STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1149

Michele Proefrock,
Relator,

vs.

Brighter Day Residence, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed May 5, 2014
Reversed
Rodenberg, Judge
Dissenting, Johnson, Judge

Department of Employment and Economic Development
File No. 30880401-3

Michele Proefrock, North Branch, Minnesota (pro se relator)

Brighter Day Residence, C/O Talx UCM Services, Inc., St. Louis, Missouri (respondent)

Lee B. Nelson, Christine Hinrichs, Department of Employment and Economic Development, St. Paul, Minnesota (for respondent DEED)

Considered and decided by Johnson, Presiding Judge; Cleary, Chief Judge; and Rodenberg, Judge.

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

RODENBERG, Judge

Relator Michele Proefrock challenges the decision of the unemployment law judge (ULJ) to deny her claim for unemployment benefits, arguing that she did not commit employment misconduct. Because the record does not substantially support the ULJ's determination that relator's actions were employment misconduct, we reverse.

FACTS

Relator began her employment as a personal care attendant (PCA) with respondent Brighter Day Residence, Inc. in March 2012. A background check by the Minnesota Department of Human Services (DHS) was a prerequisite to her eligibility for employment. She passed the background check. On August 29, 2012, while relator was off-duty, a dispute occurred at relator's home. Relator claims that her son and his girlfriend took her car without her permission and that she began to call police. Her son did call the police and reported that relator had threatened to kill his girlfriend during the dispute. As a result, relator was charged with four crimes, including two counts of terroristic threats, disorderly conduct, and domestic assault. The parties agree on appeal that relator was acquitted of all charges except misdemeanor disorderly conduct.

In February 2013, and while the criminal case against relator was pending, DHS determined that relator could not provide PCA services because of the charges, which then included felony-level and assault charges. DHS informed respondent that relator was ineligible to work as a PCA. It did not provide any details of the incident underlying the charges. Respondent discharged relator on February 7, 2013 pursuant to DHS's

licensing determination, and without any apparent further investigation into the August 29 incident. The sole reason respondent discharged relator from employment was the DHS notice. Relator filed for unemployment benefits, and the ULJ held a telephonic hearing on April 9, 2013.

The ULJ received the police report that was made in connection with the August 29 incident in evidence. Relator was the only witness who testified concerning the August 29 incident. She testified that her son had moved into her home after his release from prison in June 2012. On August 29, relator had been away from home, consuming some alcohol while socializing with friends. When she returned home, relator discovered that, while she was away, her son and his girlfriend had used her car without her permission. Relator became upset because this was the third time her son had used her car without permission since he had moved back in with her following his release from prison. Relator told police that she believes her son had used her car to go buy drugs. Relator picked up the phone and stated that she was going to call the police to report the vehicle as stolen. She told her son and his girlfriend that they need to have their "A--kicked" and that she was no longer going to let her son live at her home. She testified that her son and his girlfriend reacted by forcibly taking the phone from her. They went outside and reported by phone to the police that relator had just threatened to kill the son's girlfriend. Relator denies having made any such threat.

Relator testified that her son has been convicted of or charged with assault, terroristic threats, domestic assaults, and driving after revocation, and that "he's been in about six Minnesota county jails . . . since he's turned 18." She testified that her son has

never had a job for more than a week, and that he has always lived at her house when not incarcerated. The police report received in evidence also indicates that relator may have witnessed her son and his girlfriend smoking marijuana at relator's home immediately before the described incident.

The police report summarized hearsay statements made by relator, her son, and his girlfriend regarding the August 29 incident. Relator's son and his girlfriend told police that relator was drunk when she returned home, she became aggressive, and at one point threatened to kill the girlfriend. Relator denied the threat to police, made statements to police consistent with her testimony at the hearing, and maintains that they both fabricated the story to protect themselves. The police arrested relator for terroristic threats and administered a breath test, which showed that relator had an alcohol concentration of .184.

