STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1988

Stefanie Folkema,
Relator,

vs.

Independent School District #625,
Respondent,

Independent School District #139,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed July 13, 2010
Affirmed
Shumaker, Judge

Department of Employment and Economic Development
File No. 22943134-3

Stefanie Folkema, Rush City, Minnesota (pro se relator)

Independent School District #625, St. Louis, Missouri; Independent School District #139, Rush City, Minnesota (respondent employers)

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

Considered and decided by Larkin, Presiding Judge; Shumaker, Judge; and Bjorkman, Judge.

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

SHUMAKER, Judge

On certiorari appeal, relator argues that the unemployment-law judge (ULJ) erred in determining that she had reasonable assurance she would be returning to the same or similar employment in the next academic year, and disallowing her claim for unemployment benefits during the summer months between successive academic years. We affirm.

FACTS

Relator Stefanie Folkema was laid off on June 30, 2009, after she had worked year-round, 40 hours a week, as an educational assistant for Independent School District #625 (the District) since October 1993.[1] Folkema understood, based on conversations with the human resources department, that she "should have a job" for the following academic year because of her level of seniority with the District. Folkema was told that she "would be informed in August if there would be an available position" for her. The human resources department also told her that her new position was likely to be a 10-month position instead of a year-round position. She was assured that she would not lose her seniority or receive a pay cut in the new position. Folkema also now asserts on appeal that she was told by a "business manager working for School District #625 that [she] should apply for unemployment benefits," so she started a job search, in case a position was not available.

[1] Independent School District #139 is also listed as a respondent in this matter because Folkema was and is currently a school board member in that district. However, her connection with Independent School District #139 is not relevant to this appeal.

Folkema established a benefit account with the Minnesota Department of Employment and Economic Development (DEED). A DEED adjudicator determined that Folkema was ineligible for benefits because she could not use the wage credits earned from working for a school district during a recess. Folkema appealed that determination, and a ULJ affirmed the agency's determination. The ULJ specifically found that (1) Folkema's seniority provided "reasonable assurance" that she would be returning to the same or similar employment in the upcoming academic year, (2) the 10-month employment is the "same or similar" to her previous 12-month employment, and (3) the two months she was without work constitute the period between two successive academic years during which wage credits may not be used for unemployment purposes, even though Folkema was previously employed as a 12-month employee.

Folkema indicates that, subsequent to the hearing with the ULJ, she returned to work with the District for the 2009-2010 school year in a 10-month position, working 7.5 hours a day, at a work site that is farther from her home than her previous one.

This matter is now before this court on a writ of certiorari.

D E C I S I O N

We may affirm, or we may reverse, remand, or modify the decision of a ULJ if the substantial rights of the litigant may have been prejudiced because the findings, inferences, conclusion, or decision are affected by an error of law or are unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2008); *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). This court gives deference to the credibility determinations made by the ULJ, viewing the ULJ's factual

findings in the light most favorable to the decision. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (citations omitted). Thus, this court will not disturb the ULJ's factual findings if the evidence substantially sustains them. *Id.* "Statutory interpretation concerns a pure question of law," and "our review of the questions concerning the application and interpretation of the statute is de novo." *Halvorson v. County of Anoka*, 780 N.W.2d 385, 388 (Minn. App. 2010).

DEED will pay unemployment benefits to an applicant who meets certain requirements. Minn. Stat. § 268.069, subd. 1 (Supp. 2009). The applicant must apply for unemployment benefits and establish a benefit account in accordance with Minn. Stat. § 268.07 (2008 & Supp. 2009). *Id*., subd. 1(1). To establish a benefit account, in relevant part, the applicant must have earned a specified minimum dollar amount of "wage credits." Minn. Stat. § 268.07, subd. 2(a) (Supp. 2009). "Wage credits" are "the amount of wages paid within an applicant's base period for covered employment." Minn. Stat. § 268.035, subd. 27 (2008).

