STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1191

Michael D. Feeney,
Relator,

vs.

Department of Revenue,
Respondent,

Department of Employment
and Economic Development,
Respondent.

Filed July 1, 2008
Affirmed
Hudson, Judge

Department of Employment
and Economic Development
File No. 4593 07

Michael D. Feeney, 2351 Minnehaha Avenue East, Maplewood, Minnesota 55119-3834 (pro se relator)

Department of Revenue, Attn: Personnel Office, 600 Robert Street North, St. Paul, Minnesota 55146-6000 (respondent)

Lee B. Nelson, Katrina I. Gulstad, Department of Employment and Economic Development, 1st National Bank Building, 332 Minnesota Street, Suite E200, St. Paul, Minnesota 55101-1351 (for respondent Department of Employment and Economic Development)

Considered and decided by Hudson, Presiding Judge; Shumaker, Judge; and Schellhas, Judge.

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

HUDSON, Judge

On certiorari appeal from the decision by the unemployment-law judge (ULJ) that relator was disqualified from receiving unemployment benefits because he was discharged for employment misconduct, relator argues that the ULJ erred in denying him benefits because his conduct at a staff meeting did not constitute employment misconduct. Relator also argues that the ULJ erred in denying his request to reopen the record. We affirm.

FACTS

Relator Michael Feeney was employed with the Minnesota Department of Revenue (MDR) from February 23, 1984, through February 8, 2007. Relator began his employment on a seasonal basis, and he was made a permanent full-time employee in September 1988. Relator's final position with the MDR was as an office specialist earning $15.48 per hour.

In February 2005, the MDR suspended relator for two days without pay because he made an obscene hand gesture toward his supervisor, Sheila Barnes. Relator was admonished for his behavior and warned that any similar incidents would result in further discipline, "up to and including discharge." A month later, relator was suspended for five days without pay for using profanity when speaking with Nancy Baker, one of the lead workers. Relator was again told that his behavior was unacceptable, and that "[c]ontinued instances of inappropriate behavior will be subject to more severe disciplinary action up to and including discharge."

In July 2006, relator was suspended for ten days without pay for violating MDR's "Code of Conduct" regarding respectful treatment of others and the "Workplace Violence Statewide Policy." Specifically, relator was suspended for intentionally forcing his OPEX machine against his cubicle wall, damaging the machine and cutting off power to his cubicle and two adjacent cubicles. Relator was also warned for using a loud and disrespectful voice and for disrupting and frightening his co-workers. The letter suspending relator warned him that any future "actions performed by you that demonstrate disrespectful treatment of others, including your supervisor, insubordination towards your supervisor or actions that display violence in the workplace, create a hostile work environment or are deemed to be inappropriate will result in discharge."

On December 5, 2006, relator was involved in an argument with another employee, Pam Fonseth, during a staff meeting. The argument began after Fonseth questioned the supervisor about the process for requesting leave time, and why it was that the same people were always approved for leave around the holidays. Relator was offended by Fonseth's question because he believed the comment was directed at him. Relator was also angry with Fonseth because of an incident that occurred in June 2006, when relator believed Fonseth made a leave request for another employee before that other employee arrived at work, causing relator's request for time off that same day, December 26, 2006, to be rejected because it was not the first request received. The discourse between relator and Fonseth was loud, made other employees uncomfortable, and lasted between five and ten minutes. It finally ended when relator said: "I can damn

well take whatever the hell time off I want." Relator then abruptly left the meeting to go to a doctor's appointment for which his leave time had previously been approved.

Following the incident at the staff meeting, an investigation was conducted by MDR. On February 8, 2007, MDR discharged relator because of his "repeated disregard for [MDR's] Code of Conduct regarding respectful treatment of others, the [MDR's] Harassment Policy, and the Workplace Violence Statewide Policy, Zero Tolerance." MDR also disciplined Fonseth for her conduct at the meeting.

After the termination of his employment with MDR, relator established a benefit account with respondent Minnesota Department of Employment and Economic Development (department). A department adjudicator initially determined that relator was discharged for employment misconduct and, therefore, was disqualified from receiving benefits. Relator appealed that determination and, following a de novo hearing, the unemployment-law judge (ULJ) ruled that relator was disqualified. Relator subsequently filed a request for reconsideration with the ULJ, who affirmed his decision that relator was discharged for employment misconduct. The ULJ also denied relator's request to reopen the record. This certiorari appeal follows.

D E C I S I O N

This court may reverse or modify the decision of a ULJ if the substantial rights of the petitioner may have been prejudiced because the ULJ's findings, inferences, conclusion, or decision are affected by error of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2006). 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 Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

I

Employees discharged for misconduct are disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2006). "Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether an employee committed the alleged act is a fact question. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). This court defers to the ULJ's credibility determinations and findings of fact. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). But whether a particular act constitutes employment misconduct is a question of law, which this court reviews de novo. *Schmidgall*, 644 N.W.2d at 804.

