STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1098

Jason Geringer,
Relator,

vs.

S-M Enterprises Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed March 9, 2010
Reversed and remanded
Schellhas, Judge

Department of Employment and Economic Development
Agency File No. 21378777

Jason Geringer, Fargo, North Dakota (pro se relator)

S-M Enterprises Inc., Moorhead, Minnesota (respondent employer)

Lee B. Nelson, Amy R. Lawler, St. Paul, Minnesota (for respondent Department of Employment and Economic Development)

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

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

SCHELLHAS, Judge

On writ of certiorari, relator argues that the unemployment-law judge (ULJ) erred in his determination that relator is ineligible for unemployment benefits because he quit without good reason caused by the employer. We reverse and remand.

FACTS

Relator Jason Geringer was employed by respondent S-M Enterprises Inc. from December 2005 until September 26, 2008, when he did not return to work. Relator's expressed reasons for not returning to work were that he was not being paid according to Department of Labor and Industry (DOLI) requirements for prevailing-wage jobs and that his foreman cashed his checks. Although relator did not specifically tell anyone at S-M that September 26, 2008, would be his last day of work, he claims that he notified S-M on or about September 11, 2007, that S-M was "pretty much getting a year out of [him] to work for them if they didn't have stuff organized and settled out on the prevailing wage jobs."

After his last day of work, relator applied for unemployment benefits. An adjudicator from respondent Department of Employment and Economic Development (DEED) determined that relator was ineligible for benefits because he quit his employment and did not quit for a good reason caused by the employer. Relator appealed the determination, and a hearing was held before a ULJ.

Relator appeared pro se at the hearing and testified that at the time that he stopped working for S-M, he was a full-time employee with a final wage of $15.50 per hour. He

believed that his pay rate was incorrect for his job duties, which he described as including "[w]elding, torching, assembly work, putting up duct systems, conveyors, augers, stuff like that." Relator believed that he should have been classified as a millwright, but S-M classified him as a laborer. Relator believed that his classification as a general laborer was incorrect "[b]ecause of [his] work history," and because he considered the work he did to be "more than a general labor position." He testified that he complained to foreman Dan Meyer and human-resources manager Kirk Lindblom many times about his pay rate, and that they gave him no response other than that "they knew."

Lindblom confirmed that relator approached him about his job classification. Lindblom testified that S-M classified relator as a "laborer," that, as far as he knew, relator was paid as a "general laborer," and that S-M did not have a "millwright" classification. When asked if he was "familiar with the prevailing rates of pay in the state of Minnesota," Lindblom answered, "No, I'm not familiar with what the rate of pay is."

Dale Niemi, CEO and general manager of S-M, said that relator never approached him about classification or pay-rate issues. Niemi testified that, sometime in 2007, prior to S-M's first job at a prevailing-wage site, Niemi held a meeting with the foremen and the employees in which the participants "discussed the structure of how a Minnesota prevailing wage job worked," and that there was "no classification in the Minnesota prevailing wage code that we fell under." Niemi further testified that S-M discussed the prevailing-wage issue with the state. He testified that the state gave its "opinions" that: the foremen should be coded as "millwright[s]," though this was not terminology that S-M normally used; and the other employees would be coded as "general laborers . . .

because there is no other classification that meets what they do out there." Niemi claimed that relator's pay rate of $15.50 an hour as a general laborer was "within the prevailing wage guidelines of [DOLI]." In an affidavit admitted into the record by the ULJ at the hearing, Niemi stated that relator "never presented [S-M] with any licenses, certifications or apprenticeships to qualify him for a job title other than a general laborer."

Relator testified that there was "constant bickering" between Meyer and another foreman named Todd Vernon, and that Meyer and Vernon would "backstab each other." Relator testified that in 2007, Vernon approached him at a job site and told him that Meyer had been cashing expense-reimbursement checks payable to relator. Relator called Niemi and told him of the report. While Niemi provided relator with copies of all checks he requested, Niemi testified that he had no independent knowledge or reason to believe that anyone at S-M cashed checks intended for relator. And Meyer denied that he ever cashed any of relator's checks. Relator conceded that he was not aware of any expense-reimbursement checks that he should have received, but did not, and was not sure if there were any specific expenses for which he should have been reimbursed, but was not. Yet relator maintained that the signature on an $80 check dated October 30, 2006, was not his.

Following the hearing, the ULJ issued findings of fact and a decision that relator was ineligible for benefits. After relator moved for reconsideration, the ULJ affirmed his previous decision. This certiorari appeal follows.

