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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-538**

Abraham Paquette,  
Relator,

vs.

Fastenal Company Inc.,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed February 23, 2010  
Affirmed in part, reversed in part, and remanded  
Larkin, Judge**

Department of Employment and Economic Development  
File No. 21471066-3

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Considered and decided by Wright, Presiding Judge; Larkin, Judge; and Crippen,  
Judge.\*

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

## **UNPUBLISHED OPINION**

**LARKIN**, Judge

Relator challenges an unemployment-law judge's (ULJ) determination that he is ineligible for unemployment benefits because he was discharged for employment misconduct. Relator claims that the ULJ erred by concluding that his criminal conviction for conspiracy constitutes employment misconduct and that he was discharged because of this conviction and not because he took an unpaid leave. Relator also claims that the ULJ erred by failing to conduct his hearing as an evidence-gathering inquiry; by failing to assist him as an unrepresented party; and by failing to grant an additional evidentiary hearing on his motion for reconsideration. Because the ULJ correctly determined that relator's conviction constitutes employment misconduct, we affirm in part. But because the ULJ's factual determination that relator was discharged because of his conviction was made upon unlawful procedure and such procedure may have prejudiced relator's substantial rights, we reverse the determination of ineligibility and remand for a hearing on relator's pretextual-discharge claim.

### **FACTS**

Relator Abraham D. Paquette was employed by Fastenal Company Inc. as a salesman between March 1, 2006 and November 17, 2008. On August 8, 2006, Paquette was charged with conspiracy in federal court for selling illegal cable-box converters. Paquette claims to have told his direct supervisor, Pete Kolb, about the charge in December 2006. Paquette pleaded guilty to the charge on March 31, 2008. Mark Hall,

Paquette's district manager, claims to have first learned of Paquette's legal troubles and to have discovered his conviction on or about November 14, 2008.

On September 2, 2008, Paquette requested unpaid leave pursuant to the Family Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-2654 (2006).<sup>1</sup> Paquette completed the required paperwork on September 4 and took FMLA leave from October 6 to November 3. Paquette returned to work at Fastenal, and on November 6, Paquette received a verbal warning for poor work performance. On November 17, Paquette was discharged from his employment at Fastenal, purportedly based on his conspiracy conviction.

Paquette established an unemployment-benefit account and applied for benefits. Respondent Department of Employment and Economic Development (DEED) determined that Paquette had been discharged for employment misconduct and was therefore ineligible for unemployment benefits. Paquette appealed, and a ULJ held an evidentiary hearing. Paquette set forth a claim of pretextual discharge, arguing that he was discharged because he took a leave under the FMLA and not because of his conviction. In support of his claim, Paquette asserted that his employer knew about his pending criminal charge long before his discharge and yet did not discharge him until after he took the leave over his employer's objection.

Paquette had arranged to present the testimony of Kolb and Brian Looney, another Fastenal employee and Paquette's most-recent direct supervisor, in support of his

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<sup>1</sup> Under the FMLA, an eligible employee is entitled to a total of 12 workweeks of leave for, among other things, the birth of a child and in order to care for such child. 29 U.S.C. § 2612.

pretextual-discharge claim. At the hearing, the ULJ noted that Paquette had listed Kolb and Looney as witnesses for the hearing. Paquette informed the ULJ that Kolb and Looney told him that they were willing to participate in the hearing. The ULJ attempted to telephone Kolb and Looney, reached their voicemails, and left a message for each of them.

Paquette's district manager, Hall, participated in the hearing on behalf of Fastenal. Early in the hearing, the ULJ asked Hall if there was a reason why Kolb was not participating in the hearing. Hall responded, "I guess I don't know," and "He wasn't asked to, was he?" The ULJ replied that Paquette had asked Kolb to be a witness. Hall responded, "Okay. As far as from the Fastenal side, as far as I'm aware, I was the only one that was asked to participate today." But Hall later contradicted this statement when the ULJ asked Hall if he had spoken to Kolb or Looney about the hearing. Hall then admitted:

They called and asked me or asked me if, if, or they called and told me that, you know, [Paquette] wanted [them] to be on this call or whatever. And I said, well, you can be on the call if you want to. It's my understanding that you don't have to be on the call if you don't want to be, but I said, you can be on it, you can do whatever you want to do.

