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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-44**

Patty Pobuda,
Relator,

vs.

T J Hooligans Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed October 6, 2009
Affirmed
Larkin, Judge**

Department of Employment and Economic Development
File No. 21181272-3

Patty J. Pobuda, 2501 Spring Lake Road SW, Shakopee, MN 55379-9508 (pro se relator)

T J Hooligans Inc., 16760 Toronto Avenue SE, Prior Lake, MN 55372-3974 (respondent)

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

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and
Johnson, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Relator challenges an unemployment-law judge's determination that she is ineligible for unemployment benefits because she was discharged for misconduct. Because the unemployment-law judge did not err in making this determination, we affirm.

FACTS

Relator Patty Pobuda was employed as a bartender by respondent T J Hooligans Inc. from September 2000 through August 22, 2008. After the Minnesota State Legislature amended the Clean Indoor Air Act in 2007, smoking was no longer permitted in places of employment, including restaurants and bars. 2007 Minn. Laws ch. 82, §§ 3-8 at 538-41; *see* Minn. Stat. § 144.414, subd. 1 (2008) (current version). As a result, relator was no longer able to smoke behind the bar at work and was required to go outside for her cigarette breaks. Dave Carlson, owner of T J Hooligans, began to notice that relator's cigarette breaks were becoming problematic and discussed the issue with her on multiple occasions. On July 23, 2008, one of T J Hooligans's customers left without ordering after relator failed to serve him while she was on a cigarette break. The following day, relator was given a final warning for taking excessive cigarette breaks. On August 20, relator was serving customers on the patio in addition to her customers at the bar. At times, relator smoked with her patio customers, which resulted in her being away from the bar for extended periods. Relator was discharged from employment on August 22 for taking excessive cigarette breaks.

Relator established an unemployment benefit account. Respondent Department of Employment and Economic Development (DEED) initially determined that relator had been discharged for reasons other than employment misconduct and, as a result, was eligible for unemployment benefits. T J Hooligans appealed, and an unemployment-law judge (ULJ) held a telephonic evidentiary hearing. After considering the testimony of several witnesses, the ULJ concluded that relator had been discharged for misconduct, making her ineligible for unemployment benefits, and reversed the initial eligibility determination.

Relator requested that the ULJ reconsider the decision, arguing that, among other things, T J Hooligans had failed to establish the alleged instances of misconduct by a preponderance of the evidence. The ULJ issued an order affirming on reconsideration and holding that his review of the evidence supported the findings that (1) relator had been verbally warned not to take excessive cigarette breaks, (2) relator had disregarded her employer's reasonable concerns about her time away from the bar, and (3) relator's actions had negatively impacted her employer's business. The ULJ found that the decision was factually and legally correct based upon a preponderance of the evidence. This appeal follows.

D E C I S I O N

The standard of review is set forth in Minn. Stat. § 268.105, subd. 7(d) (2008), which provides:

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.

I.

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). Employment misconduct means “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) (2008). The misconduct definitions set out in the act are exclusive and “no other definition applies.” *Id.*, subd. 6(e) (2008).

Whether an employee committed employment misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether a particular act constitutes employment misconduct is a question of law, which an appellate court reviews de novo. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). Whether the employee committed the particular act, however, is a question of fact. *Id.* This court reviews 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).

Relator’s primary argument is that the testimony of T J Hooligans’s witnesses was not sufficiently credible to support the ULJ’s determination that she had been discharged for misconduct. This court gives deference to the credibility determinations made by the ULJ: “[c]redibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal.” *Id.* at 345. When the credibility of a party or witness has a significant effect on the outcome of a decision, the ULJ “must set out the reason for crediting or discrediting that testimony.” Minn. Stat. § 268.105, subd. 1(c) (2008). This court may only reverse or modify the ULJ’s findings if they are “unsupported by substantial evidence in view of the entire record as submitted.” Minn. Stat. § 268.105, subd. 7(d)(5).

T J Hooligans’s witnesses testified that on July 24, 2008, a meeting was held during which relator was given her final warning about excessive cigarette breaks. Relator testified that the July 24 meeting had been about giving free drinks to customers. T J Hooligans’s witnesses also testified that on August 20, servers had to wait for relator to prepare drinks and had to prepare their own drinks because relator was smoking on the patio, and that relator spent “about 70% of that night” on the patio. Relator testified that no one else prepared drinks for customers that night, and her witnesses testified that relator had a manager cover her absence whenever she was away from the bar. In its order, the ULJ noted that the testimony of relator and her witnesses was less credible than that of T J Hooligans’s witnesses. The ULJ also noted that T J Hooligans’s witnesses

corroborated each other and that their testimony “makes the most sense in light of the incident from [July 23, 2008].” Because the ULJ’s findings are supported by substantial evidence in view of the entire record and because the reasons for the ULJ’s credibility determination are set out in the decision, the findings will not be disturbed on appeal.

