Operator,” that finding is contrary to Paulsrud’s testimony that Meribel “never offered [Modeen] a different position on 2nd shift.” Whether continuing work was available on November 17

is important because Paulsrud testified that Modeen's last day of employment with Meribel was not November 13, 2017, when he submitted his resignation letter, but November 16, 2017.² There is not substantial evidence in the record to support the ULJ's finding that "[c]ontinuing work was available for Modeen on first [shift] as a welder and on second shift as a Machine Operator."

Kendall testified that he wanted to keep Modeen at the company and that he did not tell Modeen he could lose his job if he did not start producing more efficiently. Paulsrud testified that Meribel had no intention of discharging Modeen if he did not accept the shift change. But, on November 17, when Kendall called Modeen and told him that Meribel had a "change of heart" and that it did not want him "to work throughout the rest of the year," Meribel decided to end Modeen's employment, not Modeen. It is undisputed that on November 17, Modeen wanted to continue working for Meribel, as evidenced by his proposal, initially accepted by Meribel, for him to continue working in the second-shift welder position through January 2018. And Meribel's reason for ending Modeen's employment when it did was because Modeen took vacation on November 15 and 16. In sum, the ULJ's finding that Modeen quit on November 13, 2017, is not supported by substantial evidence in the record. Because Meribel's words and actions would lead a reasonable employee in Modeen's position to believe that Meribel would no longer allow the employee to work for Meribel in any capacity, Meribel discharged Modeen.³ See Minn.

² Because November 17, 2017, was a Friday and Modeen did not work Fridays in his second-shift welder position, Modeen would not have worked that day.

³ We do not mean to suggest that an employer discharges an employee whenever the employer moves the employee to another position and refuses to allow the employee to

Stat. § 268.095, subd. 5(a). And because the ULJ’s finding that Modeen quit employment is not supported by substantial evidence, we reverse the ULJ’s ineligibility determination based on that finding.⁴

II.

Modeen contends that the ULJ erred by finding that he is not available for suitable employment. Whether an applicant for unemployment benefits is available for suitable employment is a question of fact. *Semanko v. Dep’t of Emp’t Servs.*, 244 N.W.2d 663, 665 (Minn. 1976). We review that finding in the light most favorable to the decision and will not disturb the finding when the evidence substantially sustains it. *Wiley*, 834 N.W.2d at 569.

An applicant is not eligible for unemployment benefits for any week during which the applicant was not “available for suitable employment.” Minn. Stat. § 268.085, subd. 1(4) (2018).

“Available for suitable employment” means an applicant is ready, willing, and able to accept suitable employment. The attachment to the work force must be genuine. An applicant may restrict availability to suitable employment, but there must be no other restrictions, either self-imposed or created by circumstances, temporary or permanent, that prevent accepting suitable employment.

continue working in a position that has been eliminated. However, we conclude that in the circumstances of this case, where the employer agreed to allow an employee to continue working in an eliminated position for a period of time after its elimination, decided not to honor that agreement because of the employee’s subsequent conduct, and told the employee not to work throughout the rest of the year, the employer has discharged the employee.

⁴ We note that DEED does not argue in the alternative that if Meribel discharged Modeen, it did so because of employment misconduct.

Id., subd. 15(a) (2018). “An applicant who has restrictions on the hours of the day or days of the week that the applicant can or will work, that are not normal for the applicant’s usual occupation or other suitable employment, is not ‘available for suitable employment.’” *Id.*, subd. 15(d) (2018). “An applicant must be available for daytime employment, if suitable employment is performed during the daytime, even though the applicant previously worked the night shift.” *Id.*

“Suitable employment means employment in the applicant’s *labor market area* that is reasonably related to the applicant’s qualifications.” Minn. Stat. § 268.035, subd. 23a(a) (2018) (emphasis added). “In determining whether any employment is suitable for an applicant, the degree of risk involved to the health and safety, physical fitness, prior training, experience, length of unemployment, prospects for securing employment in the applicant’s customary occupation, and the distance of the employment from the applicant’s residence is considered.” *Id.*

