STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1807

Maria M. Moctezuma,
Relator,

vs.

Nuvex Ingredients Inc.,
Respondent,

Department of Employment and
Economic Development,
Respondent.

Filed July 21, 2009
Affirmed
Hudson, Judge

Department of Employment and
Economic Development
File No. 20788998-2

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Considered and decided by Kalitowski, Presiding Judge; Klaphake, Judge; and Hudson, Judge.

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

HUDSON, Judge

Relator brings a certiorari appeal to challenge the decision by the unemployment law judge (ULJ) that she is ineligible to receive unemployment benefits because she was discharged for misconduct after repeated safety violations. We affirm.

FACTS

Relator Maria Moctezuma worked full-time as a general laborer for respondent Nuvex Ingredients, Inc., a food manufacturer, from August 1996 until April 9, 2008, when she was discharged. Under the employer's policy, which relator understood, an employee would be discharged after accumulating three safety violations within one year; depending on the severity of the safety violations, fewer than three instances could lead to discharge.

In September 2007, the employer issued a first written warning to relator for a safety violation after she was observed standing on a table rather than a platform provided to stand on. She was advised to use the proper tools for the job, such as a ladder or a platform. In March 2008, the employer issued a second written warning to relator for a safety violation after she was found standing on top of a dryer, which she had accessed without using a ladder, described as a "very unsafe act." She was advised again to use the proper tools for the job, such as a ladder or platform. This time, the employer suspended her for three days and warned that future violations would result in termination.

On April 9, 2008, the employer issued relator a third written warning for a safety violation and discharged her for what was described as another "unsafe act." She used a pallet jack to load a 450-pound box of cereal onto a pallet, but she failed to remove the jack before she raised the box some 11 feet into the air to dump the box into a hopper. This was a safety hazard because the pallet jack could have fallen off and injured relator or her coworkers. When relator's supervisor arrived on the scene, he saw that the pallet jack was still 11 feet in the air with the tote and pallet, and he locked the machine. When he questioned relator to find out why she failed to remove the jack, she apologized but gave no reason for her action.

After her discharge, relator applied for unemployment benefits and was initially deemed eligible, but the employer appealed. After a hearing, the ULJ ruled that relator had been discharged for employment misconduct and was ineligible to receive unemployment benefits. Relator requested reconsideration, but the ULJ denied the request and affirmed the decision. Relator brought this certiorari appeal.

D E C I S I O N

This court may affirm, remand, reverse, or modify the decision of a ULJ if the substantial rights of the relator may have been prejudiced because the findings, conclusion, or decision are affected by an error of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (Supp. 2007).

Whether an employee has engaged in employment misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Findings of fact are viewed in the light most favorable to the ULJ's decision and are

upheld if supported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(5); *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). This court will review as a question of law whether the particular acts constitute employment misconduct. *Schmidgall*, 644 N.W.2d at 804.

I

We first address the merits of relator's challenge to the determination that she was discharged for misconduct. 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 a 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) (Supp. 2007) (emphasis added). An employee who is discharged for misconduct is not eligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (Supp. 2007).

"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) (holding that employee's act of driving vehicle through parking lot in dangerous manner showed willful or wanton disregard of

employer's interest under earlier definition of misconduct). An employer also has a right to expect an employee to abide by reasonable policies and procedures. *Schmidgall*, 644 N.W.2d at 804. Generally, refusal to do so constitutes misconduct, especially when the employee has received repeated warnings or instructions regarding the unacceptable behavior. *Id.* at 804, 806–07.

The ULJ specifically found that relator's conduct was "intentional, negligent, or indifferent," and that when, despite knowing the safety policy and having received two written warnings and a suspension for other safety violations, she once again engaged in an unsafe procedure that endangered herself and other employees, she committed misconduct.

Relator argues that her conduct was inadvertent and that inadvertent acts are specifically excluded from the definition of misconduct under Minn. Stat. § 268.095, subd. 6(a). Inadvertent is defined as "[n]ot duly attentive" and "[m]arked by unintentional lack of care." *The American Heritage Dictionary* 910 (3d ed. 1992). Thus, she argues, even serious conduct can be inadvertent. Further, noting that negligent actions can constitute misconduct under subdivision 6(a), she argues that unless an unintentional accident (such as her final safety violation) that is attributable to inattention or oversight is considered to be inadvertent and not negligent conduct, "inadvertence" would be robbed of all meaning.

Under the facts as found by the ULJ, we cannot agree. Here, relator was aware of the safety policy. After her first safety violation, she was warned; after the second, she was again warned, given a three-day suspension, and specifically informed that a third

safety violation would result in termination. With this history of violating safety standards three times, receiving warnings for the first two violations, and being aware that a third safety violation would lead to discharge from her employment, relator plainly engaged in employment misconduct when she committed the third safety violation. The ULJ's decision that relator was discharged for misconduct based on conduct that was intentional, negligent, or indifferent is supported by substantial evidence and is correct as a matter of law.

Relator also contends that the ULJ improperly focused on the policy providing for termination after three safety violations, contending that the first two incidents were inadvertent. She asserts that there was no evidence to show (1) that she had been aware of the particular safety rules that she was cited for violating, (2) how the safety policies were distributed, or (3) whether the policies were communicated in a manner that relator, who does not speak English well, could understand. But relator testified that she understood the safety policies, and the written warnings specifically described the safety violations and indicated that they involved unsafe acts and the failure to use the proper tools. There is no merit to relator's arguments.

Relator further argues that these first two safety violations were "extremely minor" and were insufficient in themselves to give rise to a finding of misconduct. First, the employer found them serious enough to issue written warnings. Moreover, the second incident resulted in a three-day suspension and a warning that another safety violation could lead to discharge. In any event, the employer discharged relator and the ULJ made his determination of misconduct based on all three incidents.

Relator contends that the hearing was unfair for several reasons. As she correctly notes, the ULJ is to conduct the evidentiary hearing as an "evidence gathering inquiry" rather than "an adversarial proceeding" and "must ensure that all relevant facts are clearly and fully developed." Minn. Stat. § 268.105, subd. 1(b) (Supp. 2007). The ULJ "must exercise control over the hearing procedure in a manner that protects the parties' rights to a fair hearing." Minn. R. 3310.2921 (2007). "ULJs have a duty to reasonably assist pro se parties with the presentation of the evidence and the proper development of the record." *Thompson v. County of Hennepin*, 660 N.W.2d 157, 161 (Minn. App. 2003) (citing Minn. R. 3310.2921).

Relator argues that the transcript shows that she did not understand the significance of intent or the subtleties of the definition of misconduct and that she needed a translator and did not have an attorney during the hearing. But relator had an interpreter throughout the entire hearing, and no problems with the translation are apparent. Further, relator raised this issue of language difficulties in her request for reconsideration, when she was represented by an attorney. The ULJ, who affirmed on reconsideration, noted that she had not indicated at the hearing that she had trouble understanding the procedure or the testimony, which was translated for her; found that she had a full and fair opportunity to present her evidence; and did not find it necessary to order an additional evidentiary hearing. The ULJ's decision on whether to grant an additional evidentiary hearing will not be reversed absent an abuse of discretion. *Skarhus*, 721 N.W.2d at 345. Relator has not demonstrated that the ULJ abused his discretion.

Next, relator asserts that during the hearing, the ULJ did very little to ascertain whether or not she intentionally or inadvertently failed to remove the pallet jack. We disagree. Our review of the transcript shows that the ULJ clearly explained to the relator that the purpose of the hearing was to determine whether her conduct was misconduct or a mistake; relator was able to testify and to question the employer's witnesses as to relator's various theories of why she was discharged; the ULJ also questioned relator, as well as asking follow-up questions of the employer on points that relator made; and the ULJ asked relator several times whether she had anything to add and allowed her to testify further when she did. The ULJ ably fulfilled his duty of assisting relator in developing the facts.

Relator also challenges the ULJ's various findings or lack thereof. This court 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." Minn. Stat. § 268.105, subd. 7(d)(5). The findings will be viewed in the light most favorable to the decision, giving deference to the credibility determinations made by the ULJ. *Skarhus*, 721 N.W.2d at 344. This court will not disturb the ULJ's factual findings when the evidence substantially sustains them. *Id.* Our review of the transcript and findings shows that the ULJ made explicit findings on the relevant issues and that all of his findings are supported by substantial evidence.

Affirmed.