STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1776

Daniel Carson,
Relator,

vs.

PACT Charter School,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed July 29, 2019
Affirmed
Smith, Tracy M., Judge

Department of Employment and Economic Development
File No. 36649325-3

Daniel Carson, Coon Rapids, Minnesota (pro se relator)

Peter A. Martin, Kutson Flynn & Deans, Mendota Heights, Minnesota (for respondent employer)

Keri A. Phillips, Department of Employment and Economic Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Jesson, Presiding Judge; Schellhas, Judge; and Smith, Tracy M., Judge.

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

SMITH, TRACY M., Judge

Relator Daniel Carson's employment with respondent PACT Charter School (PACT) terminated, and Carson sought unemployment benefits. An unemployment-law judge (ULJ) found Carson to be ineligible for benefits on the basis that he quit employment without a good reason caused by the employer. Carson now challenges the ULJ's order of affirmation, arguing that the ULJ failed to discharge the duty to assist parties, that the ULJ should have given Carson an additional hearing, and that the ULJ's decision of ineligibility is not supported by substantial evidence. We affirm.

FACTS

Carson worked for PACT as a facilities coordinator. In April 2018, Carson received a written warning stating that he acted contrary to a supervisor's directive and his own stated plan by failing to have a storage space open so that staff could access it, and that he did not properly follow procedures when he rented the school gym for his personal use. The warning called for Carson's signature as confirmation that he understood what was being warned and had discussed it with his manager. Right above the signature block, the document stated, "Signing this form does not necessarily indicate that you agree with this warning."

Carson refused to sign the warning and filed a grievance with the school board. The board denied Carson's grievance and sustained the warning. Thereafter, Carson felt some staff members avoided him, but he did not complain about the perceived problem to anyone in authority. In early May 2018, Carson was placed on a paid administrative leave until

PACT decided how to proceed. PACT tried to discuss with Carson his persistent refusal to sign the warning, but Carson did not attend a requested meeting. On May 23, 2018, Carson and his attorney met with Emily Mertes, PACT's executive director, and PACT's attorney. At that meeting, Carson signed a separation agreement.

Carson sought unemployment benefits, and respondent Department of Employment and Economic Development (DEED) sent him a request for information. Answering a question asking why he quit instead of waiting to see if he would be discharged, Carson wrote: "My lawyer said it would be better for me to quit and not be fired because it would reflect poorly on my resume and future opportunities to find employment." PACT submitted its response to an information request shortly thereafter. In it, PACT stated that "Carson took the advice of his lawyer and was willing to resign based upon the mutual agreements in the separation agreement." PACT also stated: "[The] separation agreement was agreed upon to prevent information from becoming public due to poor performance and firing." After receiving the parties' initial responses, DEED conducted an additional round of fact-finding. DEED asked PACT the specific reason why Carson was separated, to which PACT replied: "Daniel Carson voluntarily resigned from his position. He signed a Separation Agreement at his request to ensure a positive relationship with the school in the future due to his four children currently attending the school."

In August 2018, DEED administratively determined that Carson was eligible for unemployment benefits, finding that PACT discharged Carson "because of unsatisfactory work performance." PACT appealed the determination, and an evidentiary hearing was held before a ULJ. Carson appeared pro se at the hearing, and he did not call any witnesses

other than himself. The ULJ first took testimony from Carson and Mertes and then let the parties examine the witnesses. When it was Carson's turn to cross-examine, he asked Mertes only a few questions then stated that he did not have further questions. In general, the parties testified to what they had already represented to DEED through written submissions.

The ULJ issued his decision on August 24, 2018. He found that Carson was ineligible for unemployment benefits because Carson quit employment without a good reason caused by the employer. Specifically, the ULJ found that, at the May 23 meeting, "Carson's attorney advised Carson to quit because he believed the school was going to find a reason to terminate him" and that "Carson then resigned because he did not want a discharge on his employment record." Neither the April warning nor Carson's perception that staff avoided him after the warning was found to be a good reason for quitting—neither would, according to the ULJ, "compel an average, reasonable worker to quit and become unemployed." Carson filed a request for reconsideration, mainly arguing that he wanted to introduce, as new evidence, testimony by his lawyer who had attended the May 23 meeting. The ULJ issued an order denying an additional hearing and affirming his original decision.

