STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1887

Yohannes Bizen,
Relator,

vs.

Sky Chefs Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed July 13, 2010
Affirmed
Schellhas, Judge

Department of Employment and Economic Development
Agency File No. 22791489-3

Yohannes Bizen, St. Paul, Minnesota (pro se relator)

Jody A. Ward-Rannow, Ford & Harrison LLP, Minneapolis, Minnesota (for respondent Sky Chefs Inc.)

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

Considered and decided by Schellhas, Presiding Judge; Stoneburner, Judge; and Connolly, Judge.

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

SCHELLHAS, Judge

In this certiorari appeal, relator challenges the decision of an unemployment-law judge (ULJ) that he is ineligible for unemployment benefits because he was discharged for employment misconduct. We affirm.

FACTS

Respondent Sky Chefs Inc. terminated relator Yohannes Bizen's employment on June 4, 2009. Respondent Department of Employment and Economic Development (DEED) determined relator to be eligible for unemployment benefits, and Sky Chefs appealed. A ULJ conducted a telephone hearing on August 20, 2009. The hearing was scheduled to begin at 2:15 p.m., and the ULJ telephoned relator at 2:24. When relator did not answer, the ULJ left a voicemail message asking relator to telephone. The ULJ then tried relator at another number and did not get an answer. Relator never telephoned, and Sky Chefs human-resources manager Daniel Wirtz was the only participant in the telephone hearing.

Sky Chefs supplied catering services for Northwest Airlines flights. Sky Chefs hired relator as a truck driver to deliver equipment to aircrafts. Sky Chefs terminated relator for "failure to follow standard operating procedures," after a series of safety violations in May 2009. On May 8, 2009, relator failed to wear a required safety vest, and Sky Chefs informed him that if there was another violation, he could be terminated. On May 18, 2009, relator violated safety protocols again when he failed to use wands as he guided another driver away from an aircraft. Sky Chefs did not terminate relator even

though Wirtz testified that it "should have been a termination." On May 26, 2009, relator drove his truck up to the rear of an aircraft, parked it in such a way that the front wheels were aimed at the aircraft, and left the truck unattended with the wheels unchocked while he went to assist another driver. According to Wirtz, relator's conduct was "a huge violation" of safety policy. Sky Chefs learned of the incident from an employee of its customer, Northwest Airlines. The Northwest employee informed Sky Chefs that relator's truck was not chocked and had its front wheels turned toward an aircraft. Sky Chefs confirmed that the truck was not chocked.

Wirtz held a meeting with relator, the person contacted by Northwest, and the person that confirmed that the truck was not chocked. When Wirtz asked Sky Chefs about the incident, relator first stated that he had chocked the truck. When Wirtz then asked relator, "both of these gentlemen saw . . . that the truck was not chocked, so how can you sit here and tell me that it was," relator replied, "if that's what you say, then that's what it is." Relator neither admitted that he failed to chock the truck nor offered an excuse for not chocking it. Sky Chefs suspended relator on May 29, 2009, pending investigation of relator's reported failure to chock the truck on May 26. After completing its investigation, Sky Chefs terminated relator's employment due to his inability to follow safety procedures, especially safety procedures for which he had received training.

Wirtz testified that new employees have at least a month of training before they become drivers. Relator was hired in January 2008 and received "refresher" training in September 2008 and March 2009. Wirtz did not have relator's training records available at the hearing but testified that for relator to continue his employment, he would have to

have completed the training. Relator never claimed to Sky Chefs that he was not aware of the safety protocols or did not receive the training.

On August 26, 2009, the ULJ determined that relator was ineligible for unemployment benefits because his conduct in receiving "three safety violations within one week [sic]" without justification, and in lying about failing to chock the truck when confronted, displayed clearly a serious violation of the standards of behavior Sky Chefs had the right to reasonably expect. On August 28, relator filed a request for reconsideration, arguing, among other things, that the ULJ held the telephone conference without his knowledge because he received the hearing notice late. The ULJ affirmed her decision and denied relator a second evidentiary hearing, noting that the notice of appeal was mailed to relator on August 7, 2009, and concluding that relator had failed to show good cause for his failure to attend the hearing. This certiorari appeal follows.

D E C I S I O N

This court may remand, reverse, or modify the decision of a ULJ if the substantial rights of the litigant may have been prejudiced because the findings, conclusion, or decision are affected by an error of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2008); *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). This court views the ULJ's findings in the light most favorable to the decision, gives deference to the ULJ's credibility determinations, and will not disturb the ULJ's factual findings when the evidence substantially sustains them. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

The Factual Record and Relator's Failure to Participate in the Hearing

Relator does not expressly challenge the ULJ's denial of his request for reconsideration and a new hearing. Instead, relator's brief consists primarily of testimony that he presumably would have offered had he participated in the telephone hearing or been granted a new one.

The record on appeal from a ULJ's decision consists of the papers filed with the agency, the exhibits, and the transcript of the proceedings before the ULJ. *McNeilly v. Dep't of Employment & Econ. Dev.*, 778 N.W.2d 707, 709 n.1 (Minn. App. 2010) (citing Minn. R. Civ. App. P. 110.01, 115.04, subd. 1). Relator's unsupported factual assertions in his brief are therefore not part of the appellate record and do not constitute a basis for discounting or contradicting the evidence presented at the hearing or the ULJ's findings.

