IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MICHELLE LUCERO,

Petitioner-Respondent,

v. **No. A-1-CA-40468**

NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS,

Respondent-Petitioner,

and

AZTEC ABSTRACT & TITLE,

Respondent.

APPEAL FROM THE DISTRICT COURT OF ROOSEVELT COUNTY
David P. Reeb, District Court Judge

New Mexico Legal Aid
Joel Jasperse
Gallup, NM

for Respondent

Office of General Counsel
Andrea Christman
Rachael Rembold
Albuquerque, NM

for Petitioner

DISPOSITIONAL ORDER QUASHING WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

ATTREP, Chief Judge.

{1} This matter is before this Court upon our grant of the Department of Workforce Solutions' (the Department) petition for a writ of certiorari to the district court under Rule 12-505 NMRA. The Department seeks review of the district court's determination that Petitioner-Respondent Michelle Lucero was entitled to unemployment compensation benefits. We quash the writ of certiorari and explain our reasons for doing so in this dispositional order.

{2} Lucero was employed by Aztec Abstract & Title (Aztec). On March 24, 2020, Lucero was asked to leave the workplace due to concerns that she was infected with COVID-19 and was told not to return until she had proof that she had not contracted the virus. Three days later, on March 27, 2020, Bessie Engram, Lucero's supervisor and the president of Aztec, terminated Lucero. Lucero applied for and was awarded unemployment compensation benefits. Aztec appealed the award to the Department's appeals tribunal, contending Lucero was terminated for "misconduct" and therefore not entitled to unemployment compensation benefits. *See* NMSA 1978, § 51-1-7(A)(2) (2011) (providing that an individual will be denied benefits if they have been "discharged for misconduct connected with the individual's employment"). After a hearing before an administrative law judge (ALJ), the appeals tribunal affirmed the award of unemployment compensation benefits. The ALJ

found that "the weight of credible testimony and evidence [does not] establish any misconduct on the part of [Lucero]"; thus, the appeals tribunal ruled, Lucero was not discharged for disqualifying "misconduct" under Section 51-1-7(A)(2).

{3} Aztec then appealed to the Department's board of review (the Board), which reversed the appeals tribunal. The Board found that Aztec terminated Lucero for creating a hostile work environment, which, the Board concluded, amounted to disqualifying "misconduct" under Section 51-1-7(A)(2). *See Fitzhugh v. N.M. Dep't of Lab., Emp. Sec. Div.*, 1996-NMSC-044, ¶ 42, 122 N.M. 173, 922 P.2d 555 (defining "misconduct" in the context of unemployment compensation benefits to mean such conduct "in which employees bring about their own unemployment by such callousness, and deliberate or wanton misbehavior that they have given up any reasonable expectation of receiving unemployment benefits"). Lucero then petitioned the district court for a writ of certiorari, and the district court, in turn, reversed the Board. The district court concluded there was insufficient evidence to establish that Lucero was fired for engaging in disqualifying misconduct. It did so because of Engram's unequivocal sworn testimony before the ALJ that Lucero was terminated for absenteeism and because the record was devoid of evidence establishing that Lucero's absenteeism was chronic or that she had ever been warned about her absenteeism. *See Chavez v. Emp. Sec. Comm'n*, 1982-NMSC-077, ¶ 4, 98 N.M. 462, 649 P.2d 1375 (explaining that absenteeism constitutes willful

misconduct when it is persistent or chronic, and continues despite warnings from the employer). As a result, the district court concluded that the Board's decision was not supported by substantial evidence, was arbitrary and capricious, and was contrary to law. *See* Rule 1-077(J) NMRA. The Department petitioned this Court for a writ of certiorari, arguing there was substantial evidence in the record that Lucero was terminated for misconduct and that the district court erred in concluding otherwise. We granted the Department's petition.

{4} The dispute before the district court and this Court centers on whether substantial evidence in the record as a whole supports the Board's finding that Lucero was terminated for misconduct. *See* Rule 1-077(J) (setting out the scope of review before the district court); *Fitzhugh*, 1996-NMSC-044, ¶ 23 (providing that, under the whole record standard of review, "we look not only at the evidence that is favorable, but also evidence that is unfavorable to the agency's determination"). We have carefully reviewed the district court's reasoning for its conclusion that the Board's finding was not supported by substantial evidence, as well as the evidence before both the Board and the district court. For the reasons that follow, we perceive no error in the district court's decision and no other basis for certiorari review.

{5} The Department does not dispute that if Lucero was terminated for absenteeism, premised on her having missed three consecutive days of work, her absenteeism did not rise to the level of misconduct necessary to disqualify her from

receiving unemployment benefits. *See Chavez*, 1982-NMSC-077, ¶ 4. As discussed, in determining that there was no disqualifying misconduct, the district court cited Engram's unequivocal sworn testimony that she terminated Lucero solely because of Lucero's absenteeism. In an attempt to avoid the effect of Engram's admission, the Department argues that "the record contains uncontroverted, first-hand testimony regarding the threatening behavior of [Lucero]," and that "[a] reasonable person, looking at all of [Lucero's] actions, would find that [Lucero] created a hostile work environment." But whether Lucero may have created a hostile work environment is not the pertinent inquiry. As the Department itself recognizes, what matters is *why* Aztec terminated Lucero. *See Fitzhugh*, 1996-NMSC-044, ¶ 38 (examining, under Section 51-1-7(B), why an employee was terminated).

{6} While it is true that one of Lucero's coworkers testified that Lucero verbally threatened her the day before Lucero was terminated, Engram acknowledged that she found out about this incident only *after* she had terminated Lucero. The Department next suggests that we disregard Engram's admission that Lucero was terminated solely for absenteeism as a "misstatement," and that greater weight be given to Engram's hearsay statements to Lucero that she was terminated because "it's too toxic" and because "there's too much hostility over there." We, however, find no fault in the district court's determination that Engram's sworn admission prevailed over her hearsay statements. *See Chavez*, 1982-NMSC-077, ¶¶ 10-12

(reversing a determination that the employee was discharged for misconduct where the evidence was in conflict and the only evidence in support of a finding of misconduct was hearsay); *see also Tallman v. ABF*, 1988-NMCA-091, ¶ 16, 108 N.M. 124, 767 P.2d 363 ("While the administrative agency's findings are entitled to respect, they must nonetheless be set aside when the record before the reviewing court clearly precludes the agency's decision from being justified by a fair estimate of the worth of the testimony of witnesses." (internal quotation marks and citation omitted)); *Trujillo v. Emp. Sec. Dep't*, 1987-NMCA-008, ¶ 17, 105 N.M. 467, 734 P.2d 245 (providing that the district court must consider all evidence "in light of the entire record" and that it may make its own independent findings "where the decision of the administrative agency is not supported by substantial evidence").

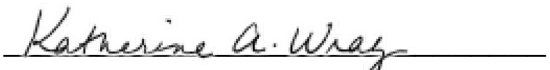
{7} Finding no error in the district court's application of the required standard of review and being presented with no significant dispute of constitutional law or substantial public interest, we conclude that certiorari was improvidently granted in this case. *See* Rule 12-505(D)(2)(d) (setting out the bases for granting a writ of certiorari); *see also State v. Conn*, 1993-NMSC-004, ¶¶ 7, 12, 115 N.M. 99, 847 P.2d 744 (providing that certiorari review is not appropriate when none of the bases for granting the writ are present). We, therefore, quash the writ of certiorari.

{8} **IT IS SO ORDERED.**

JENNIFER L. ATTREP, Chief Judge

WE CONCUR:

KRISTINA BOGARDUS, Judge



KATHERINE A. WRAY, Judge