At this point, Paquette pointed out that Hall's statement contradicted his earlier claim that, as far as he was aware, he was the "only one" from Fastenal that was asked to participate in the hearing. When the ULJ asked Hall to respond, he claimed that he didn't recall being asked the question and then suggested that he was actually asked whether Fastenal intended to call any other witnesses.

Despite Hall's contradictory testimony, his admission that he may have dissuaded Paquette's witnesses from testifying, and the fact that he was in a supervisory position over the witnesses, the ULJ did not explore the need for a subpoena. Instead, the ULJ considered and rejected Paquette's pretextual-discharge claim based on the record before her and affirmed DEED's initial determination of ineligibility. The ULJ concluded that Paquette was discharged because of his conspiracy conviction, not because of his leave, and that the conspiracy conviction constituted employment misconduct.

Paquette moved for reconsideration on several grounds. Paquette asserted that Hall had told Paquette's witnesses not to participate in the evidentiary hearing and that they should be called to testify. Paquette claimed that Kolb would contradict Hall's testimony that Paquette never informed his employer of the pending charges and that Kolb did not know of the charges. Paquette also claimed that Kolb and Looney would contradict Hall's testimony regarding how and when he learned of Paquette's criminal proceedings. Paquette further claimed that Kolb would verify that he was present when Hall questioned Paquette regarding the need for his requested leave and complained that it would hurt business. Paquette indicated that Looney would testify that he was present at a meeting between Paquette and Hall after Paquette returned from his leave and that Hall confronted Paquette about taking the leave.

The ULJ denied Paquette's request for reconsideration. The ULJ reasoned that Paquette was repeating arguments already made and considered and that Paquette was offering new evidence that was not submitted at the evidentiary hearing, including documents and additional witnesses. The ULJ concluded that the proffered evidence

would not likely change the outcome of the decision. With regard to the proffered witness testimony, the ULJ limited her analysis to the distinction between Paquette's charge and conviction, stating: "[W]hether Hall knew about the charge is irrelevant. Paquette was discharged immediately after Hall discovered that he had been convicted. Therefore, an additional hearing shall not be ordered." The ULJ did not discuss the potential impeachment value of the proffered witness testimony or how it might impact her assessment of Hall's testimony that the FMLA leave in no way influenced Fastenal's decision to discharge Paquette. This certiorari appeal follows.

## **DECISION**

### **I.**

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). Paquette claims that his conspiracy conviction does not constitute employment misconduct. 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).

Employment misconduct includes "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).

The ULJ found that Paquette had been terminated for employment misconduct stating: “Paquette’s conduct displays clearly a serious violation of the standards of behavior an employer has the right to reasonably expect of its employees, and is employment misconduct.” The ULJ found that Fastenal provides a copy of a code of conduct to all employees upon hire and that “Fastenal requires a high degree of personal integrity and responsibility from its employees.” Under the code, employees must avoid “any action that might be harmful to the employee, other employees, the Company, or cause any unfavorable reaction from current or potential customers.” The code also provides that “[d]isruptive, fraudulent, or destructive behavior is unacceptable and is grounds for disciplinary action up to and including termination.” The ULJ concluded that Paquette’s failure to follow these expectations constitutes employee misconduct. *See* Minn. Stat. § 268.095, subd. 6(a)(1) (defining employee misconduct to include intentional conduct “that displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee”). We discern no error in this conclusion.

Paquette argues that his conviction does not constitute misconduct because there is no “nexus” between his conviction and his employment and because his conviction is a single incident that did not have a significant adverse impact on the employer. *See* Minn. Stat. § 268.095, subd. 6(a) (excluding single incidents that do not result in a significant

adverse impact on the employer from the definition of employment misconduct). We disagree. Paquette was convicted of conspiracy for his role in selling illegal cable-box converters. The record includes a press release from the United States Department of Justice detailing the charge. Due to the public nature of the charge, Fastenal could be justifiably concerned that current or potential customers would be unwilling to put their trust in Paquette, and thereby Fastenal, if they discovered Paquette's conviction. Given the similarity between the nature of the conviction (i.e., illegal sales) and the nature of Paquette's employment (i.e., a sales representative), Fastenal's concern was reasonable.

