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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0025**

Darrell Hecker,
Relator,

vs.

Tamarin Painting LLC,
Respondent,
Department of Employment and Economic Development,
Respondent.

**Filed August 25, 2009
Affirmed
Stoneburner, Judge**

Department of Employment and Economic Development
File No. 21238142-3

Darrell R. Hecker, 7314 James Avenue South, Richfield, MN 55423-2926 (pro se relator)

Tamarin Painting, L.L.C., P.O. Box 656, Grand Rapids, MN 55744-0656 (respondent employer)

Lee B. Nelson, Katrina I. Gulstad, Minnesota Department of Employment and Economic Development, Suite E200, 1st National Bank Building, 332 Minnesota Street, St. Paul, MN 55101-1351 (for respondent DEED)

Considered and decided by Kalitowski, Presiding Judge; Stoneburner, Judge; and
Collins, Judge.*

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

UNPUBLISHED OPINION

STONEBURNER, Judge

Relator challenges the denial of unemployment benefits based on the decision of an unemployment law judge (ULJ) that he was discharged for misconduct. Because the record supports the ULJ's decision, we affirm.

FACTS

Relator Darrell Hecker was a full-time painter for Tamarin Painting, LLC, from October 15, 2007, until his employment was terminated effective December 9, 2007. Hecker's application for unemployment benefits was denied based on respondent Department of Employment and Economic Development's (DEED) initial determination that Hecker was discharged for misconduct. Hecker appealed.

At the hearing on Hecker's appeal, Mark Engelking, a foreman for Tamarin Painting, testified that on November 16, 2007, while carpooling to work, he saw Hecker drink alcohol. Engelking testified that, on that same day, Hecker was combative and behaving erratically toward other workers. He further testified that on other occasions he could smell alcohol on Hecker's breath and that he had observed Hecker appear to be under the influence of alcohol at work. Engelking reported sloppy work and alcohol incidents to Darin Pohl, the owner of Tamarin Painting, who discharged Hecker on November 18, 2007.

Pohl testified that Hecker had repeatedly telephoned him late at night and "wouldn't make any sense." In one instance, on November 14, 2007, Pohl believed that Hecker was drunk when he called, although Pohl admitted that he had never seen Hecker

behave as though he was under the influence of alcohol. Pohl also testified that his contractors complained that Hecker did sloppy work.

Hecker denied drinking beer in Engelking's car. He said he may have smelled of alcohol consumed the night before because he did not shower in the morning. Hecker said he and Engelking both drank beer at lunch on about three occasions. Hecker contended that his employment was terminated in retaliation for reporting Pohl's failure to pay prevailing wages on projects that required prevailing wage to the Minnesota Department of Labor and a union representative.

Pohl denied that Hecker's employment was terminated because of the prevailing-wage issue. Pohl testified that when he discovered that the project was a prevailing-wage project, he began paying the proper wage and appropriate back pay for the prior work on that job. Pohl testified that he did not always know at the beginning of a project whether it was a prevailing-wage project. Pohl testified that he did not receive any penalties for not paying prevailing wage initially on this project.

The ULJ found that Hecker was discharged for reporting to work under the influence of alcohol, constituting disqualifying misconduct. Hecker requested reconsideration, and the ULJ reaffirmed the finding of misconduct. This appeal followed.

D E C I S I O N

When reviewing the decision of an ULJ, this court may affirm the decision, remand the case for further proceedings, or

reverse or modify the decision if the substantial rights of the [relator] 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) (2008).

An applicant who was discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). 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.” Minn. Stat. § 268.095, subd. 6(a) (2008).

Whether an employee has committed employment 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 question of fact.” *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Findings of fact are viewed in the light most favorable to the ULJ’s decision and are upheld if they are supported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(5); *Skarhus*, 721 N.W.2d at 344. Whether the employee’s act constitutes disqualifying misconduct is a question of law, which this court reviews de novo. *Schmidgall*, 644 N.W.2d at 804; *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 27 (Minn. App. 2007).

Hecker argues that because Pohl and Engelking did not see him drinking on the job or acting erratic on the job site, their testimony that he was drinking on the job was “hearsay.”¹ But Engelking testified about his personal observation of Hecker consuming alcohol on the way to work, and Pohl testified about his personal opinion that Hecker was intoxicated during a telephone conversation on November 14. Engelking testified that he had observed Hecker appear to be under the influence of alcohol at work and that he had reported Hecker’s sloppy work and smelling of alcohol to Pohl. This testimony was based on personal observation and knowledge and was not hearsay. *See* Minn. R. Evid. 801(c) (defining hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted”); Minn. R. Evid. 602 (providing that a witness is competent to testify as long as there is sufficient evidence that the witness has personal knowledge of the matter). Pohl testified that he had received reports of Hecker’s sloppy work but that testimony was offered to explain Pohl’s reasons for terminating Hecker’s employment, not necessarily for the truth of the reports. We find no merit in Hecker’s “hearsay” argument.

The ULJ found that Hecker’s testimony that he was fired for reporting Pohl’s failure to pay the prevailing wage was contradictory and not believable. The ULJ credited Pohl’s testimony that Hecker was not discharged for reporting the prevailing-wage issue. The ULJ noted that only one of the three jobs that Hecker claimed were prevailing-wage projects was such a project and that, once Pohl discovered that the job

¹ A ULJ may receive any evidence which possesses probative value, including hearsay. *Marn v. Fairview Pharmacy Services LLC*, 756 N.W.2d 117, 122–23 (Minn. App. 2008) (citing Minn. R. 3310.2922 (2007)), *review denied* (Minn. Dec. 16, 2008).

was a prevailing-wage project, Pohl adjusted the wage and issued retroactive pay. We defer to the ULJ's credibility determinations. *Nichols v. Reliant Eng'g & Mfg., Inc.*, 720 N.W.2d 590, 594 (Minn. App. 2006).

We agree with the ULJ's assertion that "[a]n employer has the right to expect that an employee will report for work sober and able to perform the normal duties of his or her position according to the employer's standards." The record supports the ULJ's conclusion that Hecker was terminated for employment misconduct.

Affirmed.