STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1498

Rick L. Swanson,
Relator,

vs.

ECO Finishing Co.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed July 28, 2009
Affirmed
Halbrooks, Judge

Department of Employment and Economic Development
File No. 20807852-3

Rick L. Swanson, 6843 Regent Avenue North, Brooklyn Center, MN 55429 (pro se relator)

ECO Finishing Co., 5100 Industrial Boulevard Northeast, Fridley, MN 55421-1033 (respondent)

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

Considered and decided by Halbrooks, Presiding Judge; Lansing, Judge; and Shumaker, Judge.

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

HALBROOKS, Judge

Relator challenges the unemployment-law judge's decision that he is ineligible to receive unemployment benefits because he was discharged for employment misconduct. Relator argues that (1) he was told his job was secure even though he had been missing work due to a custody dispute; (2) he was a dedicated employee who did good work; (3) he was not informed about customer complaints until the date of his discharge; and (4) his supervisor was not very good. Because substantial evidence supports the finding that relator committed employment misconduct, we affirm.

FACTS

Relator Rick L. Swanson worked as an expediting manager for respondent ECO Finishing Co. On April 17, 2008, relator was discharged. He applied for unemployment benefits through respondent Department of Employment and Economic Development (DEED). DEED determined that relator had been discharged for employment misconduct, making him ineligible for unemployment benefits.

Relator appealed, and a hearing was held before an unemployment-law judge (ULJ). Relator and ECO operations manager Marty Meister appeared by telephone for the June 16, 2008 hearing.

Meister testified that relator had been discharged because of attendance issues. Meister also mentioned a "pizza incident" that occurred on March 28, 2008. Meister explained that relator "used vulgar language when we [had] an employee on the phone

with a customer." Relator was discharged three weeks later, when ECO found a replacement for him.

The ULJ questioned relator regarding complaints that had been made about him. The ULJ asked relator about exhibit 10, a document that Meister wrote on February 4, 2008. According to exhibit 10, relator was in the shipping office with a shipping employee, an estimator, and three customers, when relator suddenly yelled, "[W]here the f[--]k is my pen." He then "slammed down the papers he had in his hands," and "stormed out of the office, slamming the door." Relator and the shipping employee later exchanged profanities. When Meister discussed this incident with relator, the latter explained, "I thought someone took my pen and I should not have acted the way I did. Next time I will try and not act like I did." Meister told relator that his behavior was very unprofessional and unacceptable and that relator would be discharged if he ever again "act[ed] like that in front of customers or other employees." Relator denied that this incident occurred and suggested that it was the shipping employee who had been reprimanded for using profanity in front of customers.

The ULJ also questioned relator about the March 28 pizza incident. Exhibit 11, written by ECO's office manager on March 28, 2008, describes that incident as follows:

> [Relator] had left his pizza in the break room refrigerator on the night of Thursday March 27th 2008. When [relator] had gone into the break room on Friday March 28th 2008 mid-morning. He had realized that his pizza had been missing and someone had eaten the pizza. He started to scream and yell profanity saying "Who the f[--]k ate my pizza", "I am so f[--]king hungry", "I am so f[--]king pissed off". As he was yelling this he was actually about 70 feet away from me. Because of how loud he was yelling, the

> customer that I was talking to on the phone, actually stopped talking and asked me if everything was ok.
>
> After I hung up the phone, I asked [relator] if he understood that I had someone on the phone and they over-heard everything that he was saying. And that if he was going to yell profanity he needed to go outside, where no one could hear him and not yell in my office. ECO Finishing's sales [representative] . . . had also told him that he was getting a little carried away and over reacting about this whole situation.
>
> I told [relator] that his actions were very unprofessional and would not be accepted by ECO Finishing.

Relator admitted that he remembered this incident and conceded that he "may have said the F-word once." Relator denied that the office manager could have heard him. He also denied that anyone had ever spoken to him about the March 28 incident.

In his closing statement, Meister testified that relator had been advised of "[e]very single letter of reprimand," and that he had showed exhibit 10 to relator and had read that document to relator "word-for-word."

The ULJ issued his findings of fact and decision, concluding that

> the preponderance of the evidence shows that [relator] was discharged because of employment misconduct. ECO . . . has a right to reasonably expect that its employees will not use inappropriate language in the workplace. Although [relator] denied receiving a verbal warning about his conduct on February 4, 2008, the [ULJ] does not find his testimony credible. [Relator] admitted that he may have used inappropriate language on March 28, 2008 and the evidence suggests that he also used inappropriate language on February 4, 2008. In addition, Meister provided a signed statement dated February 4, 2008, and testified that he spoke to [relator] about his unprofessional conduct on February 4, 2008. Despite the verbal warning on February 4, 2008, [relator] used inappropriate language again in the break room on

> March 28, 2008. Although [relator] may have had good reason to be upset about his missing pizza, [relator] did not need to yell profane language multiple times in the break room so that other employees and customers could hear his comments.

Relator filed a request for reconsideration. On June 30, 2008, the ULJ affirmed his June 19 decision. This certiorari appeal follows.

D E C I S I O N

When reviewing the decision of a ULJ, we may affirm the decision, remand it for further proceedings, or reverse or modify it if the substantial rights of the relator 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).

An employee who is discharged for employment misconduct is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (Supp. 2007). Employment misconduct is "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) (Supp. 2007). Relator does not dispute that the February 4 and March 28 incidents cited by the ULJ constitute employment misconduct. Nor does relator address either incident in his brief.

Whether an employee committed a particular act of misconduct is a question of fact. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). We review the ULJ's factual findings in the light most favorable to the decision. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). As a result, we will not disturb the ULJ's factual findings when the evidence substantially sustains them. Minn. Stat. § 268.105, subd. 7(d)(5). Substantial evidence is "(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). We must not substitute our judgment for that of the ULJ. *See In re Denial of Eller Media Co.'s Applications for Outdoor Adver. Device Permits*, 664 N.W.2d 1, 7 (Minn. 2003) (stating that an appellate court must exercise judicial restraint lest it substitute its judgment for that of the agency).

The ULJ's decision that relator was discharged for employment misconduct was based on the February 4 and March 28 incidents. We conclude that the evidence substantially supports the ULJ's findings that relator used profanity on February 4, received oral and written warnings, and used profanity again—within hearing of other employees and customers—on March 28. Exhibit 10 describes the February 4 incident in detail, including Meister's warning that relator would be discharged if another such incident occurred. Meister himself testified that he had discussed this incident with relator and that relator had read the document. Although relator denied both that the February 4 incident had occurred and that he had received a warning, the ULJ

specifically found that relator was not credible. "Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Skarhus*, 721 N.W.2d at 345. Exhibit 11 describes the March 28 incident in detail, including the office manager's confrontation with relator about the incident. Although relator conceded that he "may have said the F-word once" on March 28, he denied that the office manager could have heard him or that anyone confronted him about the incident. But again, the ULJ specifically found that relator was not credible. We conclude that exhibit 10, exhibit 11, Meister's testimony that relator was given a warning on February 4, and relator's admission that he used profanity on March 28 constitute substantial evidence to sustain the ULJ's finding that relator committed employment misconduct.

Relator argues in his brief that (1) he was told his job was secure even though he had been missing work due to a child-custody dispute; (2) he was a dedicated employee who did good work; (3) he was not informed about customer complaints until the date of his discharge; and (4) Meister is not a very good supervisor. But the ULJ based his decision that relator had committed employment misconduct solely on the February 4 and March 28 incidents. Even if relator's claims are true, they do not negate the substantial evidence that he committed misconduct on February 4 and March 28.

Affirmed.