STATE OF MINNESOTA
IN COURT OF APPEALS
A09-805

James Deilke,
Relator,

vs.

C & B Excavating/Sewer Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed March 16, 2010
Affirmed
Crippen, Judge[*]

Department of Employment and Economic Development
File No. 21767236-3

Karen R. Cole, St. Paul, Minnesota (for relator)

C & B Excavating/Sewer Inc., Scandia, Minnesota (respondent)

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

Considered and decided by Wright, Presiding Judge; Worke, 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.

U N P U B L I S H E D O P I N I O N

CRIPPEN, Judge

Relator challenges an unemployment law judge's (ULJ) decision that he is ineligible for unemployment benefits because he had been discharged for employment misconduct. Because the ULJ's decision is supported by substantial evidence and relator's actions constitute employment misconduct, we affirm.

FACTS

Relator James Deilke worked for respondent C & B Excavating/Sewer, Inc. (C & B) as a truck driver for 19 years. C & B was a small company with two employees, relator and B.M., that installed and maintained septic systems and had a long-term contract with the city of Marine. C & B terminated relator's employment on December 15, 2008, and he established an unemployment benefit account.

Respondent Department of Employment and Economic Development (DEED) determined that relator was discharged for employment misconduct and, as a result, ineligible for unemployment benefits. Relator sought review, and a ULJ held an evidentiary hearing on February 18, 2009. After considering the testimony of relator and Juliann Bol, C & B's president, the ULJ concluded that relator was discharged for misconduct. Relator submitted a request for reconsideration and the ULJ affirmed the initial determination.

D E C I S I O N

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 conduct displaying a "serious violation of the standards of behavior the employer has the right to reasonably expect" or otherwise clearly displays a "substantial lack of concern for the employment." *Id.*, subd. 6(a) (2008).

Our review of a ULJ's eligibility determination is governed by Minn. Stat. § 268.105, subd. 7(d) (2008), which includes grounds for correction if the ULJ's findings are unsupported by substantial evidence or are otherwise affected by an error of law or is arbitrary. The question of 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).

Viewed favorably, the evidence shows support for the ULJ's findings that C & B had a long-term contract with the city of Marine; that in October 2008, relator upset the Marine city clerk by commenting that the city's work was too big for C & B; and that four months later, when this matter was heard, the city had not renewed their contract and C & B heard that the city was "looking around" to see what other companies might be able to do the job.

We have held that a single incident may constitute misconduct when an employee "deliberately chooses a course of conduct that is adverse to the employer." *Schmidgall*,

644 N.W.2d at 806. The ULJ correctly determined that relator's actions in speaking to the city clerk displayed a serious violation of the standards of behavior that C & B had the right to reasonably expect of relator. Relator's actions constituted employment misconduct, and the ULJ correctly determined that he was ineligible for benefits.[1]

The ULJ also found that after relator was at another jobsite in December 2008, the customer's employee "became so upset at [relator] that he called his boss and threatened to walk off the job." The boss at the other company then came to the jobsite, and relator was disrespectful to him as well. This customer, like the city of Marine, has since had no contact with C & B. The ULJ did not resolve disputed evidence as to what had happened in relator's interaction with the employee.

We have held that when an employee is "aggressive and offensive with customers," such actions constitute employment misconduct. *Pitzel v. Packaged Furniture & Carpet*, 362 N.W.2d 357, 357-58 (Minn. App. 1985). Similarly, we have found misconduct where an employee is rude to customers and other employees. *Montgomery v. F & M Marquette Nat. Bank*, 384 N.W.2d 602, 605 (Minn. App. 1986), *review denied* (Minn. June 13, 1986). Because the record supports the ULJ's findings

[1] Although it does not provide the basis for the ULJ's decision or our holding, the record shows, confirmed in the parties' briefs, that relator talked to the city clerk on two occasions; the second after being told not to by his employer. Such a warning would provide further support for our holding. *See Vargas v. Nw. Area Found.*, 673 N.W.2d 200, 206 (Minn. App. 2004) (general rule is that if an employer's request is reasonable and does not impose an unreasonable burden on the employee, the employee's refusal to abide by the request constitutes employment misconduct), *review denied* (Minn. Mar. 30, 2004).

that relator acted "in such a way to anger another contractor and his boss," the ULJ correctly decided that this too was misconduct prompting relator's discharge.

Relator argues that the adequacy of the evidence is flawed because the employer's testimony was based upon hearsay. But 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." Minn. Stat. § 268.105, subd. 1(b) (2008). Thus, "[a]ll competent, relevant, and material evidence" may be considered as part of the record. Minn. R. 3310.2922 (2007). Furthermore, "[a ULJ] may receive any evidence that 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.* The ULJ received hearsay evidence, via the testimony of Juliann Bol, in the form of a complaint from a contractor at the jobsite in December to whom relator had been disrespectful. 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.

Relator also argues that the stated reasons for his discharge were pretextual and that he was actually fired because he raised safety concerns to his employer. 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. *See 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."). But the ULJ allowed relator to present evidence on this argument, and concluded that relator

was discharged as a result of his statements to the city clerk and his actions at the jobsite in December. There is adequate evidence in the record to permit this finding.

Relator claims that the policy underlying the Minnesota Whistleblower Act prevents his statements to the city clerk from constituting misconduct. Under Minn. Stat. § 181.932, subd. 1(1) (2008), an employer may not penalize an employee based on the employee's report to public officials on a law violation, but there is nothing in the record to indicate that relator, when acting as he did, reported a violation or suspected violation of any law or rule.

Finally, relator argues that the ULJ failed to adequately set out the reasons for her credibility determination. 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). But if credibility determinations do not have a significant effect on the decision, the ULJ need not make any dispositive credibility determinations. *See id.* Relator argues that if the ULJ believed relator's testimony, the ULJ would have concluded that relator had not committed employment misconduct. But this contention ignores the undisputed testimony that relator told the city clerk that the job was too big for C & B. Relator also ignores the undisputed testimony that, as a result of his conduct at the jobsite in December, C & B's customers became upset to the point of contacting C & B. When the record is considered in its entirety, the absence of express credibility findings is not erroneous.

Affirmed.