The ULJ found that “[s]uitable employment for Don Modeen is full time work, earning \$20 to \$25 per hour in the manufacturing or other related industries.” The ULJ found that “Modeen is placing restrictions on his availability for work” because “[h]e is not available for work located more than a 20-minute drive from his home or for work on the weekends.” The ULJ further found that “[w]hile his wife can provide for her daily needs, Modeen limits his availability to be closer to her, if she need[s] him on short notice,” because Modeen’s wife has multiple sclerosis (MS). The ULJ concluded that because Modeen placed these restrictions on his availability for work, he was “not available for suitable employment.”

Modeen argues that “[a]lthough [he] would prefer to work close to home and to work the night shift, he has applied to a wide variety of jobs” and his “preference has not limited his availability.” (Emphasis omitted.)

The ULJ asked Modeen whether he was available to work on weekends. Modeen testified that his preference would be to not work on the weekends and that the weekends were one of the busiest times of the week for him and his wife. However, Modeen also said, “Would I, would I sacrifice my Friday, Saturday, or Sunday, um, yes.” Modeen also testified that although working on the weekends would be difficult, he would consider it. Because Modeen testified that he would be willing to work on the weekends if necessary, the ULJ’s finding that he is not available for work on the weekends is not supported by substantial evidence.

Modeen testified that he would only be willing to accept a day-shift job if it was “[n]o more than maybe 20 minutes away” or no more than 20 miles away so that he could be close to his wife, who has MS. Modeen notes that he “has applied to jobs over 45 minutes away from his house.” However, he testified that several of the positions to which he applied were “too far away” for him and that he “would apply just to see if [he got] any response.”

This court has previously stated that “[a] drive of 22 miles does not render an available position unsuitable.” *Preiss v. Comm’r of Econ. Sec.*, 347 N.W.2d 74, 76 (Minn. App. 1984). But the commissioner in that case found that the relator’s commute was not unreasonable because the relator lived “in a mountainous rural area in which employment opportunities in her field are not common.” *Id.* The ULJ did not make such a finding in

this case. In fact, the ULJ did not make any findings regarding Modeen's labor market area. Instead, the ULJ simply found that "[s]uitable employment for Don Modeen is full time work, earning \$20 to \$25 per hour in the manufacturing or other related industries." Modeen's labor market area is relevant because employment is only suitable if it is in "the applicant's labor market area." See Minn. Stat. § 268.035, subd. 23a(a). Thus, Modeen's labor market area determines how far Modeen must be willing to drive to be available for suitable employment.

A ULJ "must consider the relevant 'labor market area' based on surrounding circumstances" because the "labor market area may differ depending on the work experience and location of each applicant for benefits." *Work Connection, Inc. v. Bui*, 749 N.W.2d 63, 69 (Minn. App. 2008), *review granted* (Minn. June 18, 2008) and *appeal dismissed* (Minn. July 6, 2009). For example, "the relevant labor market is different for a brain surgeon and a common laborer; it is different for an urban and a rural Minnesotan; and it may be different for ex-urban and inner-city parts of a metropolitan area." *Id.*

An analysis of whether Modeen's 20-mile limitation makes him unavailable for suitable employment requires factual findings regarding Modeen's labor market area. This court cannot make those factual findings on appeal. See *In re Welfare of M.D.O.*, 462 N.W.2d 370, 374-75 (Minn. 1990) (stating that the role of the court of appeals is to correct errors, not to find facts); *Stiff v. Associated Sewing Supply Co.*, 436 N.W.2d 777, 779 (Minn. 1989) ("[A]n appellate court's limited scope of review circumscribes additional fact finding by it"); *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) ("The function of the court of appeals is limited to identifying errors and then correcting them."). We

therefore remand for the ULJ to (1) make findings regarding Modeen's labor market area and (2) determine whether Modeen's 20-mile limitation is a restriction that renders him unavailable for suitable employment based on his labor market area.

Reversed and remanded.