Paquette also argues that an employer who is informed of an employee's legal troubles should not be allowed to store that information away until the employer finds it most convenient to discharge the employee and then use the information as a basis to deny benefits. This type of policy argument is not properly addressed to this court. *See Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) (“[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court.”), *review denied* (Minn. Dec. 18, 1987).

The ULJ's legal determination that Paquette's federal conviction constitutes employment misconduct is affirmed.

## **II.**

Our determination that Paquette's conviction constitutes employment misconduct does not end our analysis. Paquette challenges the procedure underlying the ULJ's decision, arguing that the ULJ failed to conduct his hearing as an evidence-gathering inquiry and failed to assist him as an unrepresented party. We may reverse a decision of



a ULJ if it was “made upon unlawful procedure” that may have prejudiced the substantial rights of the relator. Minn. Stat. § 268.105, subd. 7(d)(3) (2008).

Paquette’s argument relates to his pretextual-discharge claim. An applicant who “was discharged *because of* employment misconduct” is ineligible for all unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008) (emphasis added). If a relator claims that the stated reason for his or her discharge was pretextual, the ULJ must allow the relator to present evidence on that claim. *Scheunemann*, 562 N.W.2d at 34. “When the reason for the discharge is disputed, the hearing process must allow evidence on the competing reasons and provide factual findings on the cause of discharge.” *Id.* “The [ULJ] is then obligated to weigh the evidence, determine credibility, and make a determination on the reasons for the discharge.” *Id.* If the reason for discharge is determined to be pretextual, the relator is entitled to unemployment benefits. *See id.* (“The statutory disqualification for reemployment insurance benefits applies to individuals who are discharged *for* misconduct.”).

Paquette had arranged for Kolb and Looney to testify in support of his pretextual-discharge claim, yet they were unavailable when the ULJ called them during the hearing. Despite Hall’s less-than-candid response when the ULJ first asked him if he knew why one of Paquette’s witnesses was not available and Hall’s later admission that he told both of Paquette’s witnesses that they did not have to participate in the hearing if they did not want to, the ULJ did not raise or consider the need for a subpoena. Instead, the ULJ rejected Paquette’s pretextual-discharge claim based on the record before her, concluding:

Paquette presented testimony that he was discharged as a result of taking FMLA leave. The preponderance of the evidence suggests that Paquette was discharged as a result of his conspiracy conviction. Hall testified that he did speak with Paquette about the FMLA leave, but the focus of the conversation was to gather suggestions for filling Paquette's role while he was on leave.

At oral argument on appeal, DEED argued that the ULJ's determination regarding the reason for Paquette's discharge is a credibility determination to which we should defer. *See Skarhus*, 721 N.W.2d at 345 ("Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal."). While we agree that the ULJ's finding regarding the reason for Paquette's discharge was based on a credibility determination, we will not defer to it because the ULJ did not hear relevant testimony from Paquette's witnesses before making the determination. *See Scheunemann*, 562 N.W.2d at 34 (stating that relator "should have been permitted to present evidence disputing the reason for her discharge").

At the hearing, Paquette informed the ULJ that his proffered witnesses would testify as follows: Paquette informed Kolb and Looney of the details of his criminal charge and proceeding, and Kolb told Hall about the pending criminal charge, long before Paquette's eventual discharge; after his FMLA leave, Looney informed Paquette that there were going to be some changes and that Hall was not happy that Paquette had taken the leave; Looney was present at a subsequent meeting between Hall and Paquette where Hall expressed that he was unhappy that Paquette had taken the leave; and Looney was present when Hall informed Paquette that the leave was one of the reasons for his discharge.

Testimony consistent with this proffer would directly contradict the following portions of Hall's testimony: he first learned of Paquette's charge during a Google search shortly before Paquette's termination; he had no prior knowledge of Paquette's pending criminal charge; Paquette never informed his employer (i.e., his supervisors) of the charge; Kolb had no knowledge of the charge; he never discouraged Paquette from taking a FMLA leave; the leave did not factor into the decision to discharge Paquette; and he did not tell Paquette that the leave was one of the reasons for discharge. The proffered testimony would have impeached Hall's testimony regarding the true reason for Paquette's discharge and buttressed Paquette's pretextual-discharge claim by showing that Hall knew about Paquette's criminal charge long before the discharge and that Hall was unhappy that Paquette took the FMLA.

