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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0202**

Daniel Farhat,
Relator,

vs.

The Hertz Corporation,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed March 25, 2008
Reversed and remanded
Shumaker, Judge**

Department of Employment and Economic Development
File No. 11386 06

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Considered and decided by Peterson, Presiding Judge; Shumaker, Judge; and
Stoneburner, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

Relator Daniel Farhat challenges an unemployment law judge's (ULJ) decision that he was properly disqualified from receiving unemployment benefits because he had been discharged for employment misconduct. Farhat argues that the ULJ failed to make the requisite credibility findings, conducted an unfair evidentiary hearing, erred in determining that his actions constituted employment misconduct, and improperly denied his last request for reconsideration. Because the ULJ failed to make credibility findings, although the decision was based on credibility, and the ULJ considered evidence outside the record, we reverse the ULJ's decision and remand for further proceedings, without reaching Farhat's other arguments.

FACTS

Relator Daniel Farhat was employed by The Hertz Corporation as a customer service representative from November 9, 2000, until his employment was terminated on July 20, 2006. Farhat worked full time and earned \$12.15 per hour, but could make up to \$98,000 annually with commissions and bonuses. On April 16, 2006, Kujana Walker and Robert Nelson arrived at Hertz to rent a vehicle. The pair had made a reservation for a vehicle priced at \$76.50 per day and said they were AAA members. Farhat received his manager's permission to give them the weekend rate. Farhat testified that he looked to see whether they presented an AAA card, which they did; he admitted he did not verify the name on the card. Walker and Nelson each presented a driver's license, and Walker gave Farhat her TCF check card.

There is contradictory evidence about what happened next. Farhat claims he accidentally swiped his own Wells Fargo Visa credit card in the card machine and then swiped Walker's card. Hertz argues that Farhat never entered Walker's card after swiping his own. Despite that inconsistency, the record conclusively shows the vehicle rented by Walker was not returned until July 11, well past the rental due-date. On July 10, Hertz contacted Visa to make a theft complaint against Walker. At that time, Visa informed Hertz's fleet manager, Tim Vermeire, that the rental was under Farhat's name. Vermeire informed Farhat, and Hertz charged Farhat's card \$5,945.48 for the rental.

Farhat was discharged on July 20, 2006, and a letter was sent to him, which listed three reasons for his termination: swiping his own credit card, giving a weekend rental rate, and failing to confirm that Walker and Nelson were AAA members, when in fact they were not.

Farhat applied for unemployment benefits from the Minnesota Department of Employment and Economic Development (DEED), but DEED denied his claim, finding that he had violated Hertz's policy and procedures. Farhat appealed DEED's determination. After a telephone hearing, the ULJ issued a decision, finding that "Hertz discharged Farhat . . . for violating company policy by swiping his own credit card for a customer's rental." Farhat requested reconsideration; the ULJ granted this request and ordered another evidentiary hearing. After the additional evidentiary hearing, the ULJ issued another decision, again denying benefits and finding "that Farhat either intentionally or negligently swiped his own credit card to process the transaction." The

ULJ also found that Hertz investigated the incident and found that only one credit card was swiped during the transaction.

Farhat requested reconsideration again, but the ULJ denied his request and affirmed her decision. This certiorari appeal followed.

DECISION

I.

Farhat argues that the ULJ failed to make any specific credibility findings in her decision, although the determination was substantially based on the conflicting testimony of the parties. “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) (Supp. 2005). This court will uphold a ULJ’s credibility determination if that determination is supported by substantial evidence. *Ywsyf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 533 (Minn. App. 2007).