Employment misconduct is defined 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.
>
> Inefficiency, 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.

Minn. Stat. § 268.095, subd. 6(a) (2006).

The ULJ found that relator had a "history of progressive discipline for inappropriate conduct," and that his "last warning in July 2006 included the admonition that similar behavior would result in discharge." The ULJ also found that MDR "had a right to reasonably expect that [relator] would conduct himself appropriately during the staff meeting. [Relator] did not act appropriately. He was argumentative, used inappropriate language, and was insubordinate when he ignored his supervisor's directive to stop." Thus, the ULJ concluded that relator's conduct constituted employment misconduct.

Relator argues that the ULJ erred in denying his request for unemployment benefits because the incident on December 5, 2006, did not constitute employment misconduct. But a knowing violation of an employer's directives, policies, or procedures may constitute employment misconduct because it demonstrates a substantial lack of concern for the employer's interests. *Schmidgall*, 644 N.W.2d at 804. Here, relator's supervisor, Barnes, testified that the argument during the staff meeting lasted approximately ten minutes, and that the other employees were very uncomfortable with the situation. Barnes also testified that relator ignored her requests to stop the argument, and that there was yelling, cursing, and screaming during the argument. Relator admitted at the hearing to cursing during the argument, and that "I raised my voice which I shouldn't have." Relator's conduct during the staff meeting clearly displayed a serious

violation of the standards of behavior MDR had a right to reasonably expect from an employee. *See* Minn. Stat. § 268.095, subd. 6(a). Accordingly, the ULJ did not err in concluding that relator was discharged for employment misconduct.

Relator also contends that his conduct at the staff meeting did not merit discharge, and that it was only after he became vice-president and later president of the local union that his problems with MDR arose. But relator offers no evidence that his union activity had anything to do with the disciplinary actions. Moreover, the record reflects that relator's discharge was not solely attributable to his conduct at the staff meeting. Before the December 5 staff meeting, relator had been formally disciplined three times for inappropriate behavior. After the third incident for which relator was disciplined, relator was specifically warned that any future "inappropriate" behavior "will result in discharge." Relator admitted at the hearing that he was aware that further inappropriate behavior would result in his discharge from employment. The ULJ properly concluded that relator was disqualified from receiving unemployment benefits.

II

Minnesota law provides that:

> In deciding a request for reconsideration, the unemployment law judge shall not, except for purposes of determining whether to order an additional evidentiary hearing, consider any evidence that was not submitted at the evidentiary hearing conducted under subdivision 1.
>
> The unemployment law judge must order an additional evidentiary hearing if an involved party shows that evidence which was not submitted at the evidentiary hearing: (1) would likely change the outcome of the decision *and* there was good cause for not having previously submitted that

> evidence; or (2) would show that the evidence that was submitted at the evidentiary hearing was likely false and that the likely false evidence had an effect on the outcome of the decision.

Minn. Stat. § 268.105, subd. 2(c) (2006) (emphasis added).

In his request for reconsideration, relator sought to introduce evidence that was not introduced at the evidentiary hearing. Specifically, relator sought to introduce a handwritten statement from a co-worker, John Bloomquist, regarding the December 5 incident.[1] In declining to consider this evidence, the ULJ found that relator failed to show good cause for not previously submitting the evidence. The ULJ also found that "even if the statements were made a part of the record, they would not show that the evidence submitted at the evidentiary hearing was likely false or that they would likely change the outcome of the decision."

The record supports the ULJ's decision. Relator failed to show good cause for failing to submit the new evidence. Under the statute, that is enough to deny relator's request to reopen the record. *See* Minn. Stat. § 268.105, subd. 2(c) (stating that an additional evidentiary hearing should only be granted if the new evidence "would likely change the outcome of the decision *and* there was good cause for not having previously submitted that evidence" (emphasis added)). Moreover, the additional evidence would not have changed the outcome of the decision. At the hearing, relator admitted to acting

[1] In addition to a second statement from John Bloomquist, relator attached to his informal brief a statement from another co-worker and a statement from his union attorney. These statements were not part of the record below and, therefore, we decline to consider them in this appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582–83 (Minn. 1988) ("An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below.").

inappropriately at the staff meeting. The statement relator attempted to submit to the ULJ and the statements he is now attempting to submit for the first time on appeal do not dispute relator's concessions. At most, the statements simply claim that relator is being unfairly singled out. The ULJ considered these claims at the de novo hearing and apparently found such claims to be incredible. *See Nichols v. Reliant Eng'g & Mfg., Inc.*, 720 N.W.2d 590, 594 (Minn. App. 2006) (noting that credibility determinations are resolved by the ULJ and that this court will defer to those determinations on appeal). Thus, the ULJ did not err in denying relator's request to reopen the record.

Affirmed.