After evaluating relator's request for reconsideration, the ULJ determined that relator was not entitled to a new hearing. An unemployment-benefits applicant who fails to participate in the evidentiary hearing and requests reconsideration is entitled to an order setting aside the ULJ's decision and a new evidentiary hearing if the applicant can show good cause for his or her failure to participate. Minn. Stat. § 268.105, subd. 2(d) (Supp. 2009). "Good cause" means "a reason that would have prevented a reasonable person acting with due diligence from participating at the evidentiary hearing." *Id.*

In his request for reconsideration, relator stated that Sky Chefs and the ULJ "had [the] telephone conference without my knowledge [and] I also received the letter late." Relator offered nothing further to show good cause despite being explicitly invited to do so in the Notice of Request for Reconsideration issued August 31, 2009. On

reconsideration, the ULJ found that the hearing was scheduled for August 20, 2009, that DEED mailed a notice of the hearing to relator's last known address on August 7, 2009, and that "[t]here is no evidence [relator] failed to receive the notice in a timely manner." On this basis, the ULJ concluded that relator failed to show good cause for his failure to attend the hearing and denied the request for reconsideration.

This court will not reverse a ULJ's decision to deny an additional evidentiary hearing to an applicant who missed the evidentiary hearing unless the decision constitutes an abuse of discretion. *Skarhus*, 721 N.W.2d at 345. The ULJ's factual findings with respect to the mailing of the notice are supported by the record: the notice is dated August 7, 2009, although its date of mailing is not explicit, and the address is the same as other DEED mailings to relator. The ULJ's determination that relator's excuse did not constitute good cause was not an abuse of discretion.

Employment Misconduct

The ULJ determined that relator was ineligible for benefits because he was terminated for employment misconduct.

> 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.
>
> Inefficiency, inadvertence, simple unsatisfactory conduct, a single incident that does not have a significant adverse impact on the employer, conduct an average reasonable employee would have engaged in under the circumstances, poor performance because of inability or incapacity, good faith errors in judgment if judgment was

> required, or absence because of illness or injury with proper notice to the employer, are not employment misconduct.

Minn. Stat. § 268.095, subd. 6(a) (2008). An employee who is discharged for employment misconduct is ineligible for unemployment benefits. *Id.*, subd. 4(1) (2008). Whether an employee engaged in conduct that makes the employee ineligible for benefits is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether an employee committed an act is a question of fact, but whether the act constitutes employment misconduct is a question of law. *Skarhus*, 721 N.W.2d at 344.

The ULJ determined that relator had committed employment misconduct and was therefore ineligible for benefits, because he had "three safety violations in one week [sic]" without a "justifiable reason for failing to follow the guidelines." Although we note that the evidence reflects that relator's three safety violations were spread over one month in May 2009 (they did not occur within one week), we nonetheless conclude that the ULJ's determination that the safety violations constituted misconduct was correct.

"An employer has the right to expect its employees not to engage in conduct that seriously endangers people's safety." *Hayes v. Wrico Stamping Griffiths Corp.*, 490 N.W.2d 672, 675 (Minn. App. 1992). An employer also has a right to expect an employee to abide by reasonable policies and requests. *See Schmidgall*, 644 N.W.2d at 804 (stating that refusing to abide by reasonable policies and requests is, as a general rule, employee misconduct). Here, the facts in the record before us demonstrate that relator's conduct in working without his safety vest, not using the required wands, and

leaving his truck unattended without the wheels chocked seriously endangered the safety of relator, his coworkers, and airline and airport customers. Sky Chefs had a right to expect relator to follow the safety procedures on which he had received training. Because relator's behavior displayed clearly a serious violation of the standards of behavior that Sky Chefs had a right to reasonably expect of relator, the ULJ correctly determined that relator was ineligible for benefits.

The ULJ also determined that relator had committed employment misconduct because he lied about having chocked the wheels of the truck when questioned. "Dishonesty that is connected with employment may constitute misconduct." *Baron v. Lens Crafters, Inc.*, 514 N.W.2d 305, 307–08 (Minn. App. 1994). In *Baron*, the employee was discharged for failing to train managers in a particular process and for falsely stating that he had. *Id.* at 306. This court concluded that the employee's failure to perform his duties and his dishonesty about it were misconduct. *Id.* at 308. Dishonesty in an investigation can be employment misconduct. *Cherveny v. 10,000 Auto Parts*, 353 N.W.2d 685, 688 (Minn. App. 1984). In *Cherveny*, the employer investigated suspected theft, and an employee was dishonest during the investigation. *Id.* at 687. This court stated that the employee's dishonesty "was material to the employer's investigation" and was a deliberate violation of the standards of behavior that the employer had the right to expect. *Id.* at 688. Under *Baron* and *Cherveny*, relator's dishonesty when questioned about chocking the truck was also employment misconduct.

Affirmed.