But, in order to uphold a credibility determination, there must first be an express finding by the ULJ. *Id.* at 531-32 (citing Minn. Stat. § 268.105, subd. 1(c)). Instructive to us is *Wichmann v. Travalia & U.S. Directives, Inc.*, in which this court remanded a case to a ULJ because that ULJ failed to make express credibility findings. 729 N.W.2d 23, 29 (Minn. App. 2007). We found “[t]he ULJ made no [specific credibility] findings here, never addressing credibility. But credibility was central to the decision because the ULJ’s misconduct determination rests on incidents that [relator] disputes.” *Id.* We then held “[b]ecause credibility determinations significantly affected the outcome of the case,

section 268.105, subdivision 1(c) required the ULJ to make credibility finding and to ‘set out the reason for crediting or discrediting’ the contested testimony.” *Id.*

The ULJ in this case did not address credibility, though she ostensibly believed Vermeire and disbelieved Farhat about whether Farhat did or did not swipe Walker’s credit card after swiping his own. The only finding that is remotely related to credibility contained in the ULJ’s second decision is that the ULJ found the evidence tended to show Farhat only swiped one credit card. In *Wichmann*, this court stated that “[w]e recognize that this court usually can infer from findings which witnesses the ULJ found credible. But we cannot search for substantial evidence to support these inferences in the absence of specific findings. To do so would negate the express requirement of section 268.105, subdivision 1(c).” *Id.* Here, the ULJ was required to make credibility determinations, as the decision rests on the acceptance of one of two positions as to a dispositive issue, but the ULJ failed to do so. Thus, the determination must be reversed and the matter remanded for further proceedings.

II.

Farhat raises several arguments regarding the ULJ’s conduct at the evidentiary hearings. Because we find the ULJ’s consideration of information outside the record warrants a reversal, we do not reach Farhat’s other contentions regarding the ULJ’s improper procedures. In conducting a hearing, a ULJ has a duty to “exercise control over the hearing procedure in a manner that protects the parties’ rights to a fair hearing.” Minn. R. 3310.2921 (2005). Furthermore, a ULJ should “assist unrepresented parties in the presentation of evidence” and must “ensure that relevant facts are clearly and fully

developed.” *Id.* This court has recognized that a ULJ must “be especially careful to insure fairness to all persons bringing grievances before the [d]epartment,” noting “that the unemployment compensation statutes are remedial and humanitarian in nature.” *Miller v. Int’l Express Corp.*, 495 N.W.2d 616, 618 (Minn. App. 1993) (quotation omitted).

A ULJ may receive 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 (2005). A ULJ may exclude evidence that “is irrelevant, immaterial, unreliable, or unduly repetitious.” *Id.* But “[o]nly evidence received into the record of any hearing may be considered by the [ULJ].” *Id.* To establish that a reversal is necessary, a relator must show that his substantial rights were prejudiced by unlawful procedure or other error of law. *Ywswf*, 726 N.W.2d at 530; *see also* Minn. Stat. § 268.105, subd. 7(d)(3)-(4) (Supp. 2005) (allowing reversal if the relator’s substantial rights are prejudiced by unlawful procedure or error of law).

Farhat contends, and we agree, that the ULJ improperly considered evidence outside the record. At the end of the second hearing, the ULJ asked Farhat to “explain[] why the check cards on the Wells Fargo website are gold colored and not yellow.” The record is devoid of any evidence offered by either party concerning the specific shade of each credit card; yet the ULJ appears to have drawn the inference that, because the cards were different colors, Farhat could not possibly have mistaken one for the other. The ULJ necessarily obtained this evidence from a source outside the record, and then

apparently used the extraneous evidence to discredit Farhat's testimony. Farhat was prejudiced by the ULJ's consideration of this evidence because the ULJ included a specific finding regarding the color of the credit cards in her decision, stating, "Farhat swiped his gold-colored Wells Fargo Visa debit card through the register one time to secure the rental. Farhat did not swipe Walker's yellow-colored TCF bank card." This record demonstrates the ULJ considered evidence outside the record, and therefore this aspect of the hearing was unfair.

Because the ULJ failed to make credibility determinations, as required by Minn. Stat. § 268.105, subd. 1(c), and considered evidence outside the record to Farhat's prejudice, we reverse and remand for additional proceedings as appropriate and consistent with this decision.

Reversed and remanded.