STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1805

Christina Ruscher,
Relator,

vs.

A'viands LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed June 2, 2014
Reversed
Hooten, Judge

Department of Employment and Economic Development
File No. 31358719-3

Christina Ruscher, Cottage Grove, Minnesota (pro se relator)

A'viands LLC, St. Paul, Minnesota (respondent employer)

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

Considered and decided by Hooten, Presiding Judge; Kirk, Judge; and Reyes, Judge.

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

HOOTEN, Judge

Relator-employee challenges the denial of her claim for unemployment benefits, arguing that the unemployment law judge (ULJ) erred by determining that she was discharged for employment misconduct. Because substantial evidence does not support the ULJ's factual finding and because a good-faith error in judgment is not employment misconduct, we reverse.

FACTS

Respondent A'viands is a food-service provider for hospitals, schools, and other facilities. In June 2013, A'viands discharged relator Christina Ruscher, who was a food-service operation manager at a mental-healthcare and family-shelter facility. Upon Ruscher's application for unemployment benefits, respondent Department of Employment and Economic Development (DEED) determined that Ruscher is ineligible for benefits because she was discharged for employment misconduct. Ruscher appealed this determination. The ULJ conducted a telephonic hearing in which Ruscher, A'viands' district manager Kurt TeGantvoort, and A'viands' human-resource specialist Kari Brenes participated.

According to Ruscher, on June 14, 2013, an employee identified as "Vicki" text-messaged her. Ruscher testified:

> [I]t started about 10:30 [a.m]. [Vicki] had asked me if I could find someone to cover her shift on the 15th. I said no, other people, the other employees had plans and I had obligations to be at, to be at home. A few hours later then, I was told that she had gone to the doctor and had a doctor's

> note and could not work Saturday and had asked if I could cover part of the shift. And, I had said that I could come in until 11:00 and cover. Had she come in and shown me the doctor's note I would have sent her home and made other arrangements to be at work.

Ruscher believed that Vicki lied about having a doctor's note because "[o]ver the past three years of working with her, this wasn't the first incident of [her] trying to get out of work."

On June 15, Ruscher saw Vicki in person when they were switching shifts, but they did not speak to each other. Ruscher testified that she did not ask Vicki for the doctor's note because Vicki "seemed very upset that she had to be there" and because Ruscher "did not have a good vibe" from Vicki. Ruscher explained that she was "close friends" with Vicki and "was worried that there may have been a confrontation." According to Ruscher, "there have been several confrontations in the past due to [Vicki] trying to get out of work." Ruscher admitted that she "wasn't thinking rationally" and that, if she were, she would have asked Vicki for the doctor's note. If Vicki had provided the doctor's note, Ruscher would have sent Vicki home. Ruscher stated that she asked Vicki for the doctor's note on June 18 and received it from her that day.

TeGantvoort testified that the client at the facility contacted him on June 15 regarding a meal incorrectly prepared by A'viands. When TeGantvoort spoke with Ruscher on June 18, he discovered that "it wasn't just a meal that was the concern, it was the reason for it, that an employee was sick, went to the doctor, got a doctor's note and then found out that [Ruscher] forced her to work the afternoon shift." When the ULJ asked him to clarify what he meant by "forced," TeGantvoort explained, "From my

understanding [Ruscher] told [Vicki] she needed to work, that she had other things that she needed to do, other family commitments and that she needed to work the afternoon regardless if she had a doctor's note or not." TeGantvoort asked Ruscher if she had received Vicki's doctor's note. Ruscher responded that she had not. TeGantvoort testified that he urged Ruscher to follow up on the doctor's note and that he eventually received it on June 19. According to TeGantvoort, the note stated, "[R]eturn to work on 6/16."

TeGantvoort also spoke with Vicki. As to this conversation, he testified:

> [Vicki] said that she . . . felt really bad, and she needed to go in to the doctor. She did get a hold of [Ruscher], and [Ruscher] did go in to cover when she went to the doctor. [But] when she came back at 11 o'clock she was forced . . . to work. While she was there she had made some comments to . . . our client or staff there that she had a doctor's note and that she needed to work and she was . . . not feeling well so she ended up changing the menu to accommodate for how she felt as far as with her illness.