A ULJ is required to assist unrepresented parties in the presentation of evidence, to control the hearing in a way which protects the parties' right to a fair hearing, and ensure that relevant facts are clearly and fully developed. Minn. R. 3310.2921 (2007). The hearing is to be conducted as an evidence-gathering inquiry, and not an adversarial proceeding, without regard to burdens of proof. Minn. Stat. § 268.105, subd. 1(b) (2008). When a pro se party arranges for his or her witnesses to testify, the ULJ discovers that the party's employer may have dissuaded the witnesses from testifying, and the proffered testimony is relevant and necessary to a determination of the issues, the ULJ should explore other means of obtaining the testimony. *See* Minn. Stat. § 268.105, subd. 1(b) (providing that the ULJ "must ensure that all relevant facts are clearly and fully developed"); Minn. R. 3310.2921 (requiring ULJ to assist unrepresented parties in the

presentation of evidence and ensure that relevant facts are clearly and fully developed).<sup>2</sup> This assistance is especially important when the ULJ's rejection of a pretextual-discharge claim hinges on the ULJ's determination that the employer testified credibly regarding the reason for the discharge.

Under the circumstances of this case, the ULJ did not adequately assist Paquette in the presentation of his evidence. As a result, the relevant facts concerning the reason for Paquette's discharge were not clearly and fully developed, and the ULJ's decision regarding the reason for Paquette's discharge was made upon unlawful procedure. Moreover, because the proffered testimony was relevant to Paquette's pretextual-discharge claim and may have impacted the ULJ's determination regarding the true reason for Paquette's discharge, Paquette's substantial rights may have been prejudiced. Accordingly, we reverse the ULJ's ineligibility determination and remand for a hearing on Paquette's pretextual-discharge claim—specifically, a determination of the reason for his discharge. *See* Minn. Stat. § 268.105, subd. 7(d)(3) (providing for reversal or modification of a ULJ's determination if the decision is made upon unlawful procedure resulting in prejudice to the relator's substantial rights).

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<sup>2</sup> The legislature recently clarified a ULJ's duties and now requires that the ULJ explain "that the applicant has the right to request that the hearing be rescheduled so that documents or witnesses can be subpoenaed," Minn. Stat. § 268.105, subd. 1(b) (Supp. 2009), and that the ULJ give full consideration to a request for a subpoena, Minn. Stat. § 268.105, subd. 4 (Supp. 2009). These statutes apply to ULJ determinations made on or after August 1, 2009. *See* Minn. Stat. § 645.02 (2008) ("Each act, except one making appropriations, enacted finally at any session of the legislature takes effect on August 1 next following its final enactment, unless a different date is specified in the act."). While these statutes do not control our decision in the present case, they emphasize the importance of ensuring "that relevant facts are clearly and fully developed." Minn. R. 3310.2921.

On remand, we remind the ULJ that “[w]hen the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the unemployment law judge must set out the reason for crediting or discrediting that testimony.” Minn. Stat. § 268.105, subd. 1(c). Paquette and Hall provided conflicting testimony regarding the reason for Paquette’s discharge. The ULJ found that Hall testified credibly, and this credibility determination undoubtedly influenced the ULJ’s finding that Paquette was discharged as a result of his conspiracy conviction, not because of his FMLA leave. Thus, the finding had a significant effect on the outcome of the ULJ’s decision regarding Paquette’s pretextual-discharge claim. Yet the ULJ did not set out the reasons for crediting Hall’s testimony. We cannot overlook this failure given that Hall expressly contradicted himself regarding his potential role in procuring the absence of Paquette’s witnesses. This contradiction calls Hall’s credibility into question. If the ULJ deems his testimony credible on remand, she must set forth her reasons for doing so.

Given our decision to remand on this ground, we do not address Paquette’s claim that the ULJ erred by failing to order an additional evidentiary hearing under Minn. Stat. § 268.105, subd. 2(c) (2008) (providing that a ULJ must order an additional evidentiary hearing if a party shows that evidence not submitted at initial hearing (1) would likely change the outcome of the decision and there was good cause for not submitting the evidence at the initial hearing, or (2) would show that the evidence that was submitted at

the initial hearing was likely false and the likely false evidence had an effect on the outcome of the decision).

**Affirmed in part, reversed in part, and remanded.**

Dated:

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Judge Michelle A. Larkin