The ULJ determined that relator was ineligible for unemployment benefits due to employment misconduct. In so determining, the ULJ found the hearsay statements by relator's son and his girlfriend credible because they corroborated each other, while finding relator's statements not credible due to her intoxication. He concluded that, by a preponderance of the evidence, relator had made a terroristic threat, which was the reason for her discharge from employment. The ULJ affirmed the order on reconsideration. This certiorari appeal followed.

D E C I S I O N

When reviewing a ULJ's eligibility decision, we may affirm, remand for further proceedings, or reverse or modify the decision if the substantial rights of the relator 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) (2012). We review the ULJ's factual findings in the light most favorable to the decision and defer to the ULJ's credibility determinations. *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008).

An employee who is discharged is eligible for unemployment benefits unless the discharge was for employment misconduct. Minn. Stat. § 268.095, subd. 4(1) (2012). "Employment misconduct" is "any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly: (1) a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee; or (2) a substantial lack of concern for the employment." *Id.*, subd. 6(a)(1), (2) (2012). "Whether an employee committed employment misconduct is a mixed question of fact and law." *Peterson*, 753 N.W.2d at 774. Whether the employee committed the act is a fact question. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). But whether the employee's act constitutes employment misconduct is a question of law, which we review de novo. *Id.*

Relator argues that she is entitled to unemployment benefits because she was eventually acquitted of all criminal charges except disorderly conduct. Respondent counters that "the record shows that [relator] knew or should have known [that] the DHS guidelines related to her qualification to work with clients as a PCA" and that relator's conduct, which caused her to be charged with felony-level and assault charges, amounts to employment misconduct. The parties agree that the sole basis for relator's discharge

from employment was the existence of the more serious criminal charges of which she was later acquitted. DHS must "disqualify an individual who is the subject of a background study" if "a preponderance of the evidence indicates the individual has committed an act or acts that meet the definition of any of the crimes listed in [Minn. Stat. § 245C.15 (2012)], regardless of whether the preponderance of the evidence is for a felony, gross misdemeanor, or misdemeanor level crime." Minn. Stat. § 245C.14, subd. 1(a)(2) (2012). The crime of which relator was eventually convicted, misdemeanor disorderly conduct, is not listed in section 245C.15. It appears from the record that DHS relied exclusively on the prosecutor's charging decision in disqualifying relator. Once it did so, respondent was legally justified in terminating relator's employment. Although she was no longer eligible to work as a PCA, *id.*, the issue before us is not whether the employer properly discharged her. The issue before us is whether, having been discharged, relator committed employment misconduct, thereby disqualifying her from receiving unemployment benefits.

Minnesota courts have considered the effect of criminal proceedings on eligibility for unemployment benefits in several cases. Absence from work due to incarceration has been found, in some cases, to be employment misconduct. *See Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 290 (Minn. 2006) (discussing the holding in *Grushus v. Minn. Mining & Mfg. Co.*, 257 Minn. 171, 100 N.W.2d 516 (1960)). But our supreme court has "declined to adopt a rule that absenteeism resulting from incarceration [is] misconduct as a matter of law." *Id.* Instead, the ULJ must base his determinations regarding employment misconduct "upon the facts in each particular case . . . ." *Id.*

(quoting *Grushus*, 257 Minn. at 176, 100 N.W.2d at 520). We apply a similar analysis to review a discharge from employment because of pending criminal charges.

The parties argue on appeal about whether a preponderance of the evidence shows that relator made the terroristic threats underlying her criminal charges. But relator was not discharged from employment because her employer found that she committed any disqualifying offenses. Relator was discharged because she was ineligible to work while criminal charges pended. *See* Minn. Stat. § 245C.14, subd. 1(a)(2). The actual incident was a heated dispute between a mother and her adult son, recently released from prison, which occurred at relator's home and during her personal time. Relator was eventually acquitted of the disqualifying charges. The pending charges disqualified her from working as a PCA, but her conduct falls far short of "a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee," or "a substantial lack of concern for the employment." Minn. Stat. § 268.095, subd. 6(a). Relator's conduct was objecting to her recently released criminal son taking her car, without her permission, possibly for the purpose of purchasing drugs, and despite several earlier admonitions that he not use that car.

