STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1535

Patricia Lemke,
Relator,

vs.

ABLE, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed July 1, 2024
Affirmed
Bjorkman, Judge

Department of Employment and Economic Development
File No. 49706405-2

Kyle R. Kroll, Robert B. Grimsley, Winthrop & Weinstine, P.A., Minneapolis, Minnesota (for relator)

ABLE, Inc., Caledonia, Minnesota (respondent employer)

Keri Phillips, Katrina Gulstad, Minnesota Department of Employment and Economic Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Smith, Tracy M., Presiding Judge; Bjorkman, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Relator challenges the determination of an unemployment-law judge (ULJ) that she was ineligible for unemployment benefits because she was not available for suitable employment, and the ULJ's denial of her request for reconsideration. We affirm.

FACTS

Relator Patricia Lemke has worked for respondent ABLE Inc. as a direct support professional for about 20 years. As of January 2023, Lemke worked overnight shifts from 10:00 p.m. to 8:00 a.m., for a total of 30 hours per week. On January 11, Lemke learned that ABLE would be closing the house where she was working and her existing shifts would be eliminated as of January 25. ABLE offered Lemke overnight shifts at two other houses; the shifts ended at either 8:30 a.m. or 8:45 a.m. Lemke did not accept the proposed schedule. When ABLE reached out to her at the end of the month, Lemke said she did not want the proposed shifts because she did not want to work past 8:00 a.m. ABLE only had one house with overnight schedules ending at 8:00 a.m., and other employees were already scheduled to work those shifts. On January 27, Lemke asked to move from regularly scheduled part-time shifts to on-call or substitute status; ABLE granted the request.

On January 29, Lemke established an unemployment-benefits account with respondent Minnesota Department of Employment and Economic Development (DEED). DEED initially determined that Lemke was eligible for benefits. ABLE appealed the eligibility determination.

A ULJ conducted evidentiary hearings in May and June.[1] Lemke testified along with several ABLE representatives. In her testimony, Lemke explained that she and her husband are the primary caregivers for their two young grandchildren; her husband watches them during the night and she watches them during the day, so she needs to be done with work by 8:00 a.m. When the ULJ asked if someone else "could watch them so [she] could work," Lemke responded: "Well, my husband does until I get here, but then I need to be here so he can go to work." She testified that she is not available to work daytime shifts, explaining that she would occasionally pick up daytime shifts if her husband was home with the children, "but otherwise [she] normally just do[es] the overnight shifts." And she reported that even though she is still employed with ABLE, she had not worked a shift since the end of January because "[t]here've been no overnight shifts that [she] could pick up." But ABLE representatives testified that there are shifts available during the day, or evening, or overnight ending at 8:30 a.m. or 8:45 a.m., and that ABLE would provide the necessary training for Lemke to work those shifts.

The ULJ determined that (1) Lemke did not separate from employment with ABLE, so she is not ineligible for benefits under any of the provisions of Minn. Stat. § 268.095 (2022); (2) Lemke did not refuse an offer of suitable employment from ABLE, which would make her ineligible for benefits under Minn. Stat. § 268.085, subd. 13c (2022), because she did not separate from employment; but (3) Lemke had not been available for

[1] The ULJ held the first hearing to determine whether Lemke had good cause for refusing or avoiding an offer of employment. The ULJ reopened the record and set the second hearing to determine whether Lemke quit or was discharged from employment and whether she has been available for and actively seeking suitable employment.

suitable employment since January 29 because she restricted the hours for which she was available for work, making her ineligible for benefits under Minn. Stat. § 268.085, subd. 1 (2022), "continuing unless conditions change." The ULJ noted that if Lemke's circumstances changed "and she has childcare in place during the daytime, and is available to work during daytime, she may contact [DEED] to report" the change.

Lemke requested reconsideration, stating that she has a friend "available if an offer of suitable employment (any hours) is offered," she has "never been offered" daytime hours, she "did not realize" that saying she was looking for overnight hours would disqualify her from benefits, and she "prefer[s] overnights but [is] available for suitable work (any hours) if offered." The ULJ denied reconsideration, explaining that "Lemke's unsworn written statement . . . that she had childcare available during the daytime is not persuasive, or credible, in light of her sworn testimony during the hearing."

