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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1672**

Michael Fitzgerald,
Relator,

vs.

International Paper Co. (Corp),
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed July 6, 2010
Reversed and remanded
Collins, Judge***

Department of Employment and Economic Development
File No. 21858265-3

Michael Fitzgerald, Fergus Falls, Minnesota (pro se relator)

International Paper Company, St. Louis, Missouri (respondent employer)

Lee B. Nelson, Britt K. Lindsay-Waterman, Department of Employment and Economic
Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Klaphake, Presiding Judge; Hudson, Judge; and
Collins, Judge.

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

UNPUBLISHED OPINION

COLLINS, Judge

Relator challenges the decision of the unemployment-law judge (ULJ) ruling him ineligible for unemployment benefits. Because the ULJ abused her discretion in denying relator's subpoena request, we reverse and remand.

FACTS

Relator Michael Fitzgerald was originally granted unemployment benefits when it was determined that he quit because of good reason caused by the employer, respondent International Paper Company. Specifically it was determined that Fitzgerald quit because of unsafe working conditions caused by a fellow employee, M.S. International Paper, a manufacturing company of corrugated boxes, appealed and a hearing was conducted by telephone. It was undisputed that Fitzgerald quit and the only question was whether he did so because of good reason caused by the employer.

Following is a synopsis of Fitzgerald's testimony: Fitzgerald quit by telling his supervisor that he no longer wanted to work for International Paper and by providing written notice of his intention to quit. Although he quit because of a frustrating and dangerous working environment caused by his co-worker M.S., Fitzgerald did not "elaborate" on his reasons for quitting when he informed International Paper of his decision. Fitzgerald had worked with M.S. since March 2007. M.S. suffered from narcolepsy and would fall asleep every ten to fifteen minutes while operating machinery. When M.S. fell asleep the machinery would frequently jam and Fitzgerald would have to wake him. M.S.'s narcolepsy-related behavior also created safety issues. Fitzgerald

raised concerns about M.S. at a safety meeting in April 2007 but was told by the manufacturing-safety manager that the safety meeting was not “the appropriate venue for that conversation.” Fitzgerald also told his supervisor that he did not want to work with M.S., and it was not necessary to elaborate on the reason because the supervisor witnessed M.S. falling asleep every night. The last time Fitzgerald told his supervisor about his concerns regarding M.S. was in December 2008. He narrowly avoided injury when M.S. fell asleep at his machine while holding an “on” button and Fitzgerald “had to jump back from the machine to stop it from pulling [his] hand into the pinch point.” He did not make a formal report of the incident because it “was kind of run-of-the-mill stuff” and because he had “tried reporting this kind of stuff before and . . . nothing’s ever happened.” Despite being aware of International Paper’s policy regarding reporting near misses, Fitzgerald did not fill out the near-miss form because he “wanted to be done.”

Representatives of International Paper who testified at the hearing included one from human resources, a manufacturing-safety manager, and Fitzgerald’s supervisor. The supervisor testified that he was not aware of M.S.’s alleged narcolepsy, but recounted that for “about a month” in August 2008 he would “walk by and [M.S.]’s head would be bobbing up and down like he was nodding off, and that’s when [the supervisor] would walk by and say, [M.S.], you need to be attentive, let’s go.” The supervisor could not recall Fitzgerald complaining about M.S. falling asleep, raising safety concerns, or requesting a different co-worker. The supervisor stated that there was “one other person” who complained about M.S. falling asleep, and that complaint was made in 2007.

The safety manager testified that he did not specifically recall discussing any issues with Fitzgerald regarding M.S. at a safety meeting in 2007, but he did remember receiving a complaint from a day-shift employee regarding M.S.'s tendency to fall asleep. The safety manager followed up on that complaint with M.S.'s supervisor. When questioned by Fitzgerald, the safety manager also testified that he personally noticed M.S. falling asleep in one safety meeting and he had seen M.S. "nod off" while on the manufacturing floor. The human resources representative testified that human resources never received complaints about M.S. falling asleep while working.

Fitzgerald requested subpoenas for two International Paper employees, asserting they would testify that the company was aware of the safety issues caused by M.S. because each of them had also complained about M.S. directly to International Paper supervisors and that one of them had been injured while working with M.S. The ULJ asked the International Paper representatives if the employees were available to testify. When they replied that they did not think the testimony would be relevant, the ULJ stated "Well, if they're going to testify that they have made reports regarding safety issues, and we have two supervisors saying no one's ever reported any safety issues, that may be relevant," and recessed the hearing. The ULJ directed the representatives to determine whether the two employees would voluntarily testify and, if not, to notify the ULJ prior to the rescheduled hearing in order to give the ULJ time to consider whether to issue a subpoena. When the hearing resumed, and not before, International Paper representatives testified that one of the employees was out on personal leave and did not respond to their request and the other did not want to testify.