Minn. Stat. § 268.085, subd. 7 (2008), states:

> (a) No wage credits in any amount from any employment with any educational institution or institutions earned in any capacity may be used for unemployment benefit purposes for any week during the period between two successive academic years or terms if:
>
> (1) the applicant had employment for any educational institution . . . in the prior academic year or term; and
>
> (2) there is a reasonable assurance that the applicant will have employment for any educational institution . . . in the following academic year or term, unless that subsequent

> employment is substantially less favorable than the employment of the prior academic year or term.

Under this provision, time "between successive school years is not a severance of the employment relationship warranting reemployment insurance benefits." *Sparrow v. Indep. Sch. Dist. 272*, 534 N.W.2d 551, 553 (Minn. App. 1995).

Folkema first argues that, contrary to the ULJ's findings, she did not have reasonable assurance of employment in the coming academic term. We disagree. "Reasonable assurance" can be "written, oral, implied, or even established by custom or practice." Minn. Stat. § 268.085, subd. 7(k). At the time of the hearing on August 3, 2009, Folkema had not yet been offered a position; however, sometime prior to the hearing, Folkema filled out an unemployment insurance request for information questionnaire for which she answered "yes" to the question, "Do you expect to work for this employer in the next school year?" Folkema's reason for answering "yes" to this question was that she was told, in light of her seniority, that she should be offered a 10-month position at another school. Although Folkema had not yet officially been offered another position, the evidence in the record provides substantial support for the ULJ's finding that Folkema had a reasonable assurance she would be working during the next school year.

Folkema was also told that she "would be informed in August if there would be an available position" for her, and in fact, she was rehired. Folkema now asserts on appeal that she was told by the District's "business manager" to apply for unemployment benefits, and that she started a job search. However, she did not provide this information

to the ULJ at the hearing. This court "may not base its decision on matters outside the record on appeal, and that matters not produced and received in evidence below may not be considered." *Plowman v. Copeland, Buhl & Co., LTD.*, 261 N.W.2d 581, 583 (Minn. 1997). Therefore, these facts are not considered on appeal. Even if these facts were part of the record and considered by this court, Folkema still had reasonable assurance she would be working in the coming school year. Having been told to apply for unemployment did not seem to affect Folkema's understanding that she would be rehired, as evinced by her answer of "yes" on the District's questionnaire, inquiring whether she expected to work for the District the following year. Furthermore, Folkema, even after having been offered another position, still sought unemployment benefits for the summer months during which she was not working.

Second, Folkema argues that, contrary to the determination of the ULJ, she would not be returning to the same or similar educational employment. We disagree. This court has previously considered how a school employee's move from a 12-month position to a 10-month position affects the employee's qualification for unemployment benefits. *See Swanson v. Indep. Sch. Dist. No. 625*, 484 N.W.2d 432, 434 (Minn. App. 1992) (analyzing an older but substantially similar version of the educational-wage provision of the unemployment benefits statute), *review denied* (Minn. June 30, 1992). Minn. Stat. § 268.085, subd. 7(a), states that for school employees applying for unemployment benefits, the pertinent time frame is the "academic year or term." This court determined in *Swanson* that a former year-round school employee was ineligible to receive unemployment benefits for any period between two successive academic years if the

employee has received a reasonable assurance of reemployment in the upcoming year. *Id*.

Folkema was told that if she was offered a new position she would not lose "any of [her] pay or any of [her] seniority." The ULJ determined that a 10-month position that would not affect her hourly pay rate and seniority status constitutes "same or similar." Given the previous decision of this court in *Swanson*, the ULJ did not abuse her discretion in reaching this conclusion.

Folkema indicates in her brief that, since the hearing with the ULJ, she was offered, and is now working in, a 10-month position. Folkema argues that her current position is not substantially similar to her previous position, which was a 12-month position, working 8 hours a day, with paid vacations. In her current position, she is working 7.5 hours a day, without paid vacations. However, the conditions of her current employment are not facts contained in the record; therefore, this court does not consider them. *See Plowman*, 261 N.W.2d at 583. Even if these facts were a part of the record, it is likely that the ULJ's decision would still stand. Folkema's hours have only been reduced from 40 hours a week to 37.5 hours a week, and the only change in benefits is the loss of paid vacations. These changes in her position are not substantially less favorable for purposes of Minn. Stat. § 268.085, subd. 7.

Affirmed.