D E C I S I O N

This court may remand a decision of the ULJ for further proceedings, or it may reverse or modify the decision if the substantial rights of the relator may have been prejudiced because the findings, conclusion, or decision are, among other things, arbitrary and capricious, unsupported by substantial evidence, or affected by an error of law. Minn. Stat. § 268.105, subd. 7(d) (2008). We review findings of fact in the light most favorable to the ULJ's decision, give deference to the ULJ's credibility determinations, and rely on the ULJ's findings when the evidence substantially supports them. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We review legal questions de novo. *Id.*

Relator argues that because of his incorrect job classification and pay rate, as well as the check-cashing incident, he had good reasons to quit caused by S-M and that the ULJ erred in determining that he is ineligible for benefits. An applicant who is determined to have quit is generally ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 1 (2008). However, an exception applies when the applicant quit "because of a good reason caused by the employer." *Id.*, subd. 1(1). "What constitutes good reason caused by the employer is defined exclusively by statute." *Rootes v. Wal-Mart Assocs., Inc.*, 669 N.W.2d 416, 418 (Minn. App. 2003); *see also* Minn. Stat. § 268.095, subd. 3(g) (2008) (providing that statutory definition is exclusive and that no other definition applies). The statute provides:

> A good reason caused by the employer for quitting is a reason:
>
> (1) that is directly related to the employment and for which the employer is responsible;
>
> (2) that is adverse to the worker; and
>
> (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) (2008). For this exception to apply, the applicant must complain to the employer about the adverse working condition and give the employer a reasonable opportunity to correct the problem before quitting. *Id.*, subd. 3(c) (2008). The legal conclusion that an employee quit without good reason caused by the employer must be based on findings that have the requisite evidentiary support, and is subject to de novo review. *Nichols v. Reliant Eng'g & Mfg., Inc.*, 720 N.W.2d 590, 594 (Minn. App. 2006); *Munro Holding, LLC v. Cook*, 695 N.W.2d 379, 384 (Minn. App. 2005).

Job Classification and Pay Rate

Relator argues that he had a good reason to quit caused by S-M, because S-M was not paying him the wage required by the Minnesota Prevailing Wage Law (MnPWL), Minn. Stat. §§ 177.41 – .44 (2008). This court has held that an employee had good reason to quit caused by the employer when the employer failed to pay a statutorily mandated wage. *Miller v. Int'l Express Corp.*, 495 N.W.2d 616, 618 (Minn. App. 1993); *see also Mitchell v. Crookston Welding Mach. Co.*, 492 N.W.2d 256, 258 (Minn. App. 1992) (noting that the employer's failure to pay the prevailing wage would have constituted a good reason to quit caused by the employer, but concluding that the applicant was not entitled to benefits on other grounds); *Hawthorne v. Universal Studios,*

Inc., 432 N.W.2d 759, 762 (Minn. App. 1988) (stating that an employer that violates the law in its treatment of its employees is "per se guilty of employer misconduct," giving the employee a good reason to quit). Therefore, relator's contention that he had good reason to quit caused by S-M depends on a determination of whether S-M was complying with the MnPWL.

The purpose of the MnPWL is to ensure that those who work on state-financed projects are paid wages comparable to wages paid for similar work in the community. Minn. Stat. § 177.41. Under the MnPWL, contracts for state projects must provide that those working on the project be paid the prevailing-wage rate "in the same or most similar trade or occupation in the area." Minn. Stat. § 177.43, subd. 1(2). The contract must specifically state the prevailing-wage rates. *Id.*, subd. 3. The commissioner of DOLI must "investigate as necessary" to ascertain the applicable rates for a given project before the state asks for bids. *Id.*, subd. 4. An employer that does not pay the required wage to an employee is guilty of a misdemeanor. *Id.*, subd. 5.

Relator testified that his work history and his job duties of "[w]elding, torching, assembly work, putting up duct systems, conveyors, augers, stuff like that" entitled him to be classified and paid as a millwright, rather than as a general laborer. To the contrary, Niemi testified that the employees were general laborers, "because there is no other classification that meets what they do out there." Niemi also testified that relator's pay rate of $15.50 an hour as a general laborer was "within the prevailing wage guidelines of [DOLI]," and, in his affidavit, stated that relator "never presented [S-M] with any

licenses, certifications or apprenticeships to qualify him for a job title other than a general laborer."

Based on the testimony of relator and Niemi, the ULJ determined that a preponderance of the evidence did not support relator's contention, and the ULJ found that "S-M had checked with the State and had determined that only the foremen on the job should be paid as a millwright and the other workers on the job should be paid as general laborers."