The ULJ ultimately denied the subpoena request because there was no showing that M.S. had been involved in the incident resulting in injury to one of the potential witnesses and because the other one's testimony would have been duplicative. The ULJ wrote that the

preponderance of the evidence is that Fitzgerald did not complain about the working conditions to the employer. Fitzgerald's testimony that he complained as recently as December, 2008 is not credible. It is not likely that if Fitzgerald complained repeatedly about [M.S.], that International Paper would continue to employ someone who fell asleep at work every night and could not perform their job. In addition, if Fitzgerald had nearly been injured because of [M.S.], it is not likely that he would not report that incident to the company. . . . The preponderance of the evidence is that Fitzgerald did not complain to the employer after raising the issue in the 2007 Safety Committee meeting and did not give the employer a reasonable opportunity to correct the situation.

The ULJ concluded that, therefore, "Fitzgerald quit for a reason other than a good reason caused by the employer." Fitzgerald requested reconsideration, the ULJ affirmed the findings and decision, and this certiorari appeal followed.

DECISION

This court may remand the case for further proceedings, reverse, or modify a ULJ's decision if relator's substantial rights were prejudiced because of "unlawful procedure." *See* Minn. Stat. § 268.105, subd. 7(d)(3) (2008). The ULJ should assist unrepresented parties in presenting evidence and must conduct the hearing "in a manner that protects the parties' rights to a fair hearing." *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529-30 (Minn. App. 2007) (citing Minn. R. 3310.2921 (2005)). Each

party in an unemployment-benefits hearing may present and examine witnesses, Minn. R. 3310.2921 (2009), but the ULJ may exclude evidence that is irrelevant, immaterial, or unduly repetitious. *Ywswf*, 726 N.W.2d at 530; *see also* Minn. R. 3310.2914 (2009) (“A request for a subpoena may be denied if the testimony or documents sought would be irrelevant, immaterial, or unduly cumulative or repetitious.”). The ULJ has duties to assist unrepresented parties in the presentation of evidence and to ensure all appropriate facts are developed. Minn. Stat. § 268.105, subd. 1(b) (2008); Minn. R. 3310.2921 (2009).

The ULJ has the authority to issue subpoenas to compel the attendance of witnesses. Minn. Stat. § 268.105, subd. 4 (2008). The legislature recently required that the ULJ explain at the beginning of the hearing “that the applicant has the right to request that the hearing be rescheduled so that documents or witnesses can be subpoenaed.” Minn. Stat. § 268.105, subd. 1(b) (Supp. 2009). The legislature also specifically provided that the ULJ must give full consideration to a request for a subpoena. Minn. Stat. § 268.105, subd. 4 (Supp. 2009).¹

Fitzgerald argues that it was error for the ULJ to deny his subpoena requests, contending that the testimony of the intended witnesses would have revealed that International Paper was aware of significant safety issues attributable to M.S. because these witnesses, themselves, had complained about M.S. directly to International Paper

¹ We note that these amendments to the statutes apply to ULJ determinations made on or after August 2, 2009. 2009 Minn. Laws ch. 78, § 52, at 623. However, they exemplify the importance the legislature has consistently placed on the need to ensure that a party to a ULJ hearing has the ability to present evidence.

supervisors. On appeal, DEED argues that the potential witnesses would not have been able to testify to the only relevant issue: whether Fitzgerald complained to his supervisors about his safety concerns. But in our view, the anticipated testimony would be relevant to the ULJ's determination to credit the testimony of the International Paper representatives and discredit that of Fitzgerald. This credibility determination was central to the ULJ's conclusion that Fitzgerald did not give International Paper a reasonable opportunity to correct the working conditions, and therefore Fitzgerald quit without good reason caused by the employer. The ULJ's credibility determination was based on the conclusion that it was "not likely that if Fitzgerald complained repeatedly about [M.S.], that International Paper would continue to employ someone who fell asleep at work every night and could not perform [his] job." But if the potential witnesses testified that they had, in fact, complained repeatedly about M.S., it would have directly undermined the foundation of the ULJ's credibility determination.

We therefore reverse and remand for the issuance of the requested subpoenas and further proceedings. Having resolved this appeal on the procedural issue, it is unnecessary to address Fitzgerald's other arguments.

Reversed and remanded.