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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1587**

Jeffrey N. Field,
Relator,

vs.

Commonbond Housing (Corp.),
Respondent,

Department of Employment
and Economic Development,
Respondent.

**Filed April 23, 2012
Affirmed
Klaphake, Judge**

Department of Employment and Economic Development
File No. 27767556-3

Kevin R. O'Rourke, Benjamin J. Court, Messerli & Kramer, P.A., Minneapolis,
Minnesota (for relator)

Commonbond Housing (Corp.), St. Louis, Missouri (respondent)

Lee B. Nelson, Amy Lawler, Department of Employment and Economic Development,
St. Paul, Minnesota (for respondent Department of Employment and Economic
Development)

Considered and decided by Klaphake, Presiding Judge; Stoneburner, Judge; and
Cleary, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Relator Jeffrey Field challenges the decision of an unemployment law judge (ULJ) to deny him unemployment benefits after he was discharged for misconduct from his employment as a maintenance technician with Commonbond Housing Corporation (Commonbond), a non-profit provider of affordable housing. Because there is substantial record evidence to support the ULJ's decision that relator was properly dismissed for misconduct and because the ULJ did not commit reversible error by failing to consider newly discovered evidence, we affirm.

DECISION

In unemployment cases, this court may reverse, remand, or modify a decision of a ULJ if, among other reasons, the decision is unsupported by substantial evidence, affected by an error of law, or is arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d) (2010). This court reviews questions of law de novo but will not disturb findings of fact unless unsupported by substantial evidence. *Stagg v. Vintage Place*, 796 N.W.2d 312, 315 (Minn. 2011); *Yswsf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007).

There is substantial record support for the ULJ's decision. Employment misconduct is exclusively defined by statute, and includes "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) (2010). Unemployment caselaw includes in the definition of misconduct tardiness or absenteeism. *See Stagg*, 796 N.W.2d at 317 (holding that employee discharged for excessive absenteeism and tardiness committed employment misconduct); *Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 417 (Minn. App. 1986) (holding that even a single work absence without permission may constitute misconduct); *Little v. Larson Bus Serv.*, 352 N.W.2d 813, 815 (Minn. App. 1984) (stating that an employer has a reasonable expectation that an employee will work scheduled hours).

The ULJ heard conflicting testimony on how a discrepancy occurred between relator's on-camera arrival to work and his claimed arrival time on his timesheets. Relator explained the discrepancy by testifying that he entered his work site via an entrance that did not have a camera and that he had a work-related reason for doing so. Commonbond witnesses contradicted relator's testimony, stating that generally relator had no reason to enter the building through an alternate entrance and that even if he did enter from an alternate entrance, he would have been visible on-camera. The Commonbond witnesses also suggested that relator's excuse was invalid because when he later entered the main entrance, he carried his lunch bag. The ULJ decision states that relator's testimony "was credibly rebutted by his supervisor." This court must defer to a ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (stating that appellate court defers to ULJ's credibility determinations). On this record, there is substantial evidence to support the ULJ's decision.

Relator claims that the ULJ's decision should be reversed because relator's conduct did not constitute misconduct as a matter of law. He cites *Tuckerman Optical Corp. v. Thoeny*, 407 N.W.2d 491, 493 (Minn. App. 1987), for the proposition that a "good faith misunderstanding of the employer's rules or policies does not constitute misconduct." See Minn. Stat. § 268.095, subd. 6(b)(6) (2010) (excluding from definition of employment misconduct "good faith errors in judgment if judgment was required"). Relator claims that by arriving at work each morning and immediately tending to his garbage duties, he did not commit misconduct. Relator's argument depends on there being no discrepancy between relator's logged hours and his actual arrival at work, which is contrary to the ULJ's findings. Further, relator was warned previously about his work hours and was late for work on numerous occasions. These facts, as found by the ULJ, contradict relator's claim that he acted in good faith or with regard for the employer's interest for purposes of determining whether he committed misconduct.

Relator also asserts that the ULJ committed reversible error by failing to hold a second evidentiary hearing to consider newly discovered evidence of relator's work logs that were in the possession of Commonbond and that this evidence supported relator's claims and contradicted Commonbond's claims. A sample work log for May 2 shows that relator arrived at work at 8:30 and worked on "garbage" until 8:45, arrived at work on May 3 at 7:30 and worked on "garbage" until 9:00, and arrived at work on May 5 at 7:30 and worked on "garbage" until 8:30.

A ULJ must hold an evidentiary hearing to consider evidence not submitted at the first evidentiary hearing if the new evidence "would likely change the outcome of the

decision and there was good cause for not having previously submitted that evidence” or if the new evidence would show that previously submitted evidence was “likely false” and had an effect on the decision outcome. Minn. Stat. § 268.105, subd. 2(c) (2010). Relator claims that he had good cause for not having previously submitted the evidence of his work logs because they were in the possession of Commonbond. However, he has not shown that the work logs would have likely changed the outcome of his case. He testified that he was working on garbage most mornings. The work logs support that testimony, to a degree. However, the work logs do not explain the discrepancy between relator’s start times on the work logs and the camera videotapes, especially in light of the ULJ’s credibility findings favoring Commonbond employees, who stated that relator had been previously warned about arriving late to work and who discredited relator’s excuse for arriving late. Under these circumstances, the ULJ did not err by denying relator’s request for a second evidentiary hearing.

Affirmed.