STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1537

Gebregziabher G. Seretse,
Relator,

vs.

Doherty Employment Service,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed August 12, 2008
Affirmed
Johnson, Judge

Department of Employment and Economic Development
File No. 5473 07

Gebregziabher G. Seretse, 626 Park Street, Saint Paul, MN 55103 (pro se relator)

Doherty Employment Group, Inc., Americ Disc, Inc., 7645 Metro Boulevard, Edina, MN 55439-3049 (respondent)

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 Halbrooks, Presiding Judge; Willis, Judge; and Johnson, Judge.

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

JOHNSON, Judge

An unemployment-law judge (ULJ) found that Doherty Employment Service terminated the employment of Gebregziabher Seretse because he had engaged in misconduct. Accordingly, the ULJ determined that Seretse was disqualified from receiving unemployment benefits. Seretse appeals by a writ of certiorari, arguing that the ULJ's findings are erroneous, that he did not receive a fair hearing, and that the ULJ should have reopened the evidentiary hearing. We affirm.

FACTS

Seretse began working at Americ Disc in April 2001 as an order picker in the company's warehouse. In August 2003, Doherty Employment Service, a staffing agency, entered into a contract with Americ Disc, at which time Seretse became an employee of Doherty but continued working at Americ Disc.

Seretse's position required him to operate a 5,000-pound order-picking machine that allowed him to remove boxes from high shelves in the warehouse. On Friday, March 16, 2007, John Pyrz, the distribution manager at Americ Disc, received a report that Seretse had driven his machine toward another employee, Sabina Cespedes, injuring her foot. Pyrz had an initial discussion with Seretse, who stated that he and Cespedes argued over a pallet that Cespedes had put on her order-picking machine. Seretse explained that he removed the pallet from Cespedes's machine with the forklift of his own order-picking machine, apparently while the pallet was high above the ground. Seretse was upset over the incident. Pyrz told him to go home.

Pyrz discussed the incident with Seretse further on the following Monday. After consulting with his supervisor, Pyrz terminated Seretse's employment. Pyrz testified later that the decision to terminate Seretse was based on a concern that Seretse's continued presence "was potentially going to cause more harm." Pyrz testified that the order-picker machines weigh 5,000 pounds and have caused death to workers in other companies and that order pickers at Americ Disc are trained to keep a safe distance from others when operating the machine.

After his discharge, Seretse applied for unemployment benefits with the Minnesota Department of Employment and Economic Development (DEED). In April 2007, a DEED adjudicator determined that Seretse was discharged for misconduct and, therefore, was disqualified from receiving unemployment benefits. Seretse appealed the determination of disqualification, and a ULJ held a hearing by telephone. The ULJ later issued a written decision, concluding that Seretse was disqualified from unemployment benefits because his actions on March 16, 2007, met the statutory definition of employment misconduct. Seretse requested reconsideration, but the ULJ affirmed his decision. Seretse appeals.

D E C I S I O N

This court reviews a ULJ's decision to determine whether the findings, inferences, conclusions, or decision are affected by an error of law or are unsupported by substantial evidence in view of the entire record. Minn. Stat. § 268.105, subd. 7(d) (2006). The ULJ's factual findings are viewed in the light most favorable to the decision being reviewed. *Jenkins v. American Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006).

The ultimate determination whether an employee was properly disqualified from receiving unemployment benefits is a question of law, which is reviewed de novo. *Id.*

I. Finding of Misconduct

Seretse argues that the ULJ erred by finding that he was terminated for misconduct. "Whether an employee has engaged in conduct that disqualifies him from unemployment benefits is a mixed question of fact and law." *Jenkins*, 721 N.W.2d at 289.

A discharge for employment misconduct results in disqualification from unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2006). "Employment misconduct" is defined as intentional, negligent, or indifferent conduct that clearly displays either "a serious violation of the standards of behavior the employer has the right to reasonably expect" or "a substantial lack of concern for the employment." *Id.*, subd. 6(a) (2006). "An employer has the right to expect its employees not to engage in conduct that seriously endangers people's safety." *Hayes v. Wrico Stamping Griffiths Corp.*, 490 N.W.2d 672, 675 (Minn. App. 1992); *see also Risk v. Eastside Beverage*, 664 N.W.2d 16, 22 (Minn. App. 2003) (holding that driving truck while impaired was employment misconduct).