And this case is unlike *Markel v. City of Circle Pines*, 479 N.W.2d 382 (Minn. 1992), on which DEED relies. In *Markel*, the employee was *convicted* of driving while impaired, resulting in a revocation of his driving privileges for one year. The employee's job duties included driving city vehicles. *Id.* at 383. There, the supreme court emphasized the employee's culpability for having committed a serious criminal offense. *Id.* at 385. At the time of the hearing in this case, relator had been not been convicted of

anything, and the disqualifying offenses that rendered her temporarily ineligible have *never* been proven.

"If the conduct for which the [employee] was discharged involved only a single incident, that is an important fact that must be considered in deciding whether the conduct rises to the level of employment misconduct." Minn. Stat. § 268.095, subd. 6(d) (2012). Although the ULJ is not required to make a written finding regarding this factor, *id.*, given the record on appeal, we conclude that the ULJ did not properly weigh this factor in his analysis. The August 29 incident was doubtless a "single incident" on relator's own time and at her own house.

In *Skarhus*, we considered a situation in which a single incident can rise to the level of employment misconduct, disqualifying a discharged employee from receiving unemployment benefits. 721 N.W.2d at 344 (concerning and discussing an earlier version of the statute). In that case, the relator had stolen food from her employer with a total value of less than four dollars. *Id.* at 342-43. We held that her actions had a significant adverse effect on the employer and constituted employment misconduct because her job required her to handle money and to properly account for items sold to customers. *Id.* at 344. "Thus, [the employer's] ability to assign the essential functions of the job to its employee was undermined by the employee's conduct." *Id.*

Here, relator's actions constituted a single incident and, unlike in *Skarhus*, her actions did not demonstrate that her employer could not trust her in the future performance of her job duties. *See id.* The incident at issue here, except for the now-resolved licensing impediment, could not have undermined her employer's confidence in

her ability to perform the essential functions of a PCA. The incident had nothing to do with her capacity or trustworthiness. *See* Minn. Stat. § 268.095, subd. 6(d) (stating that whether an employee was discharged based on a single incident "is an important fact" to consider). We also note that, since 2009, Minnesota Statutes chapter 268 is to be considered "remedial in nature and . . . applied in favor of awarding unemployment benefits." 2009 Minn. Laws, ch. 78, art. 4, § 1 (codified at Minn. Stat. § 268.031, subd. 2 (2012)). We are to "narrowly construe[]" disqualifying provisions. Minn. Stat. § 268.031, subd. 2. So interpreting section 268.095, subdivision 6(a), in light of the single-incident provision set forth in subdivision 6(d), we conclude that relator did not commit employment misconduct, even if we defer to the ULJ's factual findings.

But we also conclude that the record here does not support the ULJ's finding that relator made any terroristic threats. Relator argues that "the only evidence of [her] guilt at the unemployment hearing was the police report." She concedes that the police report is admissible as reliable hearsay in administrative proceedings. But, she argues, the statements of the other declarants—her son and his girlfriend—were not reliable due to both having the same incentive to fabricate their story. She argues that the police officer's report only summarized the hearsay statements made by her, her son, and his girlfriend and was insufficient to allow the ULJ to determine credibility concerning what happened on August 29, 2012.

Hearsay statements are generally admissible in unemployment proceedings if they are reliable. Minn. R. 3310.2922 (2013). Based on the evidence, the ULJ must make credibility determinations, Minn. Stat. § 268.105, subd. 1(c) (2012), and factual findings

based on a preponderance-of-the-evidence standard, Minn. Stat. § 268.031, subd. 1 (2012). We generally defer to the ULJ's credibility determinations and factual findings. *Peterson*, 753 N.W.2d at 774. But in this case, relator was the *only* witness to testify regarding what happened on August 29, 2012 (and she testified by telephone). Yet the ULJ found credible the hearsay statements of two witnesses not present at the hearing. Unexplained is how the ULJ could have concluded that persons not testifying at the hearing, one of whom had very recently been released from prison, were credible witnesses. We defer to the ULJ's factual findings only when the record "substantially sustains them." *Id.* There is no reason or basis for us to defer to the ULJ's credibility determination when the hearsay police report is available to us just as it was to the ULJ.

There is no burden of proof in unemployment-benefits cases. Minn. Stat. § 268.069, subd. 2 (2012). Here, the ULJ appears to have placed the burden on relator to disprove statements recorded in the police report by assuming the accuracy of the hearsay. The ULJ "must ensure that all relevant facts are clearly and fully developed." Minn. Stat. § 268.105, subd. 1(b) (2012). Here, neither the hearsay declarants nor the police officer were present for the hearing. Nobody other than relator testified regarding the August 29 incident or the accuracy of the police report. Although we defer to a ULJ's credibility determinations, those determinations should be based on a fully developed record. *See id.* The record was plainly insufficient to allow the finding that relator committed terroristic threats. *See* Minn. Stat. § 268.031, subd. 1 (requiring that facts be found by a preponderance of the evidence). We conclude that the credibility determinations and findings of the ULJ relevant to the decision are "unsupported by

substantial evidence in view of the entire record as submitted." Minn. Stat. § 268.105, subd. 7(d)(5).

We reiterate the instruction in *Jenkins* that a ULJ's determinations must be based "upon the facts in each particular case." 721 N.W.2d 290 (quotation omitted). We conclude that *this* relator did not commit unemployment misconduct under the circumstances presented in *this* case. There is absolutely nothing in the record contradicting relator's testimony that her son's unauthorized use of her car caused the argument which resulted in the police response. And although relator's son and his girlfriend told police that relator had made a threat to the girlfriend, neither of them appeared at the hearing. All of the evidence is consistent only with relator having had a disagreement with her son that was at her house, on her time, regarding her car. This was not "employment misconduct."

Reversed.

JOHNSON, Judge (dissenting)

I respectfully dissent from the opinion of the court. In light of the applicable precedent and the applicable standard of review, this court should affirm the decision of the unemployment law judge (ULJ).

The supreme court has held that, for purposes of unemployment benefits, "conduct which results in the loss of a license necessary for the performance of normal job duties is misconduct." *Markel v. City of Circle Pines*, 479 N.W.2d 382, 385 (Minn. 1992). The relator in *Markel* held a job that required him to have a Class B driver's license, but the license was suspended for one year after he was convicted of driving while impaired. *Id.* at 383. The supreme court upheld the administrative determination that the relator was ineligible for unemployment benefits because he had engaged in misconduct. *Id.* at 384-86.

The *Markel* opinion governs this case. Proefrock held a job that required her to pass a background study administered by the Minnesota Department of Human Services (DHS) and to maintain her PCA qualification. *See* Minn. Stat. § 256B.0659, subd. 11(a)(3) (2012). DHS disqualified her after she was charged with multiple criminal offenses, which caused her employer to terminate her employment. Proefrock does not argue that DHS did not have a legal basis and a factual basis to disqualify her based on the pending criminal charges. *See* Minn. Stat. §§ 245C.14-.16 (2012).

The question for the ULJ was whether "a preponderance of the evidence indicates [Proefrock] has committed an act . . . that meet[s] the definition of any of the crimes

listed in section 245C.15." *See* Minn. Stat. § 245C.14, subd. 1(a)(2).[1] The ULJ found by a preponderance of the evidence that Proefrock did so by threatening to kill another person. This court reviews a ULJ's finding of fact to determine whether it is supported by substantial evidence in view of the entire record. Minn. Stat. § 268.105, subd. 7(d) (2012); *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). "Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Id.* at 345.

