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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-606**

Glen Larson,
Relator,

vs.

Georgia-Pacific Wood Products LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed January 26, 2010
Affirmed
Halbrooks, Judge**

Department of Employment and Economic Development
File No. 21377862-3

Glen R. Larson, Gordon, Wisconsin (pro se relator)

Georgia-Pacific Wood Products, LLC, c/o Payroll Tax Department, Atlanta, Georgia
(respondent)

Lee B. Nelson, Amy R. Lawler, Minnesota Department of Employment and Economic
Development, St. Paul, Minnesota (for respondent Department of Employment and
Economic Development)

Considered and decided by Toussaint, Chief Judge; Halbrooks, Judge; and
Huspeni, Judge.*

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

UNPUBLISHED OPINION

HALBROOKS, Judge

Pro se relator Glen Larson challenges a decision by the unemployment-law judge (ULJ) that he is ineligible to receive unemployment benefits because he was discharged for employment misconduct after reporting to work while under the influence of alcohol. Because there is substantial evidence in the record to support the ULJ's factual findings and because relator committed employment misconduct, we affirm.

FACTS

Relator was employed by Georgia-Pacific Wood Products LLC at its Duluth plant from October 1983 to September 25, 2008, as a full-time production supervisor. After receiving two convictions for driving while impaired (DWI) in 2007, relator voluntarily attended inpatient chemical-dependency treatment in May 2007 that lasted 28 days. He did not attend an aftercare program due to his work schedule, but he attended AA meetings.

On July 10, 2008, relator's supervisor discussed attendance and performance issues with relator and told him that two other employees had reported that they thought that relator was drinking. Relator denied drinking, but his supervisor told him to get help if he needed it. At the hearing, relator admitted that he had been drinking during the summer of 2008.

On August 19, 2008, the acting plant manager (manager) noticed that relator was not in his assigned area, even though others were there, cleaning up debris after a fire had been extinguished. The manager talked to relator once he was called into the area, and

relator discussed his chemical-dependency problem; relator told the manager that he had not drunk anything since noon. It was then about 7:30 p.m. The manager told relator to get help if he was having a problem and warned that he would be discharged if he came to work while under the influence of alcohol.

On September 22, 2008, the manager noticed that relator was displaying various indicia of intoxication. According to the manager, when he asked relator if he would pass a sobriety test, relator said no. Although under the company's drug-and-alcohol policy, the manager normally would have requested a test from relator, he did not do so because (1) relator admitted that he had been drinking and would not pass the test; (2) as acting plant manager, he had not yet been trained where to bring employees for an alcohol test and the human resources manager, who would have known, was out of town; (3) a serious plant emergency that required the manager's attention for two hours occurred in the middle of their discussion; and (4) by the time the manager drove relator home, the manager thought too much time had passed to obtain a valid test result. Relator stated that the apparent indicia of intoxication had other causes. Relator denied telling the manager that he would not pass a test and claimed instead that he knew that he would pass a test. According to relator, he asked to take a test as the manager was driving him home, but the manager refused because too much time had lapsed and the manager stated that he did not know the location of the testing site.

Several days later, relator was discharged for reporting to work while under the influence. He applied for unemployment benefits but was found ineligible because he had been discharged for misconduct. Relator appealed to the ULJ, who held a hearing

and determined that relator is ineligible because he was discharged for misconduct. The ULJ affirmed on reconsideration. This certiorari appeal follows.

D E C I S I O N

Relator challenges the sufficiency of the evidence to support the ULJ's findings and contends that his application for benefits should not have been denied. On review, this court may affirm the ULJ's decision, remand it for further proceedings, or reverse or modify it

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.

Minn. Stat. § 268.105, subd. 7(d) (2008).

Whether an employee engaged in misconduct raises mixed questions of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether the employee engaged in particular acts is a question of fact. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). “We view the ULJ’s factual findings in the light most favorable to the decision, giving deference to the credibility determinations made by the ULJ,” and we will not disturb the ULJ’s factual findings when they are substantially sustained by the evidence. *Id.* (citation omitted); *see also* Minn. Stat. § 268.105, subd. 7(d)(5) (providing the substantial-evidence standard). But whether an act constitutes

misconduct rendering the employee ineligible to receive unemployment benefits is a question of law reviewed de novo. *Skarhus*, 721 N.W.2d at 344.

Relator challenges several crucial findings of fact made by the ULJ. He contends that there was no proof that he was under the influence of alcohol on September 22, 2008. While relator offered innocuous explanations for his actions that the manager interpreted as signs of intoxication, the ULJ credited the plant manager's testimony.

Relator faults the manager, contending that, had the manager followed the company's guidelines when drug or alcohol use is suspected and brought relator in for a test, he would not have been discharged. Relator asserts that the manager's claim that he did not know how to handle the situation is false. But the ULJ found that the plant manager decided not to pursue a test for several reasons: the discussion between the plant manager and relator was interrupted when the manager had to spend two hours addressing a plant emergency and, as a result, the manager thought a test might be invalid; the manager, who had not had specific training as to the testing location for the Duluth site, did not know where to take relator; and the human resources manager, who would have known, was out of town.

In cases in which the credibility of the witnesses "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). These findings must be supported by substantial evidence. *Ywsyf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 533 (Minn. App. 2007) (holding that the ULJ's credibility findings were supported by substantial evidence). Here, the ULJ found that the manager's testimony was more

credible than relator's because it was more believable, more consistent, and less self-serving. Further, relator did not have a good explanation of why the manager would lie; the ULJ found that there was no evidence that the manager was in trouble for not testing relator, and the employer was not legally required to test relator. The ULJ also found that relator was inconsistent in his claims of whether or not he was drinking or was chemically dependent. The ULJ had substantial evidence from which to conclude that the manager's testimony was more credible than relator's testimony.

The next question is whether relator committed misconduct. An employee discharged for misconduct is ineligible for 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). "Conduct that was a direct result of the applicant's chemical dependency is not employment misconduct *unless the applicant was previously diagnosed chemically dependent or had treatment for chemical dependency, and since that diagnosis or treatment has failed to make consistent efforts to control the chemical dependency.*" *Id.*, subd. 6(b) (2008) (emphasis added).

Relator, who sought and obtained treatment for chemical dependency in May 2007, asserts that he was not subject to restrictions on what he could do on his own time. But the issue here is relator's conduct at work.

The ULJ found that relator had not made consistent efforts to try to retain his sobriety, noting that although relator continued to attend AA meetings, he was admittedly drinking during the summer of 2008. Relator's supervisor told him in July 2008 to get help if he was drinking again, but relator denied that he was drinking. On August 19, 2008, the manager told relator to get help if he was having a problem and warned relator that he would be discharged if he came to work under the influence. The ULJ found that relator reported to work while under the influence on September 22, 2008. The ULJ's decision that relator had not made consistent efforts to try to retain his sobriety is supported by substantial evidence, and the ruling that the chemical-dependency exception does not apply is correct as a matter of law. Relator committed misconduct when he reported to work while under the influence, rendering him ineligible for unemployment benefits.

Affirmed.