II.

Relator also raises several claims of procedural error. We address each of these in turn.

Hearsay Testimony. Relator argues that the ULJ improperly admitted hearsay testimony at the evidentiary hearing. An evidentiary hearing is “not an adversarial proceeding,” and the ULJ “must ensure that all relevant facts are clearly and fully developed.” Minn. Stat. § 268.105, subd. 1(b) (Supp. 2007). DEED promulgates its own evidentiary-hearing rules, and these rules do not have to “conform to common law or statutory rules of evidence and other technical rules of procedure.” *Id.* Thus, “[a]ll competent, relevant, and material evidence” may be considered as part of the record. Minn. R. 3310.2922 (2007). Furthermore, “[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.” *Id.* In the present case, the ULJ received hearsay evidence in the form of a complaint from a customer who had left without being served. Because a business would reasonably rely upon customer complaints to determine whether employee misconduct occurred, the evidence in question was probative and properly received by the ULJ.

Bias on the part of the ULJ. Relator's next claim is that the ULJ conducted the evidentiary hearing in a biased manner, by lending support and direction to respondent. Under Minn. R. 3310.2921 (2007), the ULJ was obligated to "exercise control over the hearing procedure in a manner that protects the parties' rights to a fair hearing." Our review of the records indicates that the ULJ was merely exercising appropriate control over the hearing. The record does not support a claim of bias.

Confrontation and Notice of Witness Testimony. Relator's next claim is that due to a lack of notice regarding the substance of T J Hooligans's witnesses' testimony, she did not have time to prepare for and adequately confront the witnesses at the evidentiary hearing. But relator never raised lack of notice at the hearing, when the ULJ could have addressed the issue. And we will not consider issues raised for the first time on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." (quotation omitted)).

Exculpatory Evidence Not Provided. Relator makes numerous references in her brief to allegedly exculpatory evidence that was not provided to her, such as surveillance tapes from the bar and the receipts from her assigned cash register. Relator claims that T J Hooligans' failure to provide this evidence prevented her from receiving a fair hearing. Relator asserted this claim to the ULJ on reconsideration, and cited Minn. Stat. § 268.105, subd. 2(c). Under subdivision 2(c), the ULJ may not consider any evidence not submitted at the initial evidentiary hearing, except for the limited purpose of deciding whether to order an additional hearing on that evidence. And an additional hearing may

be ordered only on a showing that such evidence “(1) would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence; or (2) would show that the evidence that was submitted at the evidentiary hearing was likely false and that the likely false evidence had an effect on the outcome of the decision.” *Id.* “This court will defer to the ULJ’s decision not to hold an additional hearing.” *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 533 (Minn. App. 2007).

While the ULJ here did not specifically address subdivision 2(c), he made it clear that a review of the evidence presented supported his initial determination. And his refusal to grant a new hearing on the allegedly exculpatory evidence implicitly indicates that the exculpatory evidence would not have changed the outcome of the decision. Moreover, the ULJ may “issue subpoenas to compel the attendance of witnesses and the production of documents and other personal property considered necessary as evidence in connection with the subject matter of an evidentiary hearing.” Minn. Stat. § 268.105, subd. 4 (2008). There is nothing in the record to suggest that relator requested a subpoena to compel production of the allegedly exculpatory evidence.

Disadvantage due to Phone Connection. Relator’s final claim is that she was placed at a disadvantage during the hearing because she was unable to hear the testimony due to a poor phone connection. The record indicates that relator occasionally informed the ULJ that she was unable to hear testimony. But each time this occurred, the ULJ repeated the testimony or asked the witness to speak up and confirmed that relator heard and understood the testimony. We conclude that the ULJ handled the issue appropriately

and ensured that relator was not disadvantaged. *See* Minn. R. 3310.2921 (holding ULJ “must exercise control over the hearing procedure in a manner that protects the parties’ rights to a fair hearing”).

Age and Weight Discrimination. Finally, relator makes vague references to an age and weight discrimination claim. Because the ULJ never reached a determination on this issue, it is not properly before us for review. *See Thiele*, 425 N.W.2d at 582 (holding that a reviewing court is limited to issues presented to and considered by the district court).

Affirmed.

Dated:

Judge Michelle A. Larkin