When the outcome of a decision will be significantly affected by a credibility determination, the ULJ "must set out the reason for crediting or discrediting" the relevant testimony. Minn. Stat. § 268.105, subd. 1(c) (2008). This court must remand cases where credibility was central to the ULJ's determination but the ULJ did not make express findings as to the witnesses' credibility. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28-29 (Minn. App. 2007). Here, the only evidence about relator's proper job classification and pay rate was the testimony of relator and Niemi. Because the ULJ did not address the witnesses' credibility and provided no explanation about why he apparently credited Niemi's testimony over relator's, we remand this case for findings pursuant to Minn. Stat. § 268.105, subd. 1(c).

We also remand because the ULJ's conclusion that relator did not have good reason to quit was not based on the requisite evidentiary support, because the evidence was insufficient to determine whether S-M was in compliance with the MnPWL. This court has previously held that evidence that an employee was not being paid the required prevailing wage for federally funded projects included evidence of the wage that the

employee should have received on the project compared to the wage the employee actually received. *Mitchell*, 492 N.W.2d at 257. Here, no evidence of the prevailing wages detailed for the project by DOLI or the terms of S-M's contract with the state was presented.

A hearing before a ULJ is an evidence-gathering inquiry to be conducted "without regard to any burden of proof." Minn. Stat. § 268.105, subd. 1(b) (2008); *see also* Minn. Stat. § 268.069, subd. 2 (2008) (stating that "[a]n applicant's entitlement to unemployment benefits must be determined based upon that information available without regard to any burden of proof").[1] Instead, the ULJ has the responsibility to "ensure that all relevant facts are clearly and fully developed." Minn. Stat. § 268.105, subd. 1(b). And the ULJ should assist unrepresented parties in the presentation of evidence. Minn. R. 3310.2921 (2007).

Here, the ULJ had the responsibility to develop a record sufficient to make a legal determination as to S-M's compliance with the MnPWL. But the ULJ did not elicit the requisite information from the available witnesses, and we are troubled in particular that the ULJ did not ask S-M's representatives for the terms of its contract with the state, which under Minn. Stat. § 177.43, subd. 3, would have specifically stated the prevailing-wage rates for the project. We therefore reverse the ULJ's conclusion that relator quit

[1] Because relator stopped working at S-M in September 2008, the 2008 version of the statutes applies in this case. We note that, effective August 2, 2009, applicable to all department determinations and ULJ decisions issued on or after that date, the legislature has removed the words, "without regard to any burden of proof," from sections 268.069 and 268.105. 2009 Minn. Laws ch. 78, art. 3, § 5, at 590, § 17, at 597 (effective date), art. 4, § 34, at 615, § 52, at 623 (effective date).

without good reason caused by the employer and remand for an additional evidentiary hearing to determine whether S-M complied with the MnPWL in relator's classification and pay rate.

DEED argues that, even if relator was paid the incorrect wage, his claim fails because he did not complain to Niemi about the problem prior to quitting, as required by Minn. Stat. § 268.095, subd. 3(c). Relator testified that he complained to the foremen and to human-resources manager Lindblum, and Lindblum confirmed that relator came to him about his job classification and pay rate. But relator did not testify that he complained directly to Niemi about his classification and pay rate. The ULJ made no finding about whether relator satisfied the requirement of section 268.095, subdivision 3(c). On remand, the ULJ must make such a determination.

Checks

Relator also argues that he had a good reason to quit caused by S-M because Meyer cashed expense-reimbursement checks made out to relator. The ULJ found that "Niemi went to the bank and investigated [relator's] report and concluded that there was no evidence that anyone had ever forged [relator's] signature on paychecks or cashed checks payable to him," and that a "preponderance of the evidence does not show that Meyer, or anyone else, forged [relator's] signature or cashed checks made out to him." We defer to the ULJ's findings of fact when substantially supported by the evidence, and view the facts in the light most favorable to the ULJ's decision. *Skarhus*, 721 N.W.2d at 344. The evidence includes: Meyer's denial that he cashed any of relator's checks; testimony that Meyer and his alleged accuser, Vernon, did not get along; Niemi's

testimony that he provided relator with copies of checks he requested; and relator's concessions that he was not aware of any expense-reimbursement checks that he should have received but did not, and that he was not sure if there were any specific expenses for which he should have been reimbursed, but was not. Viewed in the light most favorable to the ULJ's decision, these facts substantially support the ULJ's finding that no one cashed checks payable to relator. Based on these findings, the ULJ correctly concluded that this alleged event did not constitute a good reason for relator to quit caused by S-M.

Reversed and remanded.