This certiorari appeal follows.

D E C I S I O N

We review a ULJ's decision for whether it is: "(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or

capricious." Minn. Stat. § 268.105, subd. 7(d) (2018). As to the eligibility decision, we do not disturb a ULJ's findings of fact as long as there is "evidence in the record that substantially supports them." *Gonzalez Diaz v. Three Rivers Cmty. Action, Inc.*, 917 N.W.2d 813, 815-16 (Minn. App. 2018). But a ULJ's interpretation of the unemployment statutes and the ULJ's ultimate decision whether an applicant is eligible for unemployment benefits is reviewed de novo. *Menyweather v. Fedtech, Inc.*, 872 N.W.2d 543, 545 (Minn. App. 2015).

I. The ULJ did not violate his duty to reasonably assist parties.

Carson cites *Thompson v. County of Hennepin* to argue that the ULJ violated his "duty to reasonably assist pro se parties with the presentation of the evidence and the proper development of the record." 660 N.W.2d 157, 161 (Minn. App. 2003). While the rule on which *Thompson* is based has since been amended to impose on the ULJ a duty to assist *all* parties, the ULJ was still required to assist Carson. Minn. R. 3310.2921 (2019) ("The unemployment law judge must assist all parties in the presentation of evidence. . . . The unemployment law judge must ensure that all relevant facts are clearly and fully developed.") Carson argues that the ULJ violated his duty by "fail[ing] to inform both parties that . . . the parties have the right to request that the hearing be continued so that additional witnesses and documents can be presented, by subpoena if necessary." He also characterizes this alleged failure to notify the parties of their rights as a due-process violation under *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976). Had the ULJ let him know, Carson argues, he would have called his lawyer who was present at the May 23 meeting to testify.

Carson's argument fails because the ULJ did provide notice of the parties' right to continue the hearing and secure evidence through subpoena. At the hearing, before taking any testimony, the ULJ stated:

> [Y]ou do have the right to request that the hearing be rescheduled if there is specific relevant evidence, like documents or witnesses that are outside of your control that need to be obtained by subpoena. If this is a concern that you have, please let me know. Do any of you have questions or concerns before we continue?

Carson answered: "Nope, no question right now."

Carson also argues that the ULJ stopped him from asking questions of Mertes during the hearing and thereby inhibited his ability to fully develop the record. Specifically, Carson complains that he could not cross-examine Mertes on her alleged failure to produce timely performance reviews for PACT employees. But Carson was not stopped from asking that question. The only question that the ULJ stopped Carson from asking was the question to Mertes of why Carson had not signed the April warning. The ULJ explained that Mertes could not "answer the question of why [Carson] did or did not do something" and that Carson could testify to such information without "need[ing] to try to make [Mertes] guess what's in [Carson's] head." Because Carson does not argue that the ULJ needed to allow that question for proper development of the record and Carson was not stopped from asking any other questions, his argument fails. The ULJ did not violate his duty to reasonably assist Carson.

II. The ULJ did not err by denying Carson an additional hearing.

Carson argues that the ULJ should have granted him an additional hearing on the request for reconsideration. ULJs must order an additional hearing when the party requesting reconsideration presents new evidence that satisfies statutory requirements, as follows:

> [An] unemployment law judge must order an additional hearing if a party shows that evidence which was not submitted at the hearing:
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> (1) would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence; or
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> (2) would show that the evidence that was submitted at the hearing was likely false and that the likely false evidence had an effect on the outcome of the decision.
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> "Good cause" for purposes of this paragraph is a reason that would have prevented a reasonable person acting with due diligence from submitting the evidence.

Minn. Stat. § 268.105, subd. 2(c) (2018). We review the decision to deny reconsideration for an abuse of discretion. *Kelly v. Ambassador Press, Inc.*, 792 N.W.2d 103, 104 (Minn. App. 2010).

