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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-693**

Terry Hess,
Relator,

vs.

Sentinel Printing Co. Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed March 16, 2010
Reversed
Lansing, Judge**

Department of Employment and Economic Development
File No. 21668939-3

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Sentinel Printing Co., Inc., St. Cloud, Minnesota (respondent)

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Considered and decided by Lansing, Presiding Judge; Halbrooks, Judge; and
Schellhas, Judge.

UNPUBLISHED OPINION

LANSING, Judge

By writ of certiorari Terry Hess appeals an unemployment-law judge's determination that he is ineligible for unemployment benefits because he quit his employment. The record, however, does not provide substantial evidence to support a determination that Hess voluntarily terminated his employment, and we, therefore, reverse.

FACTS

Terry Hess worked for Sentinel Printing Co. Inc. as an on-call employee from August 20, 2007 until December 15, 2008. Hess applied for partial unemployment benefits on December 10 because his hours had been reduced. After his employment ended completely the following week, the Minnesota Department of Employment and Economic Development determined that Hess was ineligible for benefits because he quit his job. Hess appealed and requested an evidentiary hearing.

Evidence at the hearing established that Hess was not guaranteed any hours by his employer, but he worked an average of thirty to forty hours a week. He stated that his shift supervisor would usually notify him while he was at work whether he should report for work the following day, or the second-shift supervisor would telephone him to tell him to report to work. Hess and his employer both testified that Sentinel Printing generally assigned work to the most senior person with the needed skill-set for a particular task. At the time Hess's employment ended, he was the most senior on-call employee.

December 11, 2008 was the last day Hess's employer told him to work. On December 11, Hess's supervisor told him that no work was available for him the next day, a Friday, but he should call in to see if he was needed the following Monday. On Friday Hess called in and left a message for his supervisor asking if he was needed on Monday. Hess testified that he waited at home for a return call but did not receive an answer from his employer.

Although Hess did not receive a response, he nonetheless went to Sentinel Printing's plant on the following Monday, December 15, to see if work was available. When he arrived he saw that on-call employees with less seniority were at the plant and he consequently believed he would also have work. Hess's direct supervisor was not yet at the plant. Hess punched in and went to the desk of the person who assigns morning work. The work assigner and several other employees, including two on-call employees, were at the desk. After greeting the on-call employees, Hess waited for a few minutes and, when the other employees left for their assignments, he went to hang up his coat. When he returned, the work assigner had left.

Hess looked for the work assigner at her desk in a different department, but she was not there either. Hess asked another person what he should be doing, but she did not respond. He looked for another supervisor who could assign him work but this person was not yet at the plant. Hess waited for the work assigner to return to her desk. While he was waiting, he saw that a machine operator who could also assign duties was working with another on-call employee who had less seniority than Hess. After waiting for thirty

minutes to be assigned work, Hess concluded that he was not supposed to be there that day and left.

Hess's supervisor testified that he believed Hess abandoned his job. He stated that Sentinel Printing had work for the on-call workers the week of December 15 but also stated that there may have been a failure to inform Hess that he should come in on December 15. Hess's supervisor stated that work starts slowly on Mondays and Hess should have picked up a broom and swept the floors or found something to do until he was assigned a job. He said that occasionally on-call workers will show up without being called and wait for an hour before finding out whether work is available for them. Hess's supervisor did not contact Hess after hearing that Hess had left thirty minutes after arriving on December 15. Hess's employer sent him a letter on December 19, terminating his employment for job abandonment.

Following the hearing, the unemployment-law judge (ULJ) issued an order in which he credited Hess's testimony over his supervisor's in the few instances where their accounts diverged. But the ULJ determined that Hess was nonetheless ineligible for benefits because he quit without good reason. Hess requested reconsideration and the ULJ affirmed the earlier determination. Hess appeals by writ of certiorari, arguing that the ULJ's factual finding that Hess quit is not supported by substantial evidence. Alternatively, Hess argues that his case must be remanded for further proceedings because the ULJ failed to develop the record adequately on his initial application for partial unemployment benefits and whether Sentinel Printing had decided before December 15 to terminate Hess's employment.

