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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0926**

Jeremy Olsen,
Relator,

vs.

PDS Heart Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed May 20, 2008
Affirmed
Shumaker, Judge**

Department of Employment and Economic Development
File No. 1540 07

Jeremy Olsen, 23114 Bittersweet Street Northwest, St. Francis, MN 55070 (pro se relator)

PDS Heart Inc., 1801 Centrepark Drive East, Suite 110, West Palm Beach, FL 33401-7426 (respondent-employer)

Lee B. Nelson, Katrina I. Gulstad, Minnesota Department of Employment and Economic Development, E200 First National Bank Building, 332 Minnesota Street, St. Paul, MN 55101-1351 (for respondent-department)

Considered and decided by Toussaint, Chief Judge; Willis, Judge; and Shumaker, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

In this certiorari appeal, the pro se relator challenges the decision of the unemployment-law judge (ULJ) disqualifying him from receiving unemployment benefits due to employment misconduct. We affirm.

FACTS

Relator Jeremy Olsen worked full time as a regional accounts manager for PDS Heart, Inc. from April 16, 2006 through December 18, 2006. On December 18, Olsen and his supervisor, Jeffrey Finkelmeier, drove from Minneapolis to Rochester, Minnesota for a meeting at Mayo Clinic. During the drive, Finkelmeier asked Olsen about his workday, inquiring specifically about how he spent his workday. According to Finkelmeier, Olsen admitted that he only spent three days in the field, worked the rest of the days from his home, and conducted client audits by telephone instead of going to their offices as required.

That day at lunch, Finkelmeier explained to Olsen that he was concerned about Olsen's work patterns, low customer enrollment, behavior of spending only three days in the field, and inability to provide details on the work he had performed. According to Finkelmeier, Olsen admitted "that he had reached his breaking point"; that he was not motivated by his job, but rather was motivated by professional poker; and that he did not want his job. In light of this information, Finkelmeier told Olsen he would be terminated and gave him the option of being terminated and filing for unemployment or resigning and receiving a reference.

Olsen chose to be terminated and filed for unemployment benefits, but the Department of Employment and Economic Development (DEED) determined he was disqualified from receiving benefits because he was discharged for employment misconduct.

Olsen appealed, and a ULJ held a de novo evidentiary hearing. Finkelmeier testified as to what Olsen had said during the drive to Rochester and during their lunch on December 18. He also expressed his concern that Olsen's online gambling habit was interfering with his work. Olsen denied that he gambled during work hours and denied saying that he had reached his breaking point with the job, that he did not want the job, that he only worked in the field a couple days a week, and that he conducted audits over the phone instead of in person. But the ULJ found Olsen to be not credible. The ULJ concluded that Olsen was discharged due to his employment misconduct and was thus disqualified from receiving unemployment benefits.

Olsen requested reconsideration, but the ULJ affirmed his decision. This certiorari appeal followed.

D E C I S I O N

On certiorari appeal, this court may affirm the ULJ's decision, remand it for further proceedings, or reverse or modify it if the relator's substantial rights

may have been prejudiced because the findings, inferences, conclusion, or decision are:

- (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.

Minn. Stat. § 268.105, subd. 7(d) (2006). Findings of fact are reviewed in the light most favorable to the ULJ's decision, *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006), and will be upheld if supported by substantial evidence, Minn. Stat. § 268.105, subd. 7(d)(5). Substantial evidence means “(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; or (5) the evidence considered in its entirety.” *Minn. Ctr. for Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

If an employer discharges an employee for “employment misconduct,” the employee is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2006). Minnesota law defines “employment misconduct” as “any intentional, negligent, or indifferent conduct, on the job or off the job (1) that displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee, or (2) that displays clearly a substantial lack of concern for the employment.” *Id.*, subd. 6(a) (2006). But

[i]nefficiency, inadvertence, simple unsatisfactory conduct, a single incident that does not have a significant adverse impact on the employer, conduct an average reasonable employee would have engaged in under the circumstances, poor performance because of inability or incapacity, good faith errors in judgment if judgment was required, or absence because of illness or injury with proper notice to the employer, are not employment misconduct.

Id.

