STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1351

Jay K. Farhat,
Relator,

vs.

GGNSC Wayzata LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed July 22, 2008
Reversed
Minge, Judge

Department of Employment and Economic Development
File No. 4382 07

Jay K. Farhat, 216 Yoho Drive, Anoka, MN 55303-1901 (pro se relator)

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

Considered and decided by Klaphake, Presiding Judge; Minge, Judge; and Wright, Judge.

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

MINGE, Judge

Relator appeals an unemployment law judge's (ULJ) determination that he was discharged from employment as a result of misconduct and is therefore disqualified for

unemployment insurance benefits. Because the record does not support the conclusion that relator engaged in employment misconduct, we reverse.

FACTS

Relator Jay Farhat was employed by GGNSC Wayzata LLC (employer) from October 18, 2000 through January 29, 2007 as a dining service manager. He worked full time at a rate of $23.47 per hour. As part of his duties, he scheduled kitchen workers, and he was allotted a certain number of labor hours per week for kitchen operations. He understood that he was not to exceed these hours on an annualized basis.

Farhat scheduled employees to work 56 hours more than was allotted to his department for the week of January 18 to January 24. Farhat testified the overage was due to three unusual considerations: A new employee was trained to order food in accord with his supervisor's instructions; this required 16 hours. Two other new staff members had 6.6 extra hours for their orientation. Finally, a cook had suffered a work-related injury and was placed on restricted duty. Other staff members were scheduled to perform her cooking duties. Although the injured cook was paid for 35 hours of work that week, her presence did not reduce the need for other staff time. This accounted for the extra hours.

On January 26, 2007, Farhat's supervisor spoke to him about the excess hours in his scheduling for the week of January 18 to January 24. She informed him that because his department had exceeded his allotment of labor hours for the week, he would be terminated effective January 29. Farhat's supervisor testified that Farhat knew that he was not authorized to schedule labor overages without prior approval, and that they "had

talked about it before." The supervisor did not testify and the ULJ did not find whether a weekly, as opposed to annual, overage required such approval.

In addition to saying that he tracked his hours annually, Farhat testified that he had reduced the number of hours needed to operate his department by 2,700 hours in the previous years and that this was three percent under the number of hours allocated. His supervisor did not challenge Farhat's claim that prior to January 26 he had not been told of the importance of the weekly allotment and stated that she did not know whether he was over his allotted hours for the year. The supervisor testified that the employer reviewed hours on a weekly or bi-weekly basis, that "[each] department has so many hours that they could work for the week," and that other departments would have to adjust for increased labor in another department.

The employer has a four-step disciplinary system, and employees are terminated upon their fourth rule violation. The supervisor testified that Farhat had received written warnings on three prior occasions. On May 2, 2006, July 19, 2006, and October 19, 2006, Farhat was warned for "failure to perform assigned duties in an appropriate manner or at assigned times," and/or "rude and disrespectful behavior or conduct."

The ULJ determined initially and on reconsideration that Farhat was discharged for employment misconduct because "he was specifically told on January 26, 2007, that he was to manage work within the hours of labor that he was allotted for a week[, but h]e chose not to do so" and that he was therefore disqualified from the receipt of unemployment insurance benefits. This certiorari appeal follows.

D E C I S I O N

The issue is whether the record supports a determination that Farhat's job performance constitutes employment misconduct. Farhat argues that because he was required to have labor overages by the demands of training and workers' compensation laws and because he was not told that the weekly overage was impermissible until after it had occurred, his work performance did not constitute "employment misconduct" as that phrase is defined in the unemployment insurance laws. Minn. Stat. § 268.095, subd. 6(a) (2006). Farhat further claims that even if the scheduling incident is employment misconduct, it is unrelated to his prior rule violations, and should be considered a "single incident that does not have a significant adverse impact on the employer" that does not subject him to disqualification from benefits. *See id.*

This court reviews the decision of the ULJ to determine whether

> the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are:
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> (1) in violation of constitutional provisions;
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> (2) in excess of the statutory authority or jurisdiction of the department;
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> (3) made upon unlawful procedure;
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> (4) affected by other error of law;
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> (5) unsupported by substantial evidence in view of the entire record as submitted; or
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> (6) arbitrary or capricious.

Minn. Stat. § 268.105, subd. 7(d) (2006). We also note that the statutes provide that "[t]here shall be no presumption of entitlement or nonentitlement to unemployment benefits" and that "[t]here shall be no equitable or common law denial or allowance of unemployment benefits." Minn. Stat. § 268.069, subds. 2, 3 (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 an act alleged to be misconduct 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 findings of fact. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006); *see also Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 530-31 (Minn. App. 2007) (explaining current procedure for obtaining review of unemployment-benefits decisions). This court will reverse factual findings if they are "unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 268.105, subd. 7(d)(5). Whether a particular act constitutes employment misconduct under Minn. Stat. § 268.095, subd. 6 is a question of law, which we review de novo. *Schmidgall*, 644 N.W.2d at 804; *Scheunemann*, 562 N.W.2d at 34.

Minnesota statutes define the critical terms in this dispute:

> Employment misconduct means 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.
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> 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, [or] good faith errors in judgment if judgment was required . . . are not employment misconduct.

Minn. Stat. § 268.095, subd. 6(a). The statute further provides that "[t]he definition of employment misconduct provided by this subdivision shall be exclusive and no other definition shall apply." *Id.*, subd. 6(e) (2006).