TeGantvoort testified that he discharged Ruscher because of the incident on June 15 and that unrelated concerns about Ruscher's performance played a "small role" in his decision. In her closing argument, Brenes acknowledged that there was no official citation for a health-code violation.

The ULJ determined that Ruscher committed employment misconduct because "[r]equiring Vicki to work when she was sick violated state health regulations, and made A'viands look bad to its client." Accordingly, the ULJ concluded that Ruscher is ineligible for unemployment benefits. On reconsideration, the ULJ stated that it "may be true" that Ruscher "had good reason to suspect that Vicki was lying about being sick."

Nonetheless, the ULJ affirmed his decision, reasoning that Ruscher, admittedly, showed "a lapse in judgment" by failing to "inquire as to how [Vicki] was doing, or ask if she had gone to the doctor." This certiorari appeal follows.

D E C I S I O N

When reviewing the ULJ's determination of ineligibility for unemployment benefits, we may affirm the decision, remand it for further proceedings, or reverse or modify it if the relator's substantial rights have been prejudiced because the findings, inferences, conclusion, or decision are unsupported by substantial evidence in view of the record as a whole or are affected by an error of law. Minn. Stat. § 268.105, subd. 7(d)(4)–(5) (2012). Substantial evidence "is: (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; and (5) evidence considered in its entirety." *CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 563 (Minn. App. 2001), *review denied* (Minn. Nov. 13, 2011). "Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law." *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted). We review factual findings in the light most favorable to the ULJ's decision, but "whether a particular act constitutes disqualifying misconduct is a question of law that we review de novo." *Id.*

I.

Ruscher argues that the ULJ erred by determining that she required a sick employee to work. We agree.

The ULJ found that Vicki's first text message to Ruscher on June 14 indicated that Vicki was sick and that Ruscher responded to Vicki that she "had to work" on June 15. The ULJ also found that Vicki's second text message to Ruscher indicated that Vicki had a doctor's note verifying her illness and that Ruscher again told Vicki "that she had to come into work the next day." The ULJ stated that "Ruscher acknowledged in the hearing that she required Vicki to work on June 15."

Substantial evidence does not support these findings. Ruscher's testimony shows that she denied Vicki's initial request for shift coverage. But at this point, according to Ruscher, she had no knowledge of Vicki's illness. Vicki did not communicate to Ruscher about the illness and doctor's note until her second text message. And in this conversation, Vicki asked only for a partial shift coverage, which Ruscher agreed to provide. So contrary to the ULJ's finding, Ruscher did not tell Vicki that she "had to work" despite being ill. Rather, Vicki voluntarily worked a part of the shift. Ruscher's testimony certainly does not reflect any admission that she required Vicki to work despite Vicki's illness.

The only part of the record that supports the ULJ's findings is TeGantvoort's general assertion that Ruscher "forced" Vicki to work. But TeGantvoort provided no details as to his conversation with Vicki and did not identify specific statements by Ruscher that could be construed as forcing Vicki to work. TeGantvoort's assertion

"[f]rom [his] understanding" that Ruscher told Vicki that "she needed to work" is not substantial evidence, especially in light of the absence of Vicki's testimony, copies of the text messages, or other evidence corroborating TeGantvoort's conversation with Vicki. Although we recognize that Ruscher's testimony is also uncorroborated, that evidence is at least based on personal knowledge of her conversation with Vicki. Viewing the evidence in its entirety, TeGantvoort's vague and imprecise testimony on his purported second-hand knowledge of Ruscher's conversation with Vicki is not "such relevant evidence as a reasonable mind might accept as adequate to support [the] conclusion" that Ruscher required Vicki to work. *See CUP Foods, Inc.*, 633 N.W.2d at 563.