Lemke appeals by writ of certiorari.

DECISION

When reviewing an unemployment-benefits eligibility determination, we may "affirm the decision of the unemployment law judge or remand the case for further proceedings." Minn. Stat. § 268.105, subd. 7(d) (2022). We may also reverse or modify the decision if relator's substantial rights "may have been prejudiced" because the decision is "(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious." *Id.*

We review the ULJ's factual findings "in the light most favorable to the decision" and defer to the ULJ's credibility determinations. *Neumann v. Dep't of Emp. & Econ. Dev.*, 844 N.W.2d 736, 738 (Minn. App. 2014) (quotation omitted). We will not disturb the factual findings if the evidence "substantially sustains them." *Id.* (quotation omitted).

To be eligible for unemployment benefits, a person must satisfy several conditions, including being "unemployed" (which does not necessarily mean separated from employment) and "available for" and "actively seeking suitable employment." Minn. Stat. § 268.085, subd. 1(3), (4), (5); *see* Minn. Stat. § 268.035, subd. 26 (2022) (providing that a person is "unemployed" if they "perform[] less than 32 hours of service in employment" and earn less than their "weekly unemployment benefit amount"). And they must not have any circumstances that render them ineligible, such as quitting without good cause or being discharged for employment misconduct. *See* Minn. Stat. § 268.095, subds. 1, 4.

Lemke challenges the ULJ's finding that she was not available for suitable employment and argues that the ULJ abused her discretion by denying reconsideration.[2] We address each argument in turn.

[2] Lemke also asserts that the ULJ erred by determining that she did not separate from employment with respondent employer and relied on erroneous reasoning in determining that she did not refuse an offer of suitable employment. But the sole basis for the ULJ's determination that Lemke was ineligible for benefits is the finding that she was not available for suitable employment. Because any error in the ULJ's reasoning with regard to those other issues did not affect Lemke's substantial rights, we decline to address them.

I. Substantial record evidence supports the ULJ's finding that Lemke was not available for suitable employment.

Whether an applicant is available for suitable employment is a question of fact. *See Semanko v. Dep't of Emp. Serv.*, 244 N.W.2d 663, 665 (Minn. 1976) (stating that "[t]he question of availability for work must be determined anew on the facts of each case"). As noted above, we review factual findings in the light most favorable to the ULJ's decision and will not disturb them if the evidence supports them. *Neumann*, 844 N.W.2d at 738.

"Suitable employment" is defined as employment that is in the person's "labor market area" and "reasonably related" to the person's qualifications. Minn. Stat. § 268.035, subd. 23a(a) (2022). A person is "available for suitable employment" if they are "ready, willing, and able to accept suitable employment." Minn. Stat. § 268.085, subd. 15(a) (2022). Conversely, a person is not "available for suitable employment" if they impose restrictions on when they will work—hours of the day or days of the week—that are "not normal for [their] usual occupation or other suitable employment." *Id.*, subd. 15(d) (2022). A person seeking unemployment benefits "must be available for daytime employment, if suitable employment is performed during the daytime, even though [they] previously worked the night shift." *Id.*

The ULJ found that suitable employment includes daytime shifts and Lemke has limited her availability to overnight shifts that end by 8:00 a.m. because she has caregiving responsibilities for her young grandchildren starting at that time. Lemke does not dispute that suitable employment includes daytime shifts. But she contends the ULJ erred in finding that she restricted her availability because "the testimony reveals [she] was

available at various times throughout the day." The record defeats this argument. Lemke testified expressly and repeatedly that she takes care of her grandchildren during the day, starting at 8:00 a.m., and is unavailable for daytime shifts or overnight shifts that end after that time. ABLE representatives similarly testified that Lemke told them she would not work past 8:00 a.m.