Whether an employee committed misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). “Whether the employee committed a particular act is a question of fact.” *Skarhus*, 721 N.W.2d at 344. But “[w]hether a particular act constitutes disqualifying misconduct is a question of law, which this court reviews de novo.” *Schmidgall*, 644 N.W.2d at 804.

Olsen challenges the conclusion that he was discharged because of employment misconduct. The ULJ explained that the evidence showed that Olsen had been discharged because he admitted he was not motivated to do his job, failed to perform his work in the field as required, was unable to provide specifics about where he had been the previous week, failed to go to client audits in person, and spent work hours gambling online. On appeal, Olsen does not dispute that this sort of conduct constitutes employment misconduct; rather, he contends that he did not engage in such behavior.

At the review hearing, the ULJ heard conflicting testimony from Finkelmeier and Olsen, and ultimately, the ULJ chose to believe Finkelmeier. Olsen argues the ULJ should have believed him instead. In support of this argument, Olsen points out that Finkelmeier offered him the choice of either quitting and getting a reference or being discharged and collecting unemployment. From this offer, Olsen deduces that he must not have committed any misconduct, reasoning that if he had, he would have been fired on the spot or else Finkelmeier would have had to lie in the reference letter.

Olsen’s logic is not persuasive. First, there is no evidence that Finkelmeier was making a legal determination as to whether Olsen would qualify for unemployment benefits under Minnesota law or that he was qualified to make such a determination.

Second, Olsen's argument that he would have been fired on the spot if misconduct had actually occurred is entirely speculative. Third, the evidence in the record does not indicate what the reference letter from Finkelmeier would have stated, and thus it is not clear that Finkelmeier would have lied in that reference.

Moreover, Olsen's argument at its core is directed at Finkelmeier's credibility, and on review, we defer to the ULJ's ability to weigh the evidence and make this credibility determination. See *Nichols v. Reliant Eng'g & Mfg., Inc.*, 720 N.W.2d 590, 594 (Minn. App. 2006) (stating that deference is appropriate "[w]hen witness credibility and conflicting evidence are at issue"). The ULJ believed Finkelmeier's testimony, which detailed the reasons for Olsen's discharge. This testimony provides substantial evidence to support the conclusion that Olsen's discharge was due to employment misconduct, namely his failure to perform his job duties as required, gambling during work hours, and his admission that he was not motivated by the job and did not want it. See Minn. Stat. § 268.095, subd. 6(a) (defining employment misconduct).

Olsen next argues that the ULJ erred by failing to provide support for his credibility determination. "When the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the unemployment law judge must set out the reason for crediting or discrediting that testimony." Minn. Stat. § 268.105, subd. 1(c) (2006). Failure to do so is a basis for remand. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 29 (Minn. App. 2007).

Contrary to Olsen’s assertion, the ULJ did set forth the basis for his credibility determination. At Olsen’s evidentiary hearing, the ULJ heard conflicting evidence on the reason for Olsen’s discharge, with both parties providing testimony on their version of the facts. Based on this testimony, the ULJ determined that Olsen “[wa]s not credible” and that Finkelmeier “[wa]s more credible and believable than . . . Olsen.” As required by statute, the ULJ set forth the basis for this credibility determination, explaining that Olsen’s “testimony was inconsistent and lacked clarity. Finkelmeier provided consistent and thorough testimony regarding the December 18, 2006 discussion. Finkelmeier did not have a vested interest in this matter. Finkelmeier stated that he did not object to Olsen receiving unemployment benefits.” Olsen has not explained why this explanation is insufficient.

The ULJ specifically found that Finkelmeier had no interest in the outcome of this case and that his testimony was thorough and consistent. In *Ywswf v. Teleplan Wireless Servs., Inc.*, we reviewed some of the factors that an agency decision-maker might consider when making credibility determinations, which included the witness’s interest in the outcome of the case, the reasonableness of the witness’s testimony, and “the manner in which [the witness] described” the facts. 726 N.W.2d 525, 532-33 (Minn. App. 2007). In light of this caselaw and the ULJ’s explanation, Olsen’s claim that the ULJ failed to set forth the basis for the credibility determination lacks merit.

Affirmed.