We note that even if TeGantvoort's testimony constitutes substantial evidence, the ULJ still erred. Because Vicki did not testify and the record lacks other direct evidence as to her conversation with Ruscher, the ULJ's factual finding that Ruscher required Vicki to work must be based on an acceptance of TeGantvoort's testimony and a rejection of Ruscher's. The ULJ, therefore, made an implicit credibility determination without providing the statutorily required reason. *See* Minn. Stat. § 268.105, subd. 1(c) (2012) (providing that the ULJ "must set out the reason for crediting or discrediting" a witness's testimony when the witness's credibility "has a significant effect on the outcome of a decision"); *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 29 (Minn. App. 2007) (stating that "we cannot search for substantial evidence to support . . . inferences [of credibility] in the absence of specific findings" because "[t]o do so would negate the express [statutory] requirement").

II.

Ruscher also argues that she "honestly felt that Vicki was being dishonest" and her failure to verify Vicki's illness was not misconduct but merely "a temporary lapse of judgment." Again, we agree.

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." Minn. Stat. § 268.095, subd. 6(a) (2012). A "good faith error[] in judgment if judgment was required" is not employment misconduct. Minn. Stat. § 268.095, subd. 6(b)(6) (2012).

The threshold question is whether judgment was required of Ruscher. A situation where judgment is required is one in which the employee is afforded the discretion to select an appropriate course of action. *See Potter v. N. Empire Pizza, Inc.*, 805 N.W.2d 872, 877 (Minn. App. 2011) (holding that an employee's conduct was not a good-faith error in judgment because the employer afforded the employee with no discretion), *review denied* (Minn. Nov. 15, 2011). Here, the ULJ determined that Ruscher believed that Vicki might have been dishonest and that her failure to investigate Vicki's reason to miss work was "a lapse in judgment."

DEED argues that Ruscher's "failing to talk to or question an employee who has said she is sick before having that employee handle food is not a good-faith error in judgment." But under the premise that Ruscher believed that Vicki was dishonest, the question is not whether Ruscher had the discretion to allow a sick employee to

work—Ruscher admitted that she had no such discretion. Instead, the question is whether Ruscher had the discretion to investigate, or not investigate, an employee's reason to miss work when the employee is believed to be lying about an illness. Substantial evidence supports that judgment was required of Ruscher because there was no established procedure on this scenario, Ruscher did not fail to act inconsistently with her training, and she had received no past warnings. *See Ress v. Abbott Nw. Hosp., Inc.*, 448 N.W.2d 519, 525 (Minn. 1989) (considering factors for determining whether judgment was required of an employee).

The next question is whether Ruscher erred in good faith by not investigating Vicki's reason for missing work. "Good faith" is, among other things, a state of mind that is honest and absent of intent to defraud. *Black's Law Dictionary* 762 (9th ed. 2009). The ULJ acknowledged that Ruscher reasonably suspected that Vicki was being dishonest. Nothing in the record reflects that Ruscher herself was dishonest or intended to defraud when she did not confront Vicki about her alleged illness. Rather, the undisputed evidence shows that Ruscher wished to avoid an uncomfortable confrontation with an employee who was also a friend. Accordingly, we agree with the ULJ that Ruscher made a good-faith error in judgment.

DEED argues that "the prudent thing to do . . . would have been to talk to Vicki[] and verify whether she was sick." But prudence is not necessary for the receipt of unemployment benefits. Rather, by providing that a good-faith error in judgment is not employment misconduct, the law recognizes that an employee can make mistakes and may still receive unemployment benefits.

Substantial evidence does not support the ULJ's factual finding that Ruscher required Vicki to work despite her illness. Moreover, because the ULJ correctly determined that Ruscher's failure to investigate Vicki's reason for missing work was a good-faith error in judgment, we conclude as a matter of law, under Minn. Stat. § 268.095, subd. 6(b)(6), that the ULJ erred by determining that Ruscher committed employment misconduct. Ruscher is eligible for unemployment benefits.

Reversed.