The ULJ found that Seretse engaged in employment misconduct when he disregarded safety concerns by intentionally driving his order-picking machine, with the forklift exposed, toward Cespedes and removing a pallet from her machine. Seretse challenges the accuracy of the testimony of the witnesses who appeared at the hearing. Seretse is not specific about which of the ULJ's factual findings he is challenging, but he

appears to dispute the cause of the injury to Cespedes's foot. The ULJ found that Cespedes's foot had been pinched under her forklift as a result of Seretse removing a pallet from her machine. The record indicates that Cespedes's foot was not pinched by her own forklift but by a pallet. But the ULJ's decision does not depend on precisely where and how Cespedes's foot was injured. There is substantial evidence to support the finding that Seretse engaged in unsafe conduct and that Cespedes's foot was injured as a direct result of that conduct.

The ULJ's finding that Seretse engaged in misconduct is supported by the testimony and statements of several witnesses. Pyrz testified based on his interviews with employees who witnessed the incident. Two other employees who witnessed the incident made written statements that are consistent with Pyrz's testimony and with a statement offered by Cespedes. Seretse himself conceded that he and Cespedes argued about a pallet, that he drove his order-picker machine towards Cespedes, and that he used his forklift to remove the pallet from her forklift without her consent. Seretse attempted to justify his conduct by saying that he believed Cespedes should have "honored" his "seniority" by yielding the pallet to him. Seretse also argues that Pyrz and other co-workers disliked him and that the entire incident was contrived to effect his termination.

Where Seretse's evidence differed from other witnesses, the ULJ credited testimony of other witnesses over Seretse's testimony. "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).

Credibility determinations are generally the "exclusive province of the ULJ and will not be disturbed on appeal." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006). In light of the deference given to the ULJ's credibility determinations, the evidence is sufficient to establish misconduct. Seretse's actions are not within the exception for a "single incident that does not have a significant adverse impact on the employer," Minn. Stat. § 268.095, subd. 6(a), because his actions undermined his employer's "ability to assign the essential functions of the job to" him, *Skarhus*, 721 N.W.2d at 344. Thus, the ULJ's finding that Seretse's actions constituted misconduct was supported by substantial evidence.

II. Fairness of Hearing

Seretse argues that he did not receive a fair hearing. A ULJ should conduct an evidentiary hearing as an "evidence gathering inquiry" rather than "an adversarial proceeding" and "shall ensure that all relevant facts are clearly and fully developed." Minn. Stat. § 268.105, subd. 1(b) (2006); *see also Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 27 (Minn. App. 2007); *Ywswf v. Teleplan Wireless Svcs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). The ULJ "shall exercise control over the hearing procedure in a manner that protects the parties' rights to a fair hearing." Minn. R. 3310.2921 (2005). A hearing generally is considered fair and even-handed if both parties are afforded an opportunity to give statements, cross-examine witnesses, and offer and object to evidence. *See Wichmann*, 729 N.W.2d at 27; *Ywswf*, 726 N.W.2d at 529-30.

During the hearing, the ULJ asked Seretse to give his account of the incident and the events surrounding the incident. Several of Seretse's answers continue uninterrupted for a full page of the transcript or more. Seretse was permitted to submit documents into evidence. Although the ULJ declined to admit all of Seretse's documents into evidence, the ULJ also declined to admit several documents submitted by Doherty. Seretse also was given an opportunity to ask Pyrz questions about Pyrz's testimony and to make a closing statement. Thus, we conclude that Seretse received a fair hearing. *See Ywswf*, 726 N.W.2d at 529-30; *Wichmann*, 729 N.W.2d at 27.

III. Re-opening of Evidentiary Hearing

Seretse argues that the evidentiary hearing should have been re-opened to allow him to submit additional documents that he contends would have supported his arguments. This court will defer to the ULJ's decision not to hold an additional evidentiary hearing. *Ywswf*, 726 N.W.2d at 533.

In the order of affirmation, the ULJ concluded that the additional documentation that Seretse had filed with his request for reconsideration did not meet the criteria in Minn. Stat. § 268.105, subd. 2(c) (2006), which provides that a ULJ must grant 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.

Seretse has appended several documents to his brief that were either not submitted at the hearing or were offered but not received into evidence. We have reviewed these documents and, like the ULJ, have not found any evidence that would change the outcome or show the evidence previously submitted to be false. *See Ywswf*, 726 N.W.2d at 534 (holding that relator had not shown she was entitled to additional evidentiary hearing where new evidence would not have changed outcome).

Affirmed.