Lemke also asserts that the ULJ erred by failing to elicit further information from her about who else might be available to watch her grandchildren during the day so she could work. She is correct that ULJs are required to "assist all parties in the presentation of evidence" and "ensure that all relevant facts are clearly and fully developed." Minn. R. 3310.2921 (2021). But she has not demonstrated that the ULJ failed to do so. To the contrary, when Lemke testified to her 8:00 a.m. deadline, the ULJ expressly asked if "someone else" could watch the children "so [she] could work," to which Lemke responded: "Well, my husband does until I get here, but then I need to be here so he can go to work." Given that response and Lemke's repeated statements that she is unavailable for work during the daytime because of her caregiving responsibilities, we see no error by the ULJ in not inquiring further.

Nor are we persuaded by Lemke's similar argument that the ULJ limited her ability to testify about her availability by excluding an exhibit she submitted to DEED before the second hearing.[3] A ULJ has broad discretion in evidentiary matters. *See* Minn. R. 3310.2922 (2021) (addressing receipt of evidence). And even improper exclusion of

[3] The ULJ excluded the exhibit because ABLE had not received a copy of it before the hearing.

evidence does not warrant reversal if it was harmless. *See Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 530 (Minn. App. 2007). That is the situation here. The exhibit in question comprises Lemke's timeline of events, her work search record, and text messages she exchanged with a coworker. In excluding the exhibit, the ULJ invited Lemke to testify about its *contents* and Lemke did so—she described the events of early 2023, her work search, and her communications with coworkers. She does not identify anything in the exhibit that she was prevented from testifying about or anything in the exhibit that would have shown that, despite her testimony, she was available for daytime work. Accordingly, we discern no prejudice in its exclusion.

In sum, we are satisfied that the ULJ appropriately elicited relevant evidence from Lemke and the other witnesses and that substantial evidence supports the finding that Lemke was unavailable for suitable employment.[4]

II. The ULJ did not abuse her discretion by denying Lemke's request for reconsideration.

A ULJ must order an additional hearing if a party shows that evidence not submitted at the hearing (1) "would likely change the outcome of the decision" and the party had "good cause" for not submitting it previously, or (2) would show that the evidence submitted at the hearing "was likely false and that the likely false evidence had an effect

[4] Lemke contends the ULJ erred by determining that she was overpaid benefits. But she does not dispute that she received benefits, and the record supports the ULJ's determination that she was unavailable for suitable employment and therefore ineligible to receive benefits. Because those are the only two criteria for an overpayment, Minn. Stat. § 268.101, subd. 6 (2022), and Minnesota law expressly prohibits any "equitable" allowance of benefits, Minn. Stat. § 268.069, subds. 1, 3 (2022), we discern no error in the overpayment determination.

on the outcome of the decision." Minn. Stat. § 268.105, subd. 2(c) (2022). We defer "to a ULJ's decision not to hold an additional hearing and will reverse that decision only for an abuse of discretion." *Eley v. Southshore Invs., Inc.*, 845 N.W.2d 216, 218 (Minn. App. 2014) (quotation omitted).

Lemke asserts two challenges to the denial of her reconsideration request. First, she argues that the ULJ abused her discretion by rejecting Lemke's statement that she has daytime childcare as not credible simply because it conflicted with Lemke's testimony. Lemke attributes her testimony that she was unable to work during the day to the fact she "is not an attorney and would have no reason to understand the nuances of Minnesota unemployment law." But the ULJ's decision did not hold her to such a standard. It merely held her to the obligation to testify truthfully and declined to order an additional hearing based on a new, unsworn statement that contradicted Lemke's sworn testimony about needing to care for her grandchildren during the day.

Second, Lemke contends the ULJ improperly rejected the new statement because she "followed the exact instructions" the ULJ provided in the initial decision. This contention conflates the merits of the ULJ's decision with its scope. The issue before the ULJ was whether Lemke was available for suitable employment between the end of January 2023 and the evidentiary hearings in May and June 2023; the ULJ determined Lemke was not available (and thus ineligible for benefits) during that time frame and "continuing unless conditions change." The instructions Lemke points to further spell out the scope of the ULJ's decision: "If Lemke's circumstances have changed and she has childcare in place during the daytime, and is available to work during daytime, she may

contact [DEED] to report that her circumstances have changed . . . ." In other words, the instructions advise Lemke that her ineligibility will continue until she becomes available for daytime work. As such, the instructions neither undermine nor conflict with the ULJ's supported decision under review or otherwise warrant reconsideration.

Affirmed.