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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-480**

Curt Wright,
Relator,

vs.

Miner's Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed February 16, 2010
Affirmed in part and remanded
Minge, Judge**

Department of Employment and Economic Development
File No. 21287443-4

Curtiss Wright, Duluth, Minnesota (pro se employee)

Miner's Inc., Hermantown, Minnesota (employer)

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

Considered and decided by Schellhas, Presiding Judge; Minge, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

MINGE, Judge

Relator challenges an unemployment law judge's (ULJ) determination that he is ineligible for unemployment benefits because he was discharged for misconduct based on abusive behavior. Relator argues that he was discharged based on graffiti allegations that were never resolved. The Department of Employment and Economic Development (DEED) argues that although relator was properly discharged for misconduct, he was initially suspended based on graffiti allegations and the matter should be remanded on the limited question of whether relator was eligible for unemployment benefits while suspended. We affirm the determination that relator was discharged for employment misconduct and remand for determination of whether relator was eligible for unemployment benefits while suspended for the graffiti complaint.

FACTS

Employee Curtiss Wright worked for Miner's Inc. in one of its warehouses from October 24, 2006 to September 23, 2008. On September 23, Wright's supervisor told him that he was suspended indefinitely on suspicion of defacing bathroom surfaces with graffiti. The supervisor informed Wright that the situation would be investigated while he was on suspension without pay. Wright met with the human-resources (HR) director and the director of loss prevention on September 29 about the graffiti. Wright denied responsibility for the graffiti but said he might be able to identify the offender.

Wright subsequently went to the warehouse and was seen by the evening-shift supervisor. The supervisor was aware that Wright was on suspension and asked him to

leave. After being told several times to leave and that the police would be called, Wright finally left in his car. As he drove off, Wright made an obscene gesture at the night supervisor and yelled obscenities. Wright telephoned his day-shift supervisor's office and left an obscene voicemail. Wright subsequently telephoned the HR director, called him an obscene name, and used highly offensive profanity. After that call, the HR director sent Wright a letter dated October 9, terminating his employment. Because of the termination, the graffiti investigation was discontinued.

Wright applied for unemployment benefits. A ULJ found that Wright was suspended indefinitely on September 23 for graffiti, that the October 9 discharge was for Wright's misconduct, and that the discharge was retroactive to the September 23 suspension. Wright requested reconsideration and the ULJ affirmed his earlier decision. This certiorari appeal follows.

DECISION

Wright appears pro se. He appears to raise two issues: (1) whether the ULJ erred in not recognizing that his graffiti suspension was actually the discharge; and (2) whether there is sufficient evidence to sustain the graffiti suspension. This court may affirm the ULJ's decision, remand it for further proceedings, or reverse or modify it if the decision derives from unlawful procedure, relies on error of law, is unsupported by substantial evidence in the record, or is arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d)(3)–(6) (2008). The ULJ's factual findings are reviewed “in the light most favorable to the decision, giving deference to the credibility determinations made by the ULJ.” *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (citations omitted). This

court will not disturb a ULJ's factual findings that are supported by substantial evidence.
Id.

“Whether an employee committed employment misconduct is a mixed question of fact and law.” *Skarhus*, 721 N.W.2d at 344. “Whether the employee committed a particular act is a question of fact.” *Id.* Whether that conduct constitutes disqualifying employment misconduct is a question of law which we review de novo. *Id.* For unemployment benefit purposes, 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).

I.

The ULJ determined that Wright was disqualified from receiving unemployment benefits because his post-September 29 conduct violated his employer's reasonably expected standards, constituting employment misconduct. Wright does not dispute that the conduct occurred and that it was an adequate basis for a finding of misconduct. Rather, he contends that his conduct after the September 29 meeting was not the basis for his discharge and that he was actually discharged from Miner's for alleged graffiti on September 23.

A discharge occurs “when any words or actions by an employer would lead a reasonable employee to believe that the employer will no longer allow the employee to work for the employer in any capacity.” Minn. Stat. § 268.095, subd. 5(a). Miner's

informed Wright that he was suspended until an investigation into the graffiti was conducted. The day-shift supervisor testified that he placed Wright on suspension until an investigation was made into the allegations. The HR director also testified that Miner's had been investigating the graffiti allegations until October 6. This evidence supports a finding that Miner's believed that Wright was still in its employment subject to the outcome of the graffiti investigation.

Moreover, we note that Wright stated on his unemployment-benefits application that he had been placed on suspension/laid off until further notice. Other facts show that Wright knew or had reason to know that after September 23, although he was on suspension, he remained an employee: (1) Wright met with the HR director to discuss the graffiti allegations; (2) Wright stated he did not have to leave the warehouse property when told to leave; and (3) Wright left a voicemail for the day-shift supervisor complaining about not getting a telephone call regarding the status of the investigation. Based on these facts, we conclude that there is substantial evidence supporting the ULJ determination that Wright was only suspended on September 23 and that the actual discharge for employment misconduct occurred on October 9.

II.

The other issue raised by Wright is whether there were adequate grounds for the graffiti suspension. Based on the October 9 discharge for misconduct, the ULJ did not consider this question. Rather, the ULJ determined that the termination related back to the date of the suspension. Although Wright does not effectively challenge this relation-back conclusion, DEED concedes that the ULJ's failure to determine Wright's eligibility

for unemployment benefits while on suspension leaves an unresolved issue requiring remand. Respondent DEED points out that whether Wright's date of discharge is retroactive to his suspension date depends on whether there were adequate grounds for the suspension. DEED asserts that Wright may be eligible for unemployment benefits while suspended from September 23 through October 5 (the Sunday of the calendar week of the discharge) and requests a remand for that determination.

The ULJ has a duty to conduct the evidentiary hearing as an evidence-gathering inquiry rather than an adversarial proceeding. Minn. Stat. § 268.105, subd. 1(b) (2008). The ULJ "must ensure that all relevant facts are clearly and fully developed." Minn. R. 3310.2921. The ULJ "[has] 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).

Minnesota law addresses unemployment-benefits eligibility while an employee is suspended:

An applicant who has been suspended from employment without pay for 30 calendar days or less, as a result of employment misconduct as defined under section 268.095, subdivision 6, is ineligible for unemployment benefits beginning the Sunday of the week that the applicant was suspended and continuing for the duration of the suspension.

Minn. Stat. § 268.085, subd. 13(a) (2008).

As we previously stated, the ULJ found that Wright had been suspended, not discharged, on September 23. As DEED points out, if Wright is found to be responsible

for the graffiti and if his graffiti activity constitutes employment misconduct, then his suspension was for misconduct; and because the suspension was less than 30 days, Wright would be ineligible for unemployment benefits from September 23 through October 5. DEED concedes, however, that if Wright was not responsible for the graffiti or if the graffiti did not constitute employment misconduct, the suspension was not disqualifying and Wright is eligible for unemployment benefits during the period of September 23 through October 5, 2008.

Because these matters were not addressed by the ULJ, we grant DEED's request and remand on the limited question of whether Wright's suspension was for employment misconduct.

III.

Finally, we note that Wright references a pending discrimination claim unrelated to unemployment benefits. Because the issue was not reached by the ULJ and the record does not contain any basis for determining that the discrimination claim is relevant to eligibility for unemployment benefits, we conclude that this matter is not properly before this court and do not address it.

Affirmed in part and remanded.

Dated: