STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1570

David Selden,
Relator,

vs.

Allina Health System,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed July 6, 2010
Affirmed
Worke, Judge

Department of Employment and Economic Development
File No. 22051155-3

Bernetta C. Miller, Minneapolis, Minnesota (for relator)

Allina Health System, Minneapolis, Minnesota (respondent employer)

Lee B. Nelson, Britt K. Lindsay-Waterman, Department of Employment and Economic Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Shumaker, Presiding Judge; Worke, Judge; and Bjorkman, Judge.

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

WORKE, Judge

Relator argues that the unemployment-law judge (ULJ) erred in concluding that he was terminated for employment misconduct and ineligible for unemployment benefits. Relator also argues that he did not receive a fair hearing. We affirm.

D E C I S I O N

Determination of Ineligibility

Relator David Seldon challenges the ULJ's decision that he was terminated for misconduct and ineligible for unemployment benefits. When reviewing the decision of a ULJ, this court may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced. Minn. Stat. § 268.105, subd. 7(d) (2008). Whether an employee committed employment misconduct presents a mixed question of fact and law. *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006). Whether the employee committed a particular act is a question of fact. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). 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). Whether the act committed by the employee constitutes employment misconduct presents a question of law, which we review de novo. *Scheunemann*, 562 N.W.2d at 34.

Relator was terminated from his employment as a lead-painter at respondent-employer Allina Health System for clocking in earlier than he started working and receiving pay for time he did not work. An employee who is discharged for employment

misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). 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." *Id.*, subd. 6(a) (2008). An employer has a right to expect an employee to abide by reasonable policies and procedures. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). "[A]n employee's decision to violate knowingly a reasonable policy of the employer is misconduct." *Id.* at 806. Violating an employer's timecard policy is employment misconduct. *McKee v. Cub Foods, Inc.*, 380 N.W.2d 233, 236 (Minn. App. 1986).

Relator claims that respondent-employer's policy requiring employees to begin working promptly upon clocking-in was ambiguous regarding whether employees were allowed to park prior to clocking-in. But relator admitted to respondent-employer that he knew that clocking-in prior to parking was wrong, and explained his behavior as, "I got lazy I guess." Relator alternatively contends that, even if the policy required employees to park before clocking-in, he was an exception because he was responsible for the maintenance of the exterior of the hospital. The ULJ did not believe relator's purported justification that he was working while parking his car, and the ULJ is entitled to weigh the evidence and make credibility determinations. *See Skarhus*, 721 N.W.2d at 345 ("Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal."). Accordingly, relator's arguments fail. The ULJ did not err in

deciding that relator was terminated for employment misconduct and is ineligible for unemployment benefits.

Fair Hearing

Relator also argues that he did not receive a fair hearing. A ULJ conducts a hearing "as an evidence gathering inquiry and not an adversarial proceeding." Minn. Stat. § 268.105, subd. 1(b) (2008). The ULJ "must ensure that all relevant facts are clearly and fully developed." *Id.* A hearing generally is considered fair if both parties are afforded an opportunity to give statements, cross-examine witnesses, and offer and object to exhibits. *See Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007).

Relator claims the ULJ failed to explain the evidentiary standard and inform him that he had the ability to reschedule the hearing and subpoena other witnesses, in violation of Minn. Stat. § 268.105, subd. 1(b) (Supp. 2009). But this provision was not in effect until August 1, 2009, and therefore was not applicable during the March 2009 hearing. *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.") The ULJ did not err by failing to advise relator of a right that was not legislatively effective at the time of the hearing.

Relator next asserts that the ULJ failed to ensure that his union representative testified at the hearing and should have requested additional documents from respondent-employer. A ULJ may issue subpoenas when a party requests the presence of a witness.

Minn. Stat. § 268.105, subd. 4 (2008). But nothing in the language of the statute supports the proposition that a ULJ may gather its own evidence, call its own witnesses, or otherwise be responsible for ensuring that relator's witnesses are available at the hearing. *See id*. The ULJ did not fail to adequately gather evidence because relator was unable to present testimony from his union representative and other evidence that he believed was beneficial to his case.

Finally, relator argues that the ULJ erred in refusing to grant his request for reconsideration. A ULJ may grant a request for reconsideration only when an additional evidentiary hearing "would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence." *Id.*, subd. 2(c) (2008). In denying relator's request for reconsideration, the ULJ determined that the testimony of relator's union representative was unlikely to change the outcome. Relator admitted to respondent-employer that he knew clocking-in before parking was wrong, and explained he did so because he was lazy; thus, the ULJ did not err in this respect. Moreover, relator advances no explanation as to why his union representative failed to appear, and therefore presents no good cause warranting an additional evidentiary hearing even if this evidence was likely to change the outcome. The ULJ properly denied relator's request for reconsideration.

Affirmed.