The courts have explained the definitions. "As a general rule, refusing to abide by an employer's reasonable policies and requests amounts to disqualifying misconduct." *Schmidgall*, 644 N.W.2d at 804. But, as the supreme court recently stated,

> the unemployment compensation statute is remedial in nature and must be liberally construed to effectuate the public policy set out in Minn. Stat. § 268.03, which states that the unemployment benefits provisions are to be used for the benefit of persons unemployed through no fault of their own. We have stated that this policy urges us to narrowly construe the disqualification provisions.

Jenkins v. Am. Express Fin. Corp., 721 N.W.2d 286, 289 (Minn. 2006) (quotations omitted).

A. Labor-Hours Overage

Here, the ULJ concluded that Farhat "was specifically told on January 26, 2007, that he was to work within the hours of labor that he was allotted for a week. He chose not to do so." Everyone agreed that the meeting occurred on January 26. Everyone also agreed that the overage occurred between January 18 and January 24. Because the undisputed testimony was that this meeting in which he was warned occurred *after* the week of the 56-hour labor overage, Farhat did not schedule the excess hours in violation of the instructions given him at that meeting. Although the supervisor testified that Farhat knew he was not to have labor overages and Farhat did not contest that limit on his discretion, Farhat testified he understood it was an annual limit. In sum, there is nothing

in the record to indicate Farhat had been warned that his labor overages would be calculated on a weekly, rather than annual, basis. Farhat presented uncontested evidence that he had been under his annual labor-hours limit in previous years, and that he was also on track for being under the labor-hours limit for the current year.

The reasons Farhat gave for the 56-hour labor overage for the week are good-faith, understandable considerations, rather than behavior that either (1) "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." Minn. Stat. § 268.095, subd. 6(a). Farhat had to cover for the impaired worker with another employee (35 hours). This accounts for two-thirds of the labor-hours overage. Farhat testified that he was also required to train an employee in a new task and arrange new-employee orientation. This explains the rest of the overage. His efforts to maintain staffing in light of workers' compensation laws and to schedule training was a part of his job responsibility. Arguably, he could have shaved off a few hours or extended training into subsequent weeks. However, this record does not provide a factual basis for concluding that incurring the overage was "misconduct" as defined by the statute.

Moreover, the statute indicates that proportionality is an important consideration in determining misconduct: "[A] single incident that does not have a significant adverse impact . . . [is] not employment misconduct." Minn. Stat. § 268.095, subd. 6(a). Even assuming Farhat knew of the weekly limit on hours, the record does not indicate this constitutes employment misconduct for unemployment insurance purposes. Although

there is no wage scale information or record, Farhat did testify that he had saved his employer 2,700 hours of employee time per year during the prior years and that this reflected three percent of the time worked by those he supervised. Using these numbers, it appears that the 56-hour labor overage for the week was a very small percentage of the total labor hours he was allotted for the week. Although we recognize that the cost to the employer of 56 extra hours may be several hundred dollars, the magnitude compared to Farhat's total supervisory responsibility appears to be minimal and is incidental compared to the hours of employee time that he testified he had *saved*.

Finally, although the supervisor testified that Farhat was to schedule within the hours limit by juggling staff assignments and the timing of training, there was no showing by the supervisor or finding by the ULJ that Farhat could have done such scheduling. The only evidence on record with regard to this point is a denial by Farhat that it was feasible. An employee has a responsibility to adhere to the *reasonable* policies of its employer. *See Schmidgall*, 644 N.W.2d at 804 (stating that a refusal to abide by an employer's reasonable policies constitutes misconduct).

We recognize that working within a budget and having a financially sound enterprise are fundamental considerations for a business entity and that a supervisor who cannot work within those limits fails his management responsibilities. However, assuming that Farhat erred, it appears that his offending conduct was "inadvertence," a "good faith error" or "conduct an average reasonable employee would have engaged in under the circumstances." Minn. Stat. § 268.095, subd. 6(a). Based on the undisputed

record and the findings of the ULJ, we conclude that the labor-hours overage does not provide a basis for determining that Farhat engaged in "employment misconduct."

B. Prior Warnings

Next, we consider whether the 56-hour labor overage together with Farhat's prior incidents supply an independent basis for a finding that he engaged in disqualifying employment misconduct as defined by the statute.[1] The ULJ did not determine that any of Farhat's prior warnings were for actions that arose to the level of such misconduct. Testimony regarding the May 2, 2006 written warning indicates that one of the cooks in the kitchen left a tuna salad on a countertop. This error was made by someone Farhat supervised. Farhat stated at the hearing that after the salad was discovered, he spoke with the errant employee and implemented a new kitchen policy to prevent such problems from happening again. This does not appear to provide a basis for finding that Farhat acted with "intentional, negligent, or indifferent conduct . . . that displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee, or . . . that displays clearly a substantial lack of concern for the employment." *See id.*

There is no testimony or anything in the record providing the factual basis for what may have led to the other two 2006 warnings. Farhat asserts in his brief that two of

[1] The rights of an employer to discharge or discipline an employee are based on legal standards that are not necessarily the same as the statutes governing the availability of unemployment benefits. As the supreme court has observed, the issue is not whether relator should have been discharged "but whether, now that he is unemployed, he should be denied unemployment compensation benefits as well." *Ress v. Abbot N.W. Hosp., Inc.*, 448 N.W.2d 519, 523 (Minn. 1989).

the three total incident notices involved situations in which he had "no direct involvement." Without evidence in the record of specific conduct about the other incidents and given the circumstances surrounding the 56-hour labor overage, we conclude that the record is not adequate to establish that the incidents or the graduated-discipline policy of the employer constitute employment misconduct disqualifying Farhat from receiving unemployment benefits.

Reversed.

Dated: