STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0701

Matthew P. Dorweiler,
Relator,

vs.

Wirsbo Company,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed May 5, 2009
Affirmed
Kalitowski, Judge

Department of Employment and Economic Development
File No. 20196115-3

Matthew P. Dorweiler, 4573 Slater Road, Apartment 305, Eagan, MN 55122 (pro se relator)

Wirsbo Company, 5925 148th Street West, Apple Valley, MN 55124 (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 of Employment and Economic Development)

Considered and decided by Kalitowski, Presiding Judge; Lansing, Judge; and Schellhas, Judge.

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

KALITOWSKI, Judge

Pro se relator Matthew P. Dorweiler challenges the unemployment-law judge's determination that because he was discharged for misconduct, he is ineligible to receive unemployment benefits, pursuant to Minn. Stat. § 268.095, subd. 4(1) (Supp. 2007). We affirm.

D E C I S I O N

The unemployment-law judge (ULJ) determined that relator was ineligible for unemployment benefits under Minn. Stat. § 268.095, subds. 4(1), 6(a), because relator had committed an intentional act—taking scrap metal—that displayed a serious violation of the standards of behavior relator's employer, respondent Wirsbo Company (Wirsbo), had the right to reasonably expect of relator.

Relator contends that: (1) the findings of the ULJ are not supported by credible evidence; (2) his actions were not misconduct because a previous boss allowed him to take his employer's scrap metal and other employees had done so; and (3) the hearing was unfair because he never received copies of the written statements used against him before he filed this appeal. We disagree.

In reviewing the decision of the ULJ,

> The Minnesota Court of Appeals may affirm the decision of the unemployment law judge or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner 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) (Supp. 2007); *see Ywswf v. Teleplan Wireless Servs. Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007) (applying this standard).

Under Minn. Stat. § 268.105, subd. 7(d)(5), the court of appeals may reverse or modify the ULJ's findings or inferences if they are "unsupported by substantial evidence in view of the entire record as submitted." This court views the ULJ's factual findings in the light most favorable to the decision, giving deference to the credibility determinations made by the ULJ. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). In doing so, we will not disturb the ULJ's factual findings when the evidence substantially sustains them. *Id.*

Employment misconduct

Relator argues that he did not commit misconduct because he did not violate a clear standard of behavior that respondent had the right to reasonably expect of him. We disagree.

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 fact question. *Skarhus*, 721 at 344. But whether

an employee's act constitutes employment misconduct is a question of law, which we review de novo. *Schmidgall*, 644 N.W.2d at 804.

An employee discharged for misconduct is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4(1). "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.

Id. at subd. 6(a). Employment misconduct is determined without regard to any common law burden of proof. *Vargas v. Nw. Area Found.*, 673 N.W.2d 200, 205 (Minn. App. 2004), *review denied* (Minn. Mar. 30, 2004). An employer has the right to expect its employees to follow its reasonable requests, and failure to do so constitutes employment misconduct. *Sandstrom v. Douglas Machine Corp.*, 372 N.W.2d 89, 91 (Minn. App. 1985). And a single deliberate act that adversely affects the employer may constitute misconduct. *Vargas*, 673 N.W.2d at 206.

In support of his argument that taking recyclable material and other refuse from Wirsbo's property was not a violation of a standard of behavior that Wirsbo had a right to expect, relator claims that Wirsbo's human resources manager stated that she was not sure if Wirsbo had a policy on taking recyclable material and other refuse. Relator also argues that his prior supervisor did not object to employees taking scrap metal.

But the ULJ heard testimony that: (1) Wirsbo employees are not allowed to remove recyclable material from the property; (2) relator had been warned orally and

twice in writing on May 8, 2007, and on June 27, 2007, by his supervisor not to take items from Wirsbo's refuse containers without approval; and (3) if he took any items from Wirsbo's premises or sorted through Wirsbo's garbage in the future, his employment could be subject to termination. And the ULJ heard testimony that, despite these warnings, in October 2007, several employees observed relator putting items from the refuse containers into his car and driving away. Additionally, the ULJ heard testimony that Wirsbo received money in exchange for recycling certain items, and thus, Wirsbo was adversely affected by the taking of those items. *See Vargas*, 673 N.W.2d at 206 (determining that a single deliberate act that adversely affects the employer may constitute misconduct).

Relator has not set forth any argument as to why Wirsbo's request that he stop taking scrap metal and other refuse was unreasonable. *See Sandstrom*, 372 N.W.2d at 91 (holding that an employer has the right to expect employees to follow reasonable requests, and failure to do so constitutes employment misconduct). Therefore, we conclude that relator's act of taking items from the refuse or recycling containers from Wirsbo's property constitutes misconduct because doing so was a violation of a clear standard of behavior that Wirsbo had the right to reasonably expect him to comply with.

Substantial and credible evidence

Relator contends that the ULJ's fact-findings that he took items from Wirsbo property without permission are not supported by credible evidence and that three written statements by other Wirsbo employees submitted to the ULJ were inadmissible hearsay.

We review the ULJ's findings of fact in the light most favorable to the decision, giving deference to the ULJ's credibility determinations, and we will affirm them if they are supported by substantial evidence. *Skarhus*, 721 N.W.2d at 344.

The Minnesota rules governing unemployment appeals from the Department of Employment and Economic Development provide that:

> All competent, relevant, and material evidence, including records and documents in the possession of the parties which are offered into evidence, are part of the hearing record. A judge may receive any evidence which possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs.

Minn. R. 3310.2922 (2007). Moreover, both the supreme court and this court have held that hearsay evidence is admissible in an unemployment insurance proceeding. *Pichler v. Alter Co.*, 307 Minn. 522, 523, 240 N.W.2d 328, 329 (1976); *Wilson v. Comfort Bus Co., Inc.*, 491 N.W.2d 908, 910 (Minn. App. 1992), *review denied* (Minn. Jan. 15, 1993).

Relator's supervisor terminated relator's employment based in part on written statements by three Wirsbo employees, who did not testify at the ULJ hearing. One individual stated in writing that on October 12, 2007, he saw relator put "scrap" and other items in his car. A second individual asserted in a written statement that on that same date, he noticed items next to the scrap pipe bin, and when he left to get his supervisor and returned shortly thereafter, he saw relator's car driving off from the area and the items were gone. And a third individual gave a written statement that he observed items located near the compactor and that after he left the area near the compactor and subsequently returned, the items were gone and he saw relator's car leaving the area.

In concluding that relator committed a serious violation of the standards of behavior Wirsbo had the right to expect of him, the ULJ relied in part on these three statements. We conclude that these statements have probative value of whether relator violated Wirsbo's standards of behavior, are consistent and appear to corroborate each other, and constitute the "type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." Minn. R. 3310.2922. Therefore, the ULJ did not err in relying on these statements.

Relator also complains that he did not receive copies of the written statements by the individuals who reportedly saw relator take the refuse and recycling items. But at the time of his termination, relator was aware of the written statements, relator was provided copies of the three statements prior to the second day of the hearing, and the ULJ read the statements aloud to relator and gave relator an opportunity to respond to them. Therefore, we conclude that relator had sufficient opportunity to respond to these statements.

Viewing the ULJ's fact-findings in the light most favorable to the decision and giving deference to the ULJ's determination that the testimony of relator's supervisor was credible, the three hearsay statements presented were credible, and relator's testimony that he did not take any items from Wirsbo was not credible, we conclude that the ULJ's decision was supported by substantial evidence.

Effect of Wirsbo's decision not to challenge payment of benefits

Relator argues that because Wirsbo does not contest the payment of unemployment benefits, the ULJ erred in finding him ineligible for benefits. We disagree.

Under Minnesota law, an employer's decision to challenge an employee's petition for payment of unemployment benefits has no bearing on whether or not the benefits are paid. *Rasidescu v. Comm'r of Econ. Sec.*, 644 N.W.2d 504, 506 (Minn. App. 2002), *review denied* (Minn. July 16, 2002). "Unemployment benefits are paid from state funds and are not considered paid from any special insurance plan, nor as paid by an employer." Minn. Stat. § 268.069, subd. 2 (Supp. 2007), *cited in Rasidescu*, 644 N.W.2d at 506. Therefore, an individual's application for unemployment benefits is not considered a claim against an employer but shall be considered a request for unemployment benefits from the fund. *Id.* We hold that for purposes of determining eligibility for benefits, it is irrelevant whether or not Wirsbo contests relator's unemployment benefit petition.

Affirmed.