Carson cites to the first part of subdivision 2(c) and argues that his lawyer's testimony would likely change the outcome of the decision. But Carson does not explain why he could not present his lawyer's testimony at the initial hearing, except that the ULJ did not inform him of his right to continue the hearing and subpoena the lawyer if necessary. As discussed earlier, the ULJ did so inform Carson. Carson fails to show the required "good cause," and, thus, the ULJ did not abuse his discretion by denying Carson an additional hearing under subdivision 2(c)(1).

The ULJ was not required to grant Carson an additional hearing under subdivision 2(c)(2), either. The only information Carson presented to the ULJ in support of his request for reconsideration was his written statement comprising the request itself. In that statement, Carson impliedly asserted that Mertes's testimony—that Carson would not have been discharged on May 23 if he had not resigned—was false. He wrote:

> The applicant, being a reasonable employee, chose to resign over the choice offered to him from the employer to either resign or be fired because of the words spoken by the employer to the applicant's lawyer on May 23rd, 2018 and those words were "our investigation is complete and we are planning on discharging your client, Dan Carson, at the end of this meeting today."

We first note that this factual statement, which Carson repeats in his briefing to this court, was not received into evidence in the proceeding below. And it does not comport with Carson's earlier testimony. At the hearing, Carson testified that his lawyer "felt like" PACT was "just going to get rid of [Carson]" and that his lawyer said to him: "I think they're just, they're just planning on firing you. They're just going to come up with a reason. They don't have to give you a reason." When asked, at the hearing, about how long the termination process would have been had he not resigned on May 23, Carson answered: "I would imagine it would have went pretty quick, because they, I don't know if she wanted me around during the summer working on projects or not, so." The statement that Carson newly presented to the ULJ on his request for reconsideration is not part of the record on appeal and, generally, should not be considered in our analysis. *See Appelhof v. Comm'r of Jobs & Training*, 450 N.W.2d 589, 591 (Minn. App. 1990). ("[E]vidence which was not received below may not be reviewed as part of the record on appeal.").

But, because the issue here is whether the ULJ abused its discretion in determining that an additional hearing was not warranted and ULJs do consider new evidence for that limited purpose, Minn. Stat. § 268.105, subd. 2(c), we gauge the evidentiary value of Carson's new statement. Carson's statement has no corroborating evidence such as the lawyer's affidavit. Thus, whether it is likely to prove Mertes's testimony to be false must ultimately depend on its credibility. We conclude that the ULJ was within his discretion to not credit Carson's belated assertion over Mertes's sworn testimony, not only in light of the usual deference due to a ULJ's credibility determination, *Cunningham v. Wal-Mart Assocs., Inc.*, 809 N.W.2d 231, 235 (Minn. App. 2011), but also because Carson's statement is not in accord with his earlier testimony. The ULJ did not abuse his discretion by denying Carson an additional hearing.

III. The ULJ's decision to find Carson ineligible for unemployment benefits is supported by substantial evidence.

A. Quitting employment

Unless an exception applies, an applicant is ineligible for employment benefits if the applicant quit. Minn. Stat. § 268.095, subd. 1 (2018). Carson argues that he "did not quit, but was discharged." "Whether an employee has been discharged or voluntarily quit is a question of fact subject to [this court's] deference." *Stassen v. Lone Mountain Truck Leasing, LLC*, 814 N.W.2d 25, 31 (Minn. App. 2012). "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." Minn. Stat. § 268.095, subd. 5(a) (2018). "An employee who has been

notified that the employee will be discharged in the future, who chooses to end the employment while employment in any capacity is still available, has quit the employment." *Id.*, subd. 2(c) (2018).

Carson makes three specific arguments that he was in fact discharged. First, Carson argues that PACT conceded, in its submission to DEED, that Carson had been discharged. The submission that he is referring to seems to be PACT's initial response to the unemployment-insurance request for information. In it, PACT stated that the separation agreement was signed on May 23 "to prevent information from becoming public due to poor performance and firing." Presumably, based on that response, DEED issued the determination of eligibility, finding that PACT discharged Carson because of unsatisfactory work performance.