DECISION

On certiorari appeal, we may remand, reverse, or modify a decision by a ULJ if the substantial rights of a petitioner were prejudiced because the findings, inferences, conclusion, or decision was unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(5) (2008). Whether an employee quit or was discharged is a question of fact for the decision-maker. *Hayes v. K-Mart Corp.*, 665 N.W.2d 550, 552 (Minn. App. 2003), *review denied* (Minn. Sept. 24, 2003). We review findings of fact in the light most favorable to the decision and sustain the findings if the evidence in the record provides substantial support. *Skarhus v. Davannis, Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). On issues of credibility, we defer to the ULJ's determinations. *Id.*

An employee quits his job “when the decision to end the employment was, at the time the employment ended, the employee’s.” Minn. Stat. § 268.095, subd. 2(a) (2008). An employee is discharged “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) (2008). These principles are consistent with the stated statutory purpose for unemployment compensation—to provide temporary partial wage replacement for workers who are involuntarily unemployed “through no fault of their own.” Minn. Stat. § 268.03 (2008).

Hess was an on-call employee. The record indicates that Sentinel Publishing had no formal policy for on-call workers. Hess testified that the customary practice was that he would be told while at work that he should come in the next day or he would be called by his employer later in the day. At times Hess’s supervisor told him to call in the next

day and find out if there was work the following day. The ULJ credited Hess's testimony. Although some employees show up at work even if they have not been called, the record does not indicate that this was standard practice. Hess called his employer as instructed but did not receive a return call. Even though he had received no response, Hess went into work the next business day, watched other less-senior, on-call workers go to their assignments, sought out several people who could assign him work and either could not find them or received no answer. As an on-call worker, Hess believed he was not supposed to be there and left the plant, thinking that he would be called when he was needed.

The ULJ determined that Hess was ineligible for benefits because he left his job on December 15 without confirming whether work was available for him that day or in the future and because he made no effort to contact his employer after December 15 to seek out work. This finding had the effect of imposing an additional obligation on Hess, unsupported by the applicable law or the facts in the record, to show that his separation from employment was a discharge. *See Grotjohn v. Cornbelt Foods, Inc.*, 370 N.W.2d 48, 49-51 (Minn. App. 1985) (finding employee was discharged when he did not return to work after being told he was not needed "that day or the next" and possibly not the rest of the week). In the context of his on-call status and the fact he had not been advised to come to work that day, Hess's departure on December 15 cannot be objectively viewed as an act of voluntary termination. *See Brown v. Port of Sunnyside Club, Inc.*, 304 N.W.2d 877, 879 (Minn. App. 1981) (finding employee's act of walking away during confrontation with general manager was not objective evidence of voluntary termination),

review denied (Minn. May 5, 1981). Hess's belief that his employer did not need him to work on December 15 was reasonable and therefore his departure that day did not reflect his decision to end his employment. *See Midland Elec., Inc. v. Johnson*, 372 N.W.2d 810, 812 (Minn. App. 1985) (holding that employee did not quit by not returning after vacation when he had reasonable belief he was discharged after being told to turn in his tools, told that no work was guaranteed when he got back, and ignored when he asked if he should call in).

Hess's supervisor apparently believed that Hess had been told to come in to work on December 15 and that Hess inexplicably left one half hour into his shift. Hess may have been able to avoid termination of his employment if he had called in after leaving on December 15 and continued to try to obtain information on whether work was available. But he followed his employer's instructions to seek work and took the additional step of showing up for work and looking for assignments. An on-call employee, who reasonably believes that his employer does not have work for him and will call him when it does, is not required to call in repeatedly to show he has not quit his job. *Compare* Minn. Stat. § 268.095, subd. 2(d) (stating that unemployment-benefit applicants from *staffing service employers* are deemed to have quit if they do not call to request additional work within five days of completing temporary assignment). The ULJ's decision would essentially penalize Hess for taking the extra step of going into work even after his call had not been returned and he had received no other notice that work was available. Because the record shows that Hess called in for work as instructed and was not told to come in to work by his employer, the ULJ's factual finding that Hess voluntarily quit his job is not supported

by substantial evidence. We therefore reverse the ULJ's decision that Hess is ineligible for unemployment benefits.

Because we reverse the ULJ's ineligibility determination, we do not reach Hess's alternative argument for reconsideration.

Reversed.