Substantial evidence in the agency record supports the ULJ's finding. The ULJ relied on a police report that plainly states that Proefrock threatened to kill another person. The ULJ did not err by relying on the police report because a ULJ may consider reliable hearsay evidence, *see* Minn. Stat. § 268.105, subd. 1(b); Minn. R. 3310.2922 (2011); *Skarhus*, 721 N.W.2d at 345, and a police report may be deemed reliable hearsay, *see* Minn. R. Evid. 803(8); *Gardner v. Commissioner of Pub. Safety*, 423 N.W.2d 110, 114 (Minn. App. 1988).

Furthermore, and more importantly, the ULJ determined that Proefrock's testimony was not credible, in part because she was intoxicated at the time of the incident. This credibility determination is supported by the police report, which states

[1]The ULJ decided both the administrative appeal and Proefrock's request for reconsideration while the criminal charges were pending. Proefrock's attorney informed the ULJ of the result of Proefrock's criminal trial after the ULJ denied Proefrock's request for reconsideration. This court must review the ULJ's decisions based on the record before the ULJ when he denied Proefrock's request for reconsideration. *See* Minn. Stat. § 268.105, subds. 2(c), 7(c) (2012). Even if the result of Proefrock's criminal trial could be considered on appeal, the jury's verdict would have little influence because the jury was applying a higher burden of proof. *See State v. Lemmer*, 736 N.W.2d 650, 667 (Minn. 2007); *In re Kaldahl*, 418 N.W.2d 532, 535 (Minn. App. 1988).

that her blood-alcohol concentration was .184. A fact-finder is entitled to reject a witness's testimony if the witness was intoxicated at the time of the event to which the witness testified. *See, e.g.*, *State v. Frank*, 364 N.W.2d 398, 400 (Minn. 1985). In addition, the ULJ also had the opportunity to listen to Proefrock's testimony throughout the administrative hearing, which allowed him to evaluate her credibility for a variety of relevant reasons. *See Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 532-33 (Minn. App. 2007). To reiterate, "Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Skarhus*, 721 N.W.2d at 345. This court surely is not in a better position from which to judge Proefrock's credibility. *See Even v. Kraft, Inc.*, 445 N.W.2d 831, 834-35 (Minn. 1989) (reversing opinion of workers' compensation court of appeals because that court "failed to give due weight to the compensation judge's opportunity to determine the credibility of the witnesses, substituted its own view on that issue, and also failed to accept inferences the compensation judge had reasonably drawn from the evidence").

Lastly, the single-incident doctrine has no proper role in this appeal. Neither Proefrock nor the employer raised the single-incident issue with the ULJ. Neither Proefrock nor respondent briefed the issue on appeal. Even so, a single incident of terroristic threats or domestic assault is sufficient to allow a prosecutor to file criminal charges and sufficient to allow a jury to find a person guilty of either offense. *See* Minn. Stat. §§ 609.2242, .713, subd. 1 (2012). Accordingly, there is no reason to believe that a single incident of either offense is a reason for DHS to not disqualify a PCA. *See* Minn. Stat. §§ 245C.14, subd. 1(a)(2), .15, .16. Thus, even if the ULJ had considered the

single-incident doctrine, the singular nature of Proefrock's conduct would not have altered the ULJ's conclusion. *See* Minn. Stat. § 268.095, subd. 6(a)(10)(d) (2012); *Potter v. Northern Empire Pizza, Inc.*, 805 N.W.2d 872, 875-76 (Minn. App. 2011), *review denied* (Minn. Nov. 15, 2011).

In sum, the agency record supports the ULJ's finding that Proefrock engaged in employment misconduct. Thus, I would affirm the ULJ's determination that Proefrock is ineligible for unemployment benefits.