On the record as a whole, however, the ULJ reasonably did not construe PACT's initial response as a concession that Carson was discharged. First, PACT did not specify whose motivation or intent was being described when it said: "A separation agreement was agreed upon to prevent information from becoming public due to poor performance and firing." The statement can be understood to refer to Carson's belief at the time that he would eventually be fired if he did not resign. That interpretation is in line with PACT's later submission to DEED. When asked what "the specific reason that [Carson] was separated" was, PACT answered: "Daniel Carson voluntarily resigned from his position. He signed a Separation Agreement at his request to ensure a positive relationship with the school in the future due to his four children currently attending the school." Also, PACT's principal argument before the ULJ was, from the outset, that Carson voluntarily resigned

by signing the separation agreement. PACT consistently argued that it did not discharge Carson at the May 23 meeting and made no concession to the contrary.

Second, Carson argues that the separation agreement says he was being discharged. This argument is inaccurate. The separation agreement states that "[Carson] has determined, for personal reasons, that severing his employment with [PACT] and seeking other employment opportunities will be in his best interests." The agreement does not express any initiative on PACT's part to terminate the employment. Instead, it supports the finding that Carson quit.

Third, Carson asserts that his lawyer communicated to him during the May 23 meeting that "Carson had to sign the separation agreement or be terminated that day." But, as explained above, this factual assertion is not part of the record. The record, including Carson's own testimony, substantially supports the ULJ's finding that Carson quit.

B. Good reason for quitting

Even if Carson quit his employment, he could be eligible for unemployment benefits if he quit "because of a good reason caused by the employer." Minn. Stat. § 268.095, subd. 1(1).

> A good reason caused by the employer for quitting is a reason:
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> (1) that is directly related to the employment and for which the employer is responsible;
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> (2) that is adverse to the worker; and
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> (3) that would compel an average, reasonable worker to quit and become unemployed rather than remaining in the employment.

Minn. Stat. § 268.095, subd. 3(a) (2018). The ULJ decided that the April warning, which Carson argues was unfounded, and the ensuing interaction between Carson and PACT would not have "compel[led] an average, reasonable worker to quit." *Id.*

The ULJ's decision is substantially supported by the record. The record suggests that PACT tried to discuss with Carson his persistent refusal to sign the warning but Carson did not come to the meeting. A reasonable employee, who believed he had been wrongly accused of something, would have actively pursued a discussion and tried to resolve the issue in a constructive way, rather than feeling compelled to resign. The only countervailing evidence exists in the form of Carson's bare assertions impugning the motive behind the April warning and PACT's reaction to Carson's refusal to sign the warning. Given the deference due to the ULJ's credibility determination, Carson fails to provide a basis for overturning the ULJ's decision.

C. Reliability of Mertes's testimony

Carson argues that the ULJ's decision is not substantially supported by the record because Mertes demonstrated a pattern of falsehood. Apart from Carson's criticism of Mertes's credibility, which this court cannot credit in contravention of the ULJ's factual findings, the only pieces of evidence that Carson cites in support are PACT's initial response to the request for information and the nondisparagement clause in the separation agreement. First, Carson argues that Mertes contradicted PACT's response to the request for information by testifying that Carson voluntarily resigned. Mertes's testimony did not contradict the response, however, because, as discussed earlier, the response was not a

concession that Carson had been discharged. Mertes's testimony was consistent with PACT's position held throughout the proceeding.

Second, Carson suggests that Mertes's testimony against his receiving unemployment benefits was disingenuous because PACT "agree[d] to not, in any way, make any public or private statements, written or oral, to anyone, which disparages, denigrates, criticizes, maligns or otherwise holds [Carson] in a bad or unflattering light or which impugns or harms the reputation of [Carson]." But Carson does not explain how the non-disparagement clause was violated by Mertes. No one in this case has argued that Carson must be denied unemployment benefits because he engaged in misconduct. The references to the April warning and the ensuing events were made either to give context to the May 23 meeting or to respond to Carson's claim that he was subjected to a hostile work environment. Also, even if PACT or Mertes violated the nondisparagement clause, that, in itself, does not show that any of Mertes's testimony was untruthful. Carson fails to show that the ULJ's finding of ineligibility is not supported by substantial evidence.

Affirmed.