STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1656

Gary Fraser,
Relator,

vs.

The Restaurant Company of Minnesota (Corp),
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed August 11, 2009
Affirmed
Willis, Judge[*]

Department of Employment and Economic Development
File No. 316888-5

Marcus A. Jarvis, 13630 Oakwood Curve, Burnsville, MN 55337; and

Leopold B. Epee, Curtis, Epee & El, L.L.C., 701 Fourth Avenue South, Suite 500, Minneapolis, MN 55415 (for relator)

The Restaurant Company of Minnesota (Corp), c/o Talx UCM Services, Inc., P.O. Box 283, St. Louis, MO 63166-0283 (respondent)

Lee B. Nelson, Department of Employment and Economic Development, 332 Minnesota Street, Suite E200, St. Paul, MN 55101-1351 (for respondent Department of Employment and Economic Development)

Considered and decided by Connolly, Presiding Judge; Johnson, Judge; and Willis, Judge.

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[*]Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

WILLIS, Judge

This is a certiorari appeal from a ULJ's decision that relator was ineligible for benefits because he was discharged for employment misconduct. Relator argues that the ULJ erred by refusing to issue subpoenas, failing to make adequate findings, and improperly applying the burden of proof. We affirm.

FACTS

Relator Gary Fraser worked full time as a manager for respondent The Restaurant Company of Minnesota from October 6, 2006, to September 20, 2007. To track discounts and prevent fraud, the company had a policy for keeping records of all meal tickets at its restaurants that were voided or discounted. It appears from the record that tickets were voided when a server made a mistake on an order or a customer changed his or her mind on an order, and company policy required that managers document why tickets were voided by attaching an explanatory note. It also appears that tickets could be discounted in response to customer complaints regarding issues such as food quality or service. Company policy required that a discounted ticket be initialed by both the server and a manager, as well as having a written explanation attached. This policy was not strictly enforced before September 1, 2007, at the restaurant where Fraser worked.

On September 1, 2007, the company hired Kerry Mandt as the new general manager for the restaurant. Beginning in the first week of September, Mandt held three manager meetings at which he explained that he would enforce the policy regarding voided and discounted tickets. Mandt testified that Fraser admitted to him that he was

voiding tickets when he should have been discounting them and that tickets were voided without documentation. None of the managers complied fully with the rule, but Fraser had more voided and discounted tickets without explanatory documentation than did any of the other managers. On September 20, 2007, the company fired Fraser for failure to comply with the policy.

Fraser applied for unemployment benefits, and respondent Department of Employment and Economic Development determined that Fraser was eligible for benefits. The company appealed the determination, and a hearing was conducted on December 7, 2007. Because of confusion regarding the notice, the company was unaware of the hearing, and it was conducted without the company's participation. The ULJ issued a decision affirming the determination of eligibility on the ground that Fraser reasonably assumed that his failure to document voided and discounted tickets was condoned by the company.

The company requested reconsideration and a new hearing. The ULJ set aside his decision and ordered a new hearing, at which Mandt testified that he told Fraser at three different manager meetings that the policy for voided and discounted tickets would be enforced. Fraser admitted that he voided and discounted tickets without documentation, claiming that he did not want to interrupt the flow of service by writing an explanatory note or having the server initial a discounted ticket. Mandt testified that in September he performed an audit of the preceding 90 days and found that while other managers at times did not document their voided and discounted tickets, Fraser was the only manager who consistently did not document his tickets. Mandt testified that Fraser was responsible for

almost 60 percent of all voided tickets over the 90-day period. At the hearing, Fraser asked the ULJ to issue several subpoenas, which the ULJ refused to do.

The ULJ issued his decision, finding that Mandt's testimony was more persuasive than Fraser's and found that the company "had the right to expect Fraser to comply with the reasonable directives of his supervisor." He found Fraser ineligible for benefits because he was discharged for employment misconduct. The ULJ also explained his decision not to subpoena the witnesses, stating that "[i]f this testimony was part of the record it would not change the decision." Fraser filed a motion for reconsideration, and the ULJ affirmed the decision. This appeal follows.

D E C I S I O N

This court may reverse or modify a ULJ's decision if the substantial rights of the petitioner may have been prejudiced because the decision is made on unlawful procedure, affected by error of law, unsupported by substantial evidence, or arbitrary and capricious. Minn. Stat. § 268.105, subd. 7(d)(3)-(6) (Supp. 2007). We review questions of law de novo and will not disturb findings that are supported by substantial evidence. *Ywswf v. Telepan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007).

Fraser argues that the ULJ erred by refusing to issue the subpoenas that Fraser requested for the testimony of the preceding general manager and two other managers at the restaurant. A ULJ may refuse to issue a subpoena if the testimony "sought would be irrelevant, immaterial, or unduly cumulative or repetitious." Minn. R. 3310.2914, subp. 1 (2007).

Fraser argues that the preceding general manager would have testified that the policy for voided and discounted tickets was not followed before Mandt arrived. But this testimony is irrelevant to the issue of whether Fraser committed employment 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 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) (Supp. 2007). An employee commits misconduct when he knowingly violates an employer's policy. *Montgomery v. F&M Marquette Nat'l Bank*, 384 N.W.2d 602, 604 (Minn. App. 1986), *review denied* (Minn. June 13, 1986). The ULJ found that while the "policy was not enforced prior to September 1, 2007," the new general manager "wanted the staff to follow [the company's] discount policy." The fact that the policy was not followed in the past is irrelevant to the issue of whether Fraser violated the policy. Therefore, the ULJ did not err by denying Fraser's request for a subpoena for the testimony of the preceding general manager.

Fraser argues that the two other managers would have testified regarding how they handled the tickets of customers who complained at the register about food, presumably testifying that they would void such tickets rather than discounting them, which would require a server's initials. But this testimony would, at best, show only that other managers did not follow the company's policy. The fact that other employees violated the employer's rules is not a valid defense to a claim of employment misconduct. *See Dean v. Allied Aviation Fueling Co.*, 381 N.W.2d 80, 83 (Minn. App. 1986). The

testimony of the other managers, therefore, also was irrelevant, and the ULJ did not err by refusing to issue those subpoenas.

Fraser also argues that the ULJ failed to make the credibility findings required by statute when the credibility of a party has a significant effect on the outcome of a decision. Minn. Stat. § 268.105, subd. 1(c) (Supp. 2007). The ULJ found that "Fraser's testimony was vague and confusing" and "not responsive to the questions." Because Fraser admitted that he violated the policy, however, credibility did not have a significant effect on the outcome of the decision, and the ULJ was not required to make specific credibility findings.

Finally, Fraser claims that the company did not meet its burden of proving that Fraser was ineligible for benefits. But the statute provides that "[t]he evidentiary hearing is conducted by an unemployment law judge without regard to any burden of proof as an evidence gathering inquiry and not an adversarial proceeding." Minn. Stat. § 268.105, subd. 1(b) (Supp. 2007). The issue is not whether the company met its burden of proof, but whether the ULJ's findings were "supported by substantial evidence." *Ywswf*, 726 N.W.2d at 529. The record shows that the ULJ's findings were supported by substantial evidence.

Affirmed.