STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0573

William Adams,
Relator,

vs.

Redline Specialties, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed January 21, 2014
Affirmed
Connolly, Judge

Department of Employment and Economic Development
File No. 30066349-3

Jonathan Geffen, Arneson & Geffen, PLLC, Minneapolis, Minnesota (for relator)

Redline Specialties, Inc., c/o Jeff Jamar, Minneapolis, Minnesota (respondent)

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

Considered and decided by Kalitowski, Presiding Judge; Connolly, Judge; and Crippen, Judge.*

* 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

CONNOLLY, Judge

In this certiorari appeal, relator challenges the unemployment-law judge's (ULJ) conclusion that he was discharged for employment misconduct and ineligible for unemployment benefits. We affirm.

FACTS

Relator William Adams worked at Redline Specialties Inc. (Redline) as an auto body refinish technician from August 1, 2011 until July 19, 2012. Redline is an auto body shop owned by J.G. J.G.'s wife, L.G., runs the shop when he is out of town.

During the last four months of relator's employment at Redline, the quality of his work declined. He often worked on side jobs until 4:00 a.m. and spoke of being "burnt out." Relator was not keeping pace with his workload. L.G. told him not to stay late at the shop anymore and J.G. told him that if his work did not improve, he would lose his job.

Relator also did not follow standard procedures while working on customers' vehicles. For example, he did not "mask off" cars with masking paper to prevent over-spray while painting. This resulted in paint getting on customers' tires, windows, wheel wells, and engines. Relator worked on cars and caused over-spray issues on the last three or four days of his employment.

The final event that led to relator's discharge involved his interactions with a customer, D.M., who brought his car to Redline after he hit a deer. Relator "talked him into" purchasing a rhino-liner on the lower side of his vehicle. Relator asked D.M. to pay

him *directly*, rather than paying Redline. D.M. felt uncomfortable with this situation and told L.G. about the agreement. L.G. told relator that this was not acceptable and that all customers must go through the Redline office.

Relator was terminated on July 19, 2012, due to his "extremely poor job performance," and because he attempted to have customers pay him directly for his services. After being terminated, relator filed for unemployment benefits through the Minnesota Department of Employment and Economic Development (DEED). DEED initially issued a determination that relator was discharged for reasons other than employment misconduct and was eligible for unemployment benefits. Redline appealed the determination and a ULJ conducted a de novo telephone hearing.

Relator testified at the hearing and stated that the quality of his work was due to the heat and humidity, which makes it harder to achieve proper paint results. He also explained that he discussed his arrangement to install the rhino-liner on D.M.'s vehicle with L.G., and that they agreed he would perform the work. He claims that he was not directly paid for his services.

The ULJ concluded that relator was discharged for employment misconduct and was ineligible for benefits. Relator requested reconsideration and the ULJ affirmed, determining that relator did not show good cause for his failure to submit evidence at the hearing or that this evidence would change the outcome of the decision.

D E C I S I O N

On certiorari appeal, we may modify, reverse, or remand a ULJ's unemployment-benefits determination if the relator's substantial rights may have been prejudiced

because the findings, inferences, conclusion, or decision are "(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious." Minn. Stat. § 268.105, subd. 7(d) (2012).

I.

Relator first argues that the record does not support the ULJ's determination that he was discharged for misconduct. We disagree. Employee misconduct includes "any intentional, negligent, or indifferent conduct . . . that displays clearly: (1) a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee; or (2) a substantial lack of concern for the employment." Minn. Stat. § 268.095, subd. 6(a) (2012). Whether an employee committed employment misconduct is a mixed question of fact and law. *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). Whether an act was committed is a question of fact, but whether the act constitutes employment misconduct is a question of law, which this court reviews de novo. *Id.*

On appeal, this court reviews the ULJ's fact findings in the light most favorable to the decision, giving deference to the ULJ's credibility determinations. *Id*. "[T]his court will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Id.*

The ULJ found that the quality and timeliness of relator's work declined during the last months of his employment. The ULJ also found that relator was discharged after

his employer discovered that he was directly negotiating with customers for paid work while also being paid by Redline.

These findings are supported by the record. Relator's work began to decline approximately four months before his discharge. Around this time, relator was working until 4:00 a.m. to finish side jobs unrelated to his work at Redline. L.G. testified that she approached relator because she was concerned about him and told him to stop staying late in the shop. She also testified that relator would not wear the proper attire or a respirator when painting vehicles. L.G. told relator that he "should be wearing a respirator" and "shouldn't be wearing street clothes." But even after this conversation, relator refused to wear the proper attire or a respirator while painting vehicles.

Relator also failed to "mask off" vehicles to prevent over-spray while painting. A subcontractor who worked with relator during the final days of relator's employment testified that he had to repaint vehicles that relator worked on because relator's work was unsatisfactory. He also testified that relator claimed that he did not need to mask off customers' vehicles because he had "gun control."

The quantity of work that relator was able to complete also declined. J.G. testified that relator's work took longer than anticipated. Relator did not finish two vehicles that should have been completed in a shorter time period because he had to repaint parts of vehicles that did not match. A Redline customer testified that his car was at Redline for two months while relator worked on it and that he "knew it shouldn't have [taken so] long . . . ." J.G. told relator that if his work did not pick up, relator would lose his job.

J.G. explained that relator knew that his job was in jeopardy before the final incidents triggering the discharge decision occurred.

The ULJ also determined that relator "was discharged after it was discovered that he was negotiating directly with customers of Redline to perform work not authorized by the employer for which he was to be paid directly." Relator concedes that seeking "payments from a customer without approval from the [e]mployer . . . is seemingly disqualifying employment misconduct."

J.G. testified that when relator asked D.M. to pay him directly to install a rhino-liner on his vehicle, he was "basically stealing." L.G. testified that she spoke with D.M. and that he told her that relator was trying to get business from Redline. L.G. confronted relator and told him that all business had to go through the Redline office.

A subcontractor who worked with relator at Redline during the final days of relator's employment also testified that relator solicited personal business from a Redline customer. He testified that relator intercepted the customer before the customer entered the Redline office. Relator told him that he would paint his vehicle for $150. When relator painted the vehicle, the customer was not satisfied, so relator put a rhino-liner on the vehicle. Relator then approached the subcontractor and instructed him to re-do relator's unsatisfactory work. The subcontractor did the work, but when he approached the customer regarding payment, he discovered that the customer had already paid relator directly.

We conclude that the ULJ's determination that relator was discharged based on misconduct and is not entitled to unemployment benefits is supported by the record.

Relator's behavior displays a serious violation of the standards of behavior the employer has the right to reasonably expect and a substantial lack of concern for his employment. *See* Minn. Stat. § 268.095, subd. 6(a).

II.

Relator next argues that the ULJ's determination that relator charged a customer without the consent of his employer is not supported by the record because it is based on unreliable hearsay. Hearsay evidence is admissible in a hearing before a ULJ if "it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." Minn. R. 3310.2922 (2011). However, the ULJ "may exclude any evidence that is irrelevant, immaterial, unreliable, or unduly repetitious." *Id.*

The ULJ's determination that relator charged customers without the consent of his employer is mainly based on relator's interaction with D.M. D.M. chose not to participate in the hearing, and therefore, did not testify about his arrangement with relator. Relator claims that because D.M. did not testify, the only evidence in the record is a statement from J.G. about what his wife told him. He relies on the unpublished case *Tschida v. Unity Family Healthcare*, A12-0418, 2012 WL 6652599 (Minn. App. Dec. 24, 2012) to argue that the ULJ's determination should be overruled because it is based solely on vague hearsay testimony unsupported by the record. We note that unpublished cases are not precedential. Minn. Stat. § 480A.08, subd. 3(c) (2012). In *Tschida*, the relator's supervisor's testimony was the only evidence in the record to support the ULJ's finding that the employer notified the relator about a change in her work hours; the supervisor testified that a nurse informed the relator of the change. *Id.* at *4. The

employer was unable to provide any details about what was communicated to the relator and the nurse who allegedly informed the relator of the change did not testify. *Id.* This court concluded "that the hearsay evidence from one employee that another employee verbally notified [the relator] about the change in her hours, without corroboration, is not the type of evidence upon which a reasonable, prudent person would rely." *Id.*

In this case, both J.G. and L.G. testified that relator charged D.M. without their knowledge or consent. The subcontractor further corroborated their testimony by testifying that relator was paid directly for his services in at least one other instance. Unlike the situation in *Tschida*, we conclude that this is the type of evidence upon which a reasonable, prudent person would rely because the testimony of each witness was corroborated by the testimony of other witnesses.

Relator also claims that inconsistencies in the record illustrate the problems with this hearsay evidence. We disagree. "When the credibility of an involved party or witness testifying in an evidentiary hearing 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) (2012). "Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006). The ULJ weighed the evidence presented and determined that the employer presented a more credible account of what occurred. He found relator's testimony to be "self-serving and simply not as plausible or persuasive as that given by the employer's witnesses, who were found to be more credible." This credibility determination should not be disturbed on appeal. *Id.*

III.

Relator also argues that the ULJ did not conduct a fair hearing because the ULJ should have issued a subpoena sua sponte and did not adequately control the hearing. We disagree. A ULJ is to conduct an evidentiary hearing "as an evidence gathering inquiry," and "must ensure that all relevant facts are clearly and fully developed." Minn. Stat. § 268.105, subd. 1(b) (2012). The ULJ is able to "issue subpoenas to compel the attendance of witnesses and the production of documents and other personal property considered necessary as evidence in connection with the subject matter of an evidentiary hearing." *Id.*, subd. 4 (2012).

Relator claims that the ULJ should have subpoenaed D.M. sua sponte. Redline called D.M. as a witness. When the ULJ called D.M., he stated that he did not wish to participate and that he had to go because he was bowling. Relator did not request a subpoena for any witnesses, nor did he suggest that it was an error to continue the hearing without D.M. Because relator did not ask the ULJ to subpoena D.M., we conclude that the ULJ did not err by failing to issue a subpoena sua sponte.

Relator also claims that the ULJ did not properly control the hearing because the ULJ allowed both J.G. and L.G. "to cross[-]examine [him] and each [make] arguments on the record." However, J.G. and L.G. did not both cross-examine relator; only L.G. asked relator questions at the hearing. And only J.G. made the closing argument on Redline's behalf. Therefore, there is no basis for relator's argument.

On a similar note, relator argues that the ULJ did not conduct a fair hearing because J.G. and L.G. both asked questions of their witness, A.L. However, J.G. did not

ask A.L. any questions; he simply explained to the ULJ why he called A.L. as a witness. L.G. then asked A.L. questions. Because J.G. and L.G. did not both ask A.L. questions during the hearing, the ULJ did not err by failing to conduct a